2014 (4) ECS (268) (Tri.- Del.)

In the Customs Excise & Service Tax Appellate Tribunal
West Block No.2, R. K. Puram, New Delhi-110066

M/s. DUGGAR FIBRE PVT. LTD.

V/s.

C.C., NOIDA

Date of Hearing/ Decision: 8.10.2014

Customs Appeal No.C/219/2010-CU(DB)
(Arising out of Order-in-Appeal No.62/CE/APPL/NOIDA/10 dated 25.02.2010 passed by the Commissioner of Customs (Appeals), Noida).

Appearance:
Ms. Reena Rawat, Advocate — For the Appellant.
Shri Govind Dixit & Shri Amresh Jain, DR — For the Respondent.

CORAM:
Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Rakesh Kumar, Technical Member

(Final Order No.53973/2014 /Dated:8.10.2014)

"There is a difference between the description of the goods declared and the nature thereof visible to the naked eye. Report of the Chartered Engineer was assailed by appellant on the only ground that the said report did not mention that the stainless steel coils were of prime quality. It does not matter to law if the Chartered Engineer does not come out with that conclusion when he clearly mentions that 17 coils were found to be of specified assorted length, width as well as thickness and were neat and clean without ingress of any foreign material like plastic, etc. His report categorically found out that there was specified length and breadth of desired size. That supports the case of the Revenue to hold that the goods imported were not scrap. Had that been scrap that would have been of irregular size without defined length and breadth. Therefore, mis-declaration of description of the goods is established." (para 5)

Per: D.N. Panda:
Ld. Counsel submits that the goods imported were Prime Stainless Steel Coils Grade-430. Those were purchased as such from M/s. Cna Metals Ltd., USA (as per page 22 to appeal folder). The department, on verification of the goods by the Chartered Engineer, found that the goods claimed to be Stainless Steel Scrap of Grade 430 were Prime Quality goods. That brought out misdeclaration of description of goods and dispute between the parties

a. Confirmation of duty demand against M/s Agro Canners to the tune of Rs 1,94,70,583/- and imposition of penalty of Rs 1,94,70,583/- and imposition of redemption fine of Rs 70,00,000/-.

b. Imposition of penalty of Rs 15,00,000/- on Shri Ashwani Kumar More.

c. Imposition of penalty of Rs 6,00,000/- on Shri Prakash Charia.

(C) However, the Commissioner readjudicated the case confirming duty of Rs 1,94,70,583/- and penalty of Rs 1,94,70,583/- on M/s Agro Canners, Kolkata and imposing penalty on the following M/s Kandla Clearing Agency Pvt Ltd., Shri Dev Kumar Kapta, Shri Shantilal Jain, Shri Rajkumar Mundhra, Shri S S Sharma and Shri Ajay sharma. He has dropped Redemption Fine of Rs 70,00,000/- (Rupees seventy lakhs) and omitted any mention of penalties on S/Shri Ashwini Kumar More and Shri Prakash Charia.

(D) Consequently, the Commissioner has erred by readjudicating the points which had attained finality - particularly in respect of the above mentioned points/issued which had attained finality as no appeal had been filed.

6. On perusal of the records, we do notice that this Bench had remanded the matter aback in respect of the appellants as indicated in original proceedings to adjudicating authority to reconsider the issue. It is also noticed that M/s Agro Canners never filed an appeal against the confirmation of demands of customs duty or against the amount of redemption fine imposed in the original proceedings. In our considered view, the adjudicating authority in this denevo proceedings in respect of other notices and appellants could not have set aside the redemption fine which was imposed on the goods in the original proceedings.

7. The impugned order is set aside which has set aside redemption fine on the respondent in original proceedings.

8. We set aside the impugned order to the extent challenged before us i.e., redemption fine imposed in the original proceeding could not have set aside by the adjudicating authority and allow the appeal filed by the Revenue.

(Dictated and pronounced in the Court)

and correct in as much as the said order dated 31.07.2009 was passed in pursuance of the Hon'ble CESTAT Order No. A/915 o 987/WZB/2004/C-1 dated 7.5.2004 and CESTAT order No. A/195-211/WZB/2005/C-1 dated 11.3.2005. However on examination it is found that the said order dated 31.7.2009 is not in conformity to the orders passed by Hon'ble CESTAT as mentioned above under which the matter was remanded for limited purpose of passing order in the matter of seven appellants as shows herein below:-

Sr No	Noticee-Appellant	Order No. of Hon'ble CESTAT, Mumbai	Appeal No.
1	Kandla Clearing Agency Pvt Ltd	A/915 to 987/ WZB/2004/ C-1 dated 7.5.2004	C/1039/03
2	Shri Dev Kumar Kapta	A/915 to 987/ WZB/2004/ C-1 dated 7.5.2004	C/1040/03
3	Shri Shantilal Jain	A/915 to 987/ WZB/2004/ C-1 dated 7.5.2004	C/1041/03
4	Shri Rajkumar Mundhra	A/915 to 987/ WZB/2004/ C-1 dated 7.5.2004	C/101103
5	Shri S. S. Sharma	A/195 to 211/ WZB/2005/ C-1 dated 11.03.2005	12/04
6	Shri Ajay Sharma	A/195 to 211/ WZB/2005/ C-1 dated 11.03.2005	27/04
7	Shi Rajendra Kumar Mohta	A/195 to 211/ WZB/2005/ C-1 dated 11.03.2005	04/04

(B) However, no appeal was filed by the main noticee M/s Agro Canners, Shri Ashwini Kumar More, Shi Prakash Charia in the case. The CESTAT allowed the appeals filed by above '7' persons by way of remand to the Commissioner of Customs, Kandla for Denovo adjudication after extending a reasonable opportunity of hearing to the appellants. Thus Order-in-Original No KDL/COMMR/60/2003 dated 10.09.2003 becomes final in respect of the following commissioner in the Denovo proceedings:

2014 (4) ECS (265) (Tri.- Ahd.)

In the Customs Excise & Service Tax Appellate Tribunal,
West Zonal Bench, Ahmedabad

C.C., KANDLA

V/s.

M/s. AGRO CANNERS

Date of Hearing / Decision: 17/7/2014

Appeal No. C/559/2009
(Arising out of OIO No.KDL/Commr/09/09/10 dated 31.7.2009. Passed by The commissioner (A), CC, Kandla)
Appearance:
Shri Nagori (AR) For the Appellant
None For the Respondent

CORAM:
Mr. M.V. Ravindran, Hon'ble Member (Judicial)
Mr. H.K. Thakur, Hon'ble Member (Technical)

(Order No. A/11461/2014 dtd 17/7/2014)

"M/s Agro Canners never filed an appeal against the confirmation of demands of customs duty or against the amount of redemption fine imposed in the original proceedings. In our considered view, the adjudicating authority in this denevo proceedings in respect of other notices and appellants could not have set aside the redemption fine which was imposed on the goods in the original proceedings." (para 6)

Per: Mr. M.V. Ravindran:
This appal is filed by the Revenue against OIO No. KDL/Commr/09/09/10 dated 31.7.2009.

2. Despite notices, respondent did not turn-up nor has filed any adjournment application.

3. Since the matter is of 2009, we take up the appeal for disposal in the absence of any representation from the respondents.

4. Heard Departmental representative.

5. On considering the submissions made by the Ld Dept Representative and perusal of records, we find that the Revenue in appeal before the Tribunal against the impugned order on the following ground:

   The Order-in-original No.KDL/COMMR/09/09-10 dated 31.7.2009 passed by Commissioner of Customs, Kandla is not legal, proper

facts the transshipment in other case of methanol was given under similar circumstances for the goods which were freely importable. IGM declaration given in that case is not pressed into service by the appellants to compare as to what description/declaration was given in that case by the importer in the IGM. Further, in the case of a full vessel load it is difficult to understand as to why cargo was required to be unloaded into shore tanks for transshipment when a fully chartered vessel can be taken straight to the port of destination. Transshipment provisions are not meant for undertaking business/ trading activities in India as claimed by the main appellant. It is also extremely difficult to comprehend that cargo, worth more than Rs.200 Crores in both these cases, was kept idle for more than 6 months without the main appellant asking for extension of storage period under the Customs Act, 1962. From the facts available on record, we agree that the findings arrived at by the adjudicating authority that the goods 'gas oil', subsequently equated to HSD, was not intended for transshipment. Accordingly, the goods were rightly confiscated and redemption fines were correctly imposed along with penalties on the main appellant. M/s Act Shipping Ltd (CHA) was well aware of various procedures of transshipment and the facts that on similar transshipments permission was granted by the Revenue but the CHA never guided the main appellant to file proper IGMs showing the port of destination etc at the time of filing IGM, as required under the procedures prescribed by Revenue. Penalties upon the CHA and Shri T.V. Sujan Director of M/s Act Shipping Ltd have thus been correctly imposed. Shri Yunus Fazilli Director of the main appellant in his statement recorded by the investigation appeared as a responsible Director of the main appellant but he was not authorized to give any statement on behalf of the main appellant, therefore, he has been correctly penalized by the adjudicating authority. However, the custodian M/s Mundra Port & SEZ Ltd, Shri Anand Marathe DGM of Liquid Terminal, Capt. Umesh Abhyankar and Shri D. Mahapatra are either the custodians of the shore tanks or the employees of the custodians where the goods were stored. It has thus been correctly argued that they had no knowledge that the goods stored in the shore tanks were not meant for transshipment and were not going to be personally benefited in these proceedings. Therefore, penalties imposed upon the custodians and their employees are set aside.

9. In view of the above, the appeal Nos. C/35/2011, C/36/2011, C/37/2011, C/38/2011, C/39/2011, C/49/2011, C/50/2011, C/55/2011 filed by the appellants are rejected and the Appeal Nos. C/56/2011, C/57/2011, C/58/2011 and C/116/2011 filed by other appellants are allowed.

(Pronounced in Court on 09.09.2014)

stored in the shore tanks.

8. It is observed from the prevailing import-export policy at the relevant time that Hydrcarbons of Import Export Policy headings 27101111, 27101112, 27101113, 27101119, 27101120, 27101190, 27101930, 2710 1940 were permitted to be imported only through State Trading Enterprises or the canalized agencies. The goods of heading 27101950, 27101960, 27101970, 27101980, 27101990 and Heading 2711, pertaining to certain Hydrocarbon gases, of import export policy, were freely importable. It has been correctly observed by the adjudicating authority that the prospective buyers and the port of destination were not known/declared at the time of export. During the course of hearing on a specific query by the Bench it was submitted that after permissions of export given to the main appellant as a result of High Courts order, cargo was taken back by the owner of the cargo to Middle East from where one of the consignment was originally procured. In the facts & circumstances of this case, it becomes difficult to appreciate as to why the cargo was brought into territory of India for transshipment when the same was to be taken back to the same place from where the goods originated. At the time of taking cargo out of India also no port of destination was given by the main appellant. It is observed from the letter dt.30.04.2010 written by the agent of the main appellant to the Joint Commissioner Customs Kandla that similar transshipment was permitted earlier for a chemical tanker MV Borneo Pioneer carrying methanol. In Para 27.14 of the Order-in-Original dt.30.12.2010, the adjudicating authority had given a finding that the cargo involved in that case was methanol which was freely importable and not canalized item which is the case in the present proceedings. From the facts available on record; incomplete description of the cargo given in the cargo declarations, no mention of the port of destination and the name of any prospective buyer and taking of 'gas oil' back to the same place from where partly the cargo originated, suggest that crgo was not for transshipment. As per the contents of the letter dt.30.04.2010 written by the main appellant to the Joint Commissioner Customs Kