2013 (2) ECS (125) (Tri - Mum)

IN THE CUSTOMS, EXCISE AND SERVICE TAX

APPELLATE TRIBUNAL

WEST ZONAL BENCH AT MUMBAI

Jindal Drilling & Industries Ltd.

Vs

Commissioner of Customs (Import), Nhava Sheva

APPEAL NO: C/151/2011

[Arising out of Order-in-Appeal N: 442 (Gr.VA)/2010 (JNTCH)/Imp - 402 dated 31/12/2010 passed by the Commissioner of Customs (Appeals), Mumbai - II.]

Jindal Drilling & Industries Ltd. …Appellant

Vs

Commissioner of Customs (Import) ...Respondent
Nhava Sheva

Appearance:

Shr: C.M. Sharma, Consultant for the appellant

Shr Navneet, Addl. Commissioner (AR) for the respondent

CORAM:

Hon'ble Shri P.R. Chandrasekharan, Member (Techncial)

Hon'ble Shri Anil Choudhary, Member (Judicial)

Date of hearing: 16/01/2013
Date of decision- 08 /02/2013

ORDER NO: A/261/13/CSTB/C-I

Per. P.R. Chandrasekharan:

"In the case of refund, the application his to be filed within six months from the date of payment of duty and not with respect to date of assessment." [Para 10]

1. The appeal is directed against the Order-in-Appeal No:442 (Gr.VA) / 2010 (JNCH) / Imp-402 dated 31/12/2010 passed by the Commissioner of Customs (Appeals), Nhava Sheva, Mumbai -11.

2. The appellant MIs. Jindal Drilling & Industries Ltd. filed a Bill of Entry No. 931186 dated 06/06/2009 for import of 'Oil Well Supplies' falling under Chapter 84 of the Customs Tariff Act. The Bill of Entry was assessed to duty on second check basis on 09/06/2009 pending payment of duty and examination of goods and out of charge order. The appellant paid Customs duty assesses on 16/06/2009, the goods were examined by the Customs on 17/06/2009 and the out of charge was given. It was noticed that the foreign supplier had charged for 550 pieces of the goods whereas the actual quantity of goods received was only one piece. Thus there was over-invoicing by the foreign supplier. Therefore, the appellant preferred an appeal before the lower appellate authority on 14/09/2009 along with a condonation of delay application challenging the assessment order. The notice of hearing was sent to the appellant on 29/06/2010 and the appellant was heard on 07/09/2010. The learned appellate authority passed the impugned order holding that, since the appeal has been filed after a lapse of 97 days i.e., after the condonable period he dismissed the appeal as time barred. Hence, the appellant is before us.

3. The learned consultant for the appellant submits that the no ice for hearing was sent to the appellant on 29/66/2010 and the appellant was heard on 07/09/2010 both on merits as well as on time bar. However, the learned appellate authority passed order holding hat since the appeal has been filed after a lapse of 97 days i.e., after the condonable period, the appeal is time barred. The learned consul ant for the appellant submits that when the notice for hearing was issued and the appellant was heard on merits, it should be presumed that delay has been condoned and, therefore, rejection of the appeal on account of time bar is not correct in law. He relies on the decision of the hon'ble High Court of Bombay in the case of Ajinkya Enterprises vs. Union of India 2008 (229) ELT 656 (Bom.) in support of the above connection. The learned consultant further submits that the 60/90 days period for filing the appeal should be counted from the date of order for out of charge after payment of duty and examination of goods and not from the date of assessment of the Bill of Entry. In the instant case, the out of charge was given on 17/06/2009 and the appeal has been filed on 14/09/2009 and, therefore, the appeal has been filed within the condonable period of 30 days after the expiry of 60 days for filing of the appeal and hence the appeal could not have been dismissed as time barred. He relies on the decision of this Tribunal in the case of Sterilite Optical Technologies Ltd. vs. Commissioner of Central Excise, Aurangabad 2007 (213) ELT 658 (Bom.); Mangalore Refinery & Petrochemicals Ltd. vs. Commissioner of Central Excise 2012 (278) ELT 289 (Kar.) and Bansal Alloys & Metals Pvt. vs. Commissioner of Customs 2009 (24Q) ELT 483 (P&H) in support of the above contention. The learned consultant submits that as per Public Notice No. 85/99 dated 29/07/1999, in respect of bill of Entry file through EDI system, the importer's copy and Exchange Control copy of the Bill of Entry is' generated only after grant of out-of-charge and; the date of out of charge is the date of assessment.

4. The learned Additional Commissioner appearing for the Revenue submits that what is challenged is the assessment order passed by the Asstt./Dy. Commissioner of Customs. It is the date of passing of the said order which is relevant for considering the time limit for filing 'the appeal. The learned addl. Commissioner (AR) submits that as per the Public Notice, after assessment is over by the AO/AC, the system generates one (customs) copy of Bill of Entry and 3 copies of the TR6 challans for payment of duty and the documents are handed over to the importer at the service centre. Thus, in the present case since the assessment was completed on 09.06.2009 communication of the same along with copies of TR6 challans also was carried out immediately after assessment. Therefore, the relevant date is the date of assessment of the Bill, of Entry. He

relies or the decision of the Tribunal in the case, of Payal Petropack Pvt. Lta vs. Commissioner of Customs New Delhi 2010 (251) ELT 533 (Tri.-Del.) and the decision of the hon'ble apex Court in the case of Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur 2008 (221) ELT 163 (SC) in support of his, contention that the appeal is time barred.

5. We have carefully considered the rival submissions. There is no dispute about the fact that the goods have been assessed to duty on 09/06/2009 and the assessment order was passed on that date. It is an entirely different matter that the appellant paid the duty subsequently and got the goods cleared after examination by the Customs and out of charge order was issued on 17/06/2009. As per Section 128 of the Customs Act, "any person aggrieved by any decision on order passed under this Act by an officer of Customs lower in rank than a Commissioner of Customs, may appeal to the Commissioner (Appeals) within 60 days from the date of communication to him of such decision or order provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, allow to be presented within a further period of.30 days". From the provisions of law stated above, it is clear that the appeal has to be filed within 60 days from the communication of the assessment order. In the present case it is not in dispute that the assessment order was passed and communicated on 09/06/2009. Therefore, the time limit for computing the appeal period has to be counted from 09/06/2009 which is the date of communication of the assessment order and not from 17/06/2009 when the out of charge order was passed.

5.1 Section 17 of the Customs Act, envisages two types of assessments. One is, assessment on first check basis where the goods an examined first and the assessment is done after examination as provided under sub-section (2) of Section 17. The second method is called second check assessment provided in sub-section (4) of Section 17, Under sub-section (4), the imported goods, prior to the examination or testing thereof, are permitted by the proper officer to be assessed to duty on the basis of statements made in the Bill of Entry relating thereto, and the documents produced and the information furnished under sub-section (3). But if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other , action, which may be taken under this, Act, be re-assessed to duty.

1.2. In the present case; it is seen that there Was no re-assessment done after examination. From the provisions of law cited above, it is clear that the assessment was complete on 09/06/2009 though payment of duty, examination of the goods and out-of-charge was done later.

5.3. An identical issue came up before this Tribunal for consideration in Payal Petropack Pvt. Ltd. (cited supra) and this Tribunal held as follows:

"3.1 From the records of the case, it is seen that while the assessment have been completed on 5-12-08, the out of charge order was given on 19-12-08 and this is clear from the letters dated 8-12-08 and 12-12-08 of the appellant addressed to the Assistant Commissioner. he appellant's plea that since vide their letter dated 29-12-08 addressed to the Assistant Commissioner, they had asked for speaking order, which was not issued and it is because of this that delay has taken place in filing of appeal, the date of assessment order on bill of entry should not be adopted as the date of the order is not acceptable, as the present appeal has been filed by treating the assessment on the bill of entry as the assessment order' and since the assessment on the hill or entry had been completed on 5-12-08, the limitation period would be counted from this date. In any case, even if the date of out of charge is treated as the date of assessment order, even then the appeal has been filed beyond the period of ninety days and thus there is more than 30 day's delay in fling of appeal, which in terms of Hon'ble Supreme Court judgment in the case of Singh Enterprises v. CCE. Jamshedpur (supra) cannot he condoned. In view of this, I do not find any infirmity in the impugned order. The appeal is dismissed."

