IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4/4/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.596 of 2018

Tecno Doors Pvt Ltd
Plot No.L-1 SIPCOT Indl. Park
Mambakkam and Pondur A Village
Sriperumbudur
Kancheepuram 602 106. ...Appellant/Applicant

Vs

The Commissioner of Customs
New Custom House
Meenambakkam
Chennai 600 027. ...Respondent/Respondent

Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962, to set aside the impugned Final Order No.42350/2017 dated 4/10/2017 passed in Appeal No.C/148/2010 by the Custom, Excise and Service Tax Appellate Tribunal Chennai against the order of the Commissioner of Customs (Appeals) 60, Rajaji Salai, Custom House Chennai-1, dated 18.12.2009 and made in Appeal C.Cus NO.1548/2009.

For appellant ..Mr.Hari Radhakrishnan

For respondent ..Mr.Rajnish Pathiyil
Central Government Standing Counsel

J U D G M E N T
(Judgment of the Court was made by S.MANIKUMAR, J)

Being aggrieved by the Final Order No.42350/2017, dated 4/10/2017, passed in Appeal No.C/148/2010, on the file of the CESTAT, Chennai, instant Civil Miscellaneous Appeal is filed.

2. Brief facts are that Tecno Doors Private Ltd., Kancheepuram, appellant herein, had imported “Landing Panel Left and Right Landing Doors” and “Panel Centre Cabin Operator” from Spain, filed a Bill of Entry, dated 20/2/2009, for home consumption. Subject goods were covered, under invoice No.09/224, dated 16/2/2009, showing FOB value of EURO 19855.60 and air freight of EURO 10648.34.

3. According to the appellant, as per Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for the purpose of arriving at the assessable value, freight amount shall not exceed 20% of the FOB value of the imported goods. Accordingly, appellant added freight amount of EURO 3900, being 20% of FOB value, to the invoice value, to arrive at the assessable value. However, the assessing Officer, directed the appellant, to include the freight amount of EURO 6748.34, as miscellaneous charges.

4. Appellant has further contended that after including the balance air freight amount, as miscellaneous charges, the total assessable value arrived at was INR 20,33,121,28/-, instead of actual assessable value of INR 16,93,054/-. Thus, the appellant had paid the duty on the enhanced assessable value and cleared the goods.

5. After clearance of the goods, appellant filed an appeal before the Commissioner of Customs, appeals against the assessment of Bill of Entry, dated 20/2/2009. Commissioner of Customs, Appeals, dismissed the appeal, vide order, in Appeal No.1548/2009, dated 18/12/2009. Being aggrieved, appellant has filed an appeal before the CESTAT.

6. Vide, order, dated 4/10/2017, in Final Order No.42350/2017, CESTAT, Madras, remanded the matter, to the Commissioner of Appeals, to ascertain as to whether the Bill of Entry was indeed assessed based on higher freight amount adopted by the department, as claimed by the learned Advocate, whether the miscellaneous charges were declared by the appellant or were otherwise added by the assessing officer, in the course of assessment. In case, there has been no modification of the declared values and freight amounts, etc., declared by the appellants while filing the Bill of Entry, there cannot be any grievance against the assessment of the Bill of Entry. However, in case higher freight amount/miscellaneous charges have been added by the assessing Officer, the Commissioner (Appeals) will consider the matter on merits.

7. Instant Civil Miscellaneous Appeal is filed on the following substantial questions of law:-

> "1. Whether the Hon'ble Tribunal has erred in directing the Commissioner of Customs, Appeals, to decide the case on merits, after only in the event if it is found that the assessable value was enhanced by the adjudicating Authority?
>
> 2. Whether the appellant has a right to file an appeal against the Bill of Entry, even if the enhanced duty was not paid under protest?

3. Whether there can be any estoppel against law even if the appellant had paid duty after declaring higher freight amount in the bill of entry in view of the second proviso to sub-rule (2) of Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007?"

8. Inviting the attention of this Court to the proviso to sub-Rule 2 of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, Mr.S.Hari Radhakrishnan, learned counsel for the appellant submitted that as per the said Rule, freight cost, if ascertainable, shall not exceed twenty per cent of the FOB value of the goods. According to him, freight cost, is EURO 10648.34 and 20% of the FOB value is EURO 3900, which was added to the invoice value to arrive at the assessable value. Learned counsel for the appellant further submitted that at the instance of the department, the balance freight cost of Euro 6748.34 was added to the assessable value as miscellaneous charges.

9. Inviting the attention of this Court to Section 128 of the Customs Act, 1962, decision in J.M.Industries Vs. Commissioner of Customs, Jamnagar, reported in 2003 (156) ELT 977 (Tri-Del), learned counsel for the appellant submitted that assessment of Bill of Entry is an appealable order and therefore, appeal was filed before the Commissioner of Customs, Appeals, who rejected the same.

10. Learned counsel for the appellant further submitted that though excess amount has been paid, on the basis of assessable value, Customs department, is not entitled to collect more than 20% of the FOB value, as freight charges, as per the statute and hence, there cannot be any estoppel against law. Collection of excess amount is in violation of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

11. Placing reliance on Bayshore Glass Trading Pvt Ltd., Vs. Commissioner of Cus., Kolkata, reported in {2002 (148) ELT 1243 (Tri.-Kolkata), learned counsel for the appellant submitted that when the Commissioner of Appeals dismissed the appeal, as not maintainable, on the ground, as duty was not paid under protest, the Tribunal held that filing of an appeal itself is a protest and remanded the appeal to the Commissioner Appeals, to decide the case, on merits.

12. Responding to the above submissions, Mr.Rajnish Pathiyil, learned counsel for the revenue submitted that there is no illegality or irregularity in the order of the Tribunal, remanding the matter to ascertain as to whether the miscellaneous charges were declared by the appellant or otherwise, added at the instance of the Assessing Officer, in

the course of assessment and also made an attempt to raise an issue of limitation. He also invited the attention of this Court to the failure on the part of the appellant, to produce a copy of the protest letter/representation of the payment made, during personal hearing.

13. Heard the learned counsel for the parties and perused and materials available on record.

14. Before adverting to the rival contentions, we shall consider the relevant rules, viz., the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

15. Rule 10 of the above said regulations, deal with Cost and services and the same is extracted hereunder:-

> (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods -
>
> (a). the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-
> (i). Commissions and brokerage, except buying commissions;
> (ii). The cost of containers which are treated as being one for customs purposes with the goods in question;
> (iii). The cost of packing whether for labour or materials;
> (b). The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-
> (i). materials, components, parts and similar items incorporated in the imported goods;
> (ii). Tools, dies, moulds and similar items used in the production of the imported goods;
> (iii). Materials consumed in the production of the imported goods;
> (iv). Engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c). royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d). The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e). all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

(2). For the purposes of sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -

(a). the cost of transport of the imported goods to the place of importation;

(b). loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c). the cost of insurance:

Provided that -

(i). where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii). The charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c) ;

(iii). Where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of the free on board value of the goods:

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii):

Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a).

(3). Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4). No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.”

16. There is no dispute that under the invoice, bearing No.09/224, dated 16/2/2009, contained FOB value of EURO 19855.60 and air freight of EURO 10648.34. Contention of the appellant is that he had added freight amount of EURO 3900, being 20% of FOB value, to the invoice value, to arrive at the assessable value. But the assessing Officer directed the appellant to include the balance freight amount of EURO 6748.34 as miscellaneous charges. According to the appellant, after including the balance air freight amount as miscellaneous charges, the total assessable value arrived at INR 20,33,121.28, whereas, the actual assessable value is INR 16,93,054/-. As per sub-Rule (1) of 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for the purpose of sub-Section (1) of Section 14 of the Customs Act, 1962 (52/1962) and these rules, the value of the imported goods shall be a value of such goods,for delivery at the time and place of importation and shall include

(a). the cost of transport of the imported goods to the place of importation;

(b). loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c). the cost of insurance:

17. Thus, from the reading of the statutory rules, it is manifestly clear that where the cost of transport referred to, in clause (a) of sub-Rule 2 of Rule 10 of the said Rules is not ascertainable, such cost shall be 20% of the free on board

value of the goods. Even taking it for granted that the appellant has not filed any proof of document, viz., protest letter or representation against the excess payment, department is not entitled to collect amount, not exceeding 20% of the free on board value of goods. Whether there was protest or not, when the statute empowers such cost, which shall not exceed 20% of the free on board value of the goods.

18. Remand order of the CESTAT, Madras, with a rider that whether the miscellaneous charges were declined by the appellant, as otherwise, added at the instance of the assessing officer, in the course of assessment proceedings, is contrary to the statutory rules, extracted supra.

19. Contention of the learned counsel for the appellant that the said aspect is not required to be adjudicated on remand, is in consonance with the statutory rule. Appellant has made out a case for interference, on the substantial questions of law, stated supra.

20. In the result, this Civil Miscellaneous Appeal is allowed. Final Order No.42350/2017, dated 4/10/2017, on the file of the CESTAT, Madras is set aside. Substantial questions of law are answered in favour of the appellant. Matter is remanded to the Commissioner of Appeals to reassess the Bill of Entry, dated 20/2/2009, in accordance with the statutory rule, extracted supra, within a period of one month from the date of receipt of a copy of this order. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

mvs.
To
1. The Customs Service and Service
   Tax appellate Tribunal,
   No.26, Shastri Bhavan Avenue building,
   Haddows Roads, Chennai 600 006.
2. The Commissioner of Customs
   New Custom House, Meenambakkam
   Chennai 600 027.
3. The Commissioner of Customs (Appeals)60,
   Rajai Salai, Custom Hosue,Chennai. 1
+ 1 cc to M/s Hari Radhakrishnan, AdvocateSr.25046
+ 1 cc to M/s. Rajnish Pathiyil, Advocate Sr.24821

C.M.A.No.596 of 2018

RK(CO)
EU(24/04/2018)