OD - 3

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [CUSTOMS]
ORIGINAL SIDE

CUSTA/13/2025
IA NO: GA/1/2025, GA/2/2025

COMMISSIONER OF CUSTOMS (PORT), KOLKATA
VS
M/S POWER GRID CORPORATION OF INDIA

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

HEARD ON : 25.04.2025
DELIVERED ON : 25.04.2025

Ms. Manasi Mukherjee, Adv.
Mr. Bijitesh Mukherjee, Adv.
...for appellant.
Mr. Dipankar Majumdar, Adv.
Mr. Sarangam Chakraborty, Adv.
...for respondent.

T.S. SIVAGNANAM, CJ. :

1. Affidavit of service filed in Court be kept with the record.

2. There is a delay of 92 days in filing the appeal. We have perused the averments set out in the said application and we find sufficient cause has been shown for not preferring the appeal within the period of limitation. Accordingly, the application (GA 1/2025) is allowed and the delay in filing the appeal is condoned.
3. This appeal filed by the revenue under Section 130 of the Customs Act, 1962 (the Act) is directed against the order dated May 2, 2024 passed by the Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata in Customs Appeal No.78110 of 2018.
4. The revenue has raised the following substantial questions of law for consideration.

> "*1. Whether the learned Tribunal erred in interfering with the Final Order NO.I) FOR THAT the learned Tribunal failed to appreciate that the Bills of Entry were assessed finally under Section 46 of the Customs Act, 1962 and not provisional under Section 18 of the Act, as well as the learned Tribunal erred in not considering Condition 91 of Notification No.21/2002 under Sl.no.424 only stipulates that in case of power projects, an undertaking is to be given by the importer that the import items are for use of Power Project only ?*
>
> *2. Whether the learned Tribunal failed to appreciate that in this case, there was no ground for provisional assessment as the invoice submitted were also final. The learned Tribunal also failed to appreciate that, the importer neither requested the assessing group for provisional assessment of the bills for having*

price variation clause in their contract nor submitted any provisional invoices against the impugned Bills of Entry though being aware that the Invoice value might change in future. The price variation clause was not brought on record neither it was mentioned in invoices. The learned Tribunal also failed to consider that, the importer did not declare or intimate about the price variation clause filing Bills of Entry electronically in EDI system ?

3. Whether learned Tribunal failed to consider that although the Importer has claimed that they had informed the Department that the filing of the impugned Bills of Entry is under price variation clause, they failed to produce any document in which they requested the department to provisionally assess the impugned 11 nos. of Bills of Entry under the provisions of Section 18 of Customs Act, 1962. The Bills of Entry were assessed finally under the provisions of Section 17 of Customs Act, 1962 ?

4. Whether learned Tribunal failed to appreciate that in the instant case three (03) Bills of Entry were self assessed and cleared through RMS but importer did not request for provisional assessment nor did they intimate the assessing group to bring on record that price variation clause is there in the agreement ?"

5. We have heard Ms. Manasi Mukherjee, learned standing counsel appearing for the appellant/department and Mr. Dipankar Majumdar, learned counsel appearing for the respondent/assessee.
6. The respondent/assessee entered into a contract with a Korean Company for import of transformer and accessories with price variation clause

where bid price (based on prevailing indices 30 days prior to bid opening date) was to be varied depending upon prevailing prices of various raw materials as per the indices chosen by the parties under the contract. In pursuance of the said contract, the assessee filed bills of entry for importation of the said item on initial provisional bid price for power transmission project under section 46 of the Customs Act, 1962. The assessee pointed out that the relevant contract contained a price variation clause which was specifically mentioned in the bills of entry, invoices, bill of lading, etc. and copy of the contract was also submitted as per which price was provisional. It is not in dispute that the contract agreement was part of the documents on the basis of which the assessment of the bills of entry was done and goods were cleared. After the goods were cleared, the assessee submitted a letter and requested the Deputy Commissioner of Customs, Haldia Port for re-assessment of nine bills of entry due to negative variation of price contract and by reference to the price variation clause in the contract. The assessee contended that at the time of customs clearance, customs duty was paid on invoices raised by the supplier and these invoices were replica of bill of quantity (BoQ) of the contract; the said contract had been executed under price variation clause, the price given on the contract agreement is subject to change and final price depending on the different indices. The adjudicating authority rejected the request made by the assessee for re-assessment of the bills of entry holding that it cannot be revised as the assessment of bills of entry were final and it cannot be reopened without challenging the assessment of the bills of entry. The said order was put to challenge before the Commissioner of Customs (Appeals) [Appellate Authority], who by order dated 9.5.2018 allowed the assessee's appeal. Challenging the said order, the revenue preferred appeal before the learned Tribunal which was dismissed by the impugned order.

7. We have elaborately heard the learned advocates for the parties and carefully considered the reasoning given by the first Appellate Authority as well as the Tribunal.