5.4. The reliance placed by the appellant in the case of Ajinkya Enterprise vs. Union of India does not help their case. Merely because date of hearing was indicated in the notice, it cannot be presumed that the delay in filing the appeal has been condoned. A delay can be condoned provided there is power given to the appellate authority to condone the delay. The appellate authority has power to condone the deiay only if the appeal is filed within a period of 30 days from the expiry of the time-limit of 60 days for filing the appeal. If the appeal is filed after the lapse of 90 days, there is no power vested with the Commissioner (Appeals) to condone the delay. If the Commissioner (Appeals) does not have any power to condone the delay, it cannot be presumed that he has condoned the delay.

5.5. The hon'ble apex Court in the case of Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur cited supra, held that:

> "The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal."

Section 35 of the Central Excise Act is pari materia to Section 28 of the Customs Act and, therefore, the ratio of the decision cited supra will squarely apply to the facts of the present case.

5.5. The Supreme Court further considered the matter and held that even a higher authority than the Commissioner (Appeals) such as Tribunal, High Court or the Supreme Court has no power to condone the delay in excess of 90 days. The hon'ble apex Court observed that

> "there was no law declared by this Court that even though the Statute prescribed a particular, period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose."

5.7 The reliance placed by the appellant in the case of Sterlite Optical Technologies Ltd. (cited supra) does not help their case. In that case the hon'ble High Court held as follows:

> "22. The word "assessment" is used as meaning sometimes the computation of rate of duty, sometimes the assessable value of goods and sometimes the whole procedure laid down under the Act for imposing duty liability upon the manufacturer or importer. The word assessment is, thus, capable of bearing a very comprehensive meaning; in the context, it can comprehend the whole procedure for ascertaining and imposing duty liability. The word "levy" was interpreted by the

Supreme Court in the case of Asstt. Collector of Central Excise v. National Tobbaco of India Ltd. 1978 (2) FLT (J 416) = AIR 1972 SC 2563 as embracing within it the process of assessment and also imposition of tax. The term `levy' appears to be wider in it's import than the term `assessment'. It may include with `imposition' of tax as well as `assessment'."

Nowhere the hon'ble High; Court held that assessment would include payment of duty or examination of goods or grant of out-of-charge. The, said order was passed in the context of 100% EOU with respect to rite of duty of goods cleared to DTA. Thus, the facts are different and distinguishable and hence cannot be applied to the present case.

5.8. In the Mangalore Refinery & Petrochemicals Ltd. case, cited supra, the issue for decision was relating to availment of CENVAT credit under Rule 57G of the Central Excise Rules, 1944. The aid rule prescribed a time-limit of six months from the date of issue of any document and Bill of Entry as one of the specified document under the said Rule. The question for consideration was the six months period should be computed from the date of assessment or from the date of out-of-charge and, not from, the date of assessment . It was held that Bill of Entry is not only a document of assessment but also a document for payment of duty and grant of out-of-charge. Thus the said case pertains to totally different set of facts all together and has nc application to the facts of the present case.

5.9. In the case of Barisal Alloys & Metals Pvt. Ltd., cited supra the issue for consideration was the time-limit for computing grant of refund in respect of short-landed goods. In that case, the Bill of Entry was sought to be amended under Section 149 of the Customs Act, 1962 on the basis of documentary evidence existing at the time of clearance of the goods which was permitted by the Assistant Commissioner who granted the refund within six months from the date of payment of duty. In the case of refund, the application his to be filed within six months from the date of payment of duty and not with respect to date of assessment.

5.10. Thus, the case laws relied upon by the appellant deals with all together different situations and has no application to the present case.

6. Accordingly, we find that the appeal is devoid of merits and hence dismissed.

(Pronounced in Court and 6 -02-12013)