IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14417 OF 2018

Union of India
Through The Principal Chief
Materials Manager ...Petitioner
Versus
The Commissioner of Customs
(Import-I) & Anr. ...Respondents

Mr.R.V. Desai, Senior Counsel a/w Mr.T.J. Pandian for the Petitioner.

Mr.Vijay Kantharia a/w Mr.Ram Ochani for the Respondents.

CORAM : M.S. SANKLECHA &
S.C. GUPTE, JJ

DATE : 09th AUGUST 2019

ORAL JUDGMENT (Per S.C.Gupte, J)

1. This Writ Petition, filed by Union of India through Controller of Stores, Central Railway, seeks to challenge an order in Original (order dated 05th July 2006) claiming differential duty and interest, and demand notices issued by the Commissioner of Customs (Imports), Mumbai, in pursuance of the order in original. The petitioner-Union has paid the differential duty. The challenge merely pertains to the claim of the Commissioner of Customs for recovery of interest.

2. The chief contention of the petitioner-Union is that the subject goods were imported by the Railways in 1986-1987 under the Project Import Regulations, 1986. The goods were assessed to customs duty provisionally under the Customs Tariff heading 9801 by extending the benefit of concessional duty rates. It is submitted that on the date the goods were imported, there was no provision in law, namely, the Customs Act, 1962, for claiming any interest on delayed payment of duty. It is submitted that the duty was finally assessed by the order in original dated 05th July 2006; that duty was duly paid; there being no provision, however, for payment of interest on delayed payment of duty, no interest could be charged by the Commissioner of Customs on such delayed payment.

3. Mr.Desai, learned senior counsel appearing for the petitioner, submits that Section 28AA of the Customs Act, which provides for interest on delayed payment of duty, was introduced by the Finance Act, 1995, viz Act 22 of 1995, with effect from 26th May 1995. Learned counsel submits that the Import of the subject goods has been fully accomplished as far back as in 1986-1987 and hence, there is no scope for charging any interest on delayed payment of duty or the import of goods in the present case. Learned counsel relies on the decision of our Court in the case of

Commissioner of Central Excise V/s. Dev Ashish[1], which in turn relied on the decision of the Supreme Court in the case of ***Commissioner of Central Excise V/s. ELGI Equipments Ltd.***[2] Relying of this decision, it is submitted that for imports made prior to the introduction of Section 28AA in the Customs Act, no interest can be claimed on delayed payment of duty. Learned counsel also submits that the Central Excise and Customs Appellate Tribunal has already passed an order in the case of ***Ansar and Company V/s. Commissioner of Customs***[3] taking the same view, as is urged by the petitioner in the present case, and that the respondent-customs have accepted that order.

4. Section 28AA of the Customs Act provides that when a person charged with customs duty determined under Sub-Section (2) of Section 28 fails to pay such duty within three months from the date of such determination, he shall pay, in addition to the duty, interest at the stipulated rate on such duty from the date immediately after the expiry of three months till the date of payment of such duty. It is not in dispute that the order in original determining duty payable under Sub-Section (2) of Section 28 was

1 2015 (317) E.L.T. 405 (Bom.)
2 2001 (128) ELT 52 (SC)
3 2019 (366) ELT 760

passed by the Deputy Commissioner of Customs on 05th July 2006. It is also not in dispute that the duty determined by the Deputy Commissioner was not paid by the petitioner Union within the stipulated period of three months, but was paid on 10th April 2018. The assesses-petitioner is, accordingly, liable to pay interest under Section 28AA effective from the date immediately after the expiry of three months from 05th July 2006, i.e. 5th October 2006 and till the date of payment, i.e. 10th April 2018.

5. The decision of our Court in the case of ***Dev Ashish (Supra)*** was delivered in the context of Section 11AB of Central Excise Act 1944 inserted with effect from 28th September 1996. This Court held that the provisions, being in the nature of charge of penal interest, could not be invoked for the period prior to 28th September 1998, on which day Finance Bill of 1996 inserting Section 11AB into the Central Excise Act got the assent of the President of India. The assessee's application in that case was for refund of interest erroneously recovered for the period prior to the 28th September 1996. (The demand was for the period of February 1995 to December 1999 and the case of assessee was that no interest could be recovered till 28th September 1996.)

6. No doubt, the order in ***Dev Ashish*** (supra) does rule that the penal interest provision in section 11AB of Central Excise Act would apply only to those cases where clearances were effected after the date of insertion of section 11 AB in the Act. But that is because of the peculiar nature of section 11AB, as it then stood. Under section 11AB, as it then stood, interest was required to be paid "from the first date of the month succeeding the month in which duty ought to have been paid under the Act", in the event of non-levy or non-payment or short-levy or short-payment of any duty of excise. All duties of excise are leviable and payable at the time of clearance or removal of the goods produced or manufactured. The question of non-levy or non-payment or short-levy or short-payment would thus arise at the time of such clearance or removal. The relevant date for claiming interest, thus, would be the date of clearance without payment of full duty, occasioning such non or short-levy or payment. The observations of our Court in that case that the provisions of Section 11AB, inserted with effect from 28th September 1996, would apply only to those cases where clearances were effected after 28th September 1996, have to be read in that context. In our case, we are concerned with interest payable under section 28AA of the Customs Act, which is in *pari materia* with Section 11AA of the Central Excise Act and not Section 11AB of the

Act. Section 28AA, as it stood at the relevant time, provided for the assessee's liability to pay interest if customs duty was not paid within three months from the date of determination of the duty. Interest was then leviable from the date immediately after the expiry of such period of three months. The relevant date, thus, was the date of determination of duty and expiry of three months thereafter. If and to the extent that date happened to be after the insertion of section 28AA, the provision was certainly applicable to the case.

7. The case of ***ELGI Equipments Ltd*** *(supra)* considered the provisions of Section 11AC of the Central Excise Act, 1944 providing for penalty. The Supreme Court held that the provisions were prospective in operation and no illegality committed prior to the insertion of Section 11AC in the Act, could be the subject matter of penalty under the provisions. The Supreme Court relied on the presumption against retrospective operation of a statute prejudicially affecting vested rights or past transactions. Section 11AC of the Central Excise Act, as it then stood, provided for penalty for short levy or non-levy of duty determined under Sub-Section (10) of Section 11A, on account of an illegality such as fraud or collusion or willful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder

with intent to evade payment of duty. The provision was held by the Supreme Court to be applicable only to those illegalities which were committed by the assessee after the introduction of the provision. If any such illegality was committed prior to the introduction of the provision of penalty in the Act, the penalty provision could not be applied to it. In our case, the assessee's liability to pay interest arises under section 28AA on account of non-payment of duty determined by the authorities within three months of such determination. The order in original determining such duty in our case was passed after the introduction of Section 28AA in the Act. The assessee was, in the premises, bound to pay the duty within three months of such determination and in the absence of such payment, liable to pay interest immediately after expiry of three months and till payment of such duty.

8. It is also pertinent to note that the order in original, assessing the customs duty payable, itself provided for payment of interest under Section 28AA of the Customs Act if the duty assessed was not paid within three months. The Union of India never challenged the order in original or any of its provisions before any statutory appellate authority and accepted the order. That is one more reason why it ought not to be permitted to now challenge the

stipulation of interest.

9. So far as the decision of the Tribunal in ***Ansar and Company*** is concerned, the decision was rendered on 15th March 2019. The tax effect in that case being below Rs.50 lakhs, the Department has been advised not to file appeal from that order. Non-filing of appeal, thus, does not imply acceptance on the part of the Department of the decision rendered in ***Ansar and Company's*** case. There is, accordingly, no merit even in this contention of the assessee.

10. In the premises, there is no merit in the challenge. The Writ Petition is accordingly dismissed.

(S.C. GUPTE,J.) **(M.S. SANKLECHA,J.)**