8. As noted above, the adjudicating authority by order dated 13.1.2017 rejected the request for re-assessment of the bills of entry on the ground that the bills of entry were assessed finally and the goods were cleared. The correctness of the stand taken by the adjudicating authority was tested by the first appellate authority by noting the factual position, more particularly, the price variation clause contained in the contract agreement in clause 8.0. After taking note of the said condition, the first appellate authority observed that the subject bills of entry were assessed under General Exemption Order no.122, serial no.424 and Condition no.91. As per Condition 91, concessional customs duty certificate was also submitted to the Customs and in the concessional customs duty certificate the contract number was clearly specified and, therefore, the

terms and conditions of the contract are also part and parcel of the assessment, when the assessments were made on the basis of the concessional customs duty certificate. Furthermore, the first Appellate Authority noted that the contract details are also endorsed in the bills of entry which admittedly contained a price variation clause. Therefore, the first Appellate Authority came to the conclusion that the assessment of the bills of entry must be deemed to be provisional assessment.

9. To support its view, the learned Tribunal took note of the decision of the Delhi bench of the Tribunal in which there is a reference to a decision of the Hon'ble Division Bench of this Court in the case of *ITC Ltd. and Another vs. Union of India and Others, 1988 (34) ELT 473 (Cal HC)*, wherein it was held that the lower authorities were clearly in error in holding that the final nature of the approval granted in the price list was a bar to the filing of the price list. Further, in the said decision there is a reference to an order passed by the learned single Bench of the High Court of Bombay in WPO/261/1976 in the case of *Premier Automobiles Ltd., Bombay vs. Union of India and Others, 1987 (30) ELT 71 (Bom.).* In the said decision, the court noted that the price lists submitted and invoices issued during the pendency of the appeal before the Hon'ble Supreme Court, contained specific averment to the effect that the prices are subject to the decision of the Hon'ble Supreme Court and in case the prices were allowed to be increased, such increased prices would govern

the transactions under the price list and the invoices and the buyers would be obliged to pay the difference in the price. In the said case ultimately the assessee therein was allowed to increase the price and they collected the difference in price from the customers by issuing debit notes. The department's move was to collect duty on the difference in price covered by the debit notes. Before the High Court of Bombay the assessee contended that the price lists had been approved finally and, therefore, there could not be a demand that there were final assessments in respect of all the clearances and show cause notice not being issued within six months of the date of payment of duty was barred by time. In the said case though the court came to the conclusion that even though the assessment made by the department was final, they were so only to the extent of provisional price and did not prevent the department from seeking to recover the additional duty of the final price fixed by the Hon'ble Supreme Court with retrospective effect. The said judgment of the Hon'ble single Bench was affirmed by the Division Bench. Apart from that the learned Tribunal also took note of the decision of a Co-ordinate Bench of the Tribunal reported in *1997 (95) ELT 386 (T),* wherein it was held that since the purchase orders contain price variation clause and copies of the purchase orders and contracts were submitted along with the price lists and the prices declared were provisional inasmuch as they were subject to the price variation clause, provisionality also attaches to the approval granted to the price lists and the assessment also must be treated as provisional and the provision of limitation contained in Section 11B will not be attracted. Learned Tribunal decided the correctness of the order passed by the first appellate authority and noted the legal as well as factual position and held that at the time of filing the bills of entry the assessee had provided the contract and as per the contract there is a price variation clause and therefore the assessment of the bills of entry at the time of clearance of the goods are deemed to be provisional and they are required to be assessed finally by the department as applied for by the assessee. The Tribunal also took note of the decision of the coordinate Bench of the Tribunals in the case of *Commissioner of Central Excise, Trirupti vs. Kurool Cylinders Pvt. Ltd., 2007 (219) ELT 473 (Tri-Bang); Commissioner of Central Excise, Hyderabad Vs. R.M. Cylinders (P) Ltd., 2006(198) ELT 45 (T) and M/s. Nagarjuna Constructions Co. Ltd. vs. CCE, Hyderabad, 2006(199) ELT 155 (T) and also the decision in the case of Commissioner of Central Excise, Mumbai-III vs. EMCO Ltd, 2017(357) ELT 1158 (Tri.-Mum.).*

10. Thus, we find that the learned Tribunal rightly took note of the legal position applied in the same to the facts and circumstances of the case and rightly dismissed the appeal filed by the revenue.

11. Thus, we find no ground to interfere with the order passed by the learned Tribunal.

12. Accordingly, the appeal is dismissed and the substantial questions of law are answered against the appellant/department.
13. The stay application (GA/2/2025) stands dismissed.

.

(T.S. SIVAGNANAM, CJ)

I agree :

(CHAITALI CHATTERJEE (DAS), J.)

Pkd./sm/SN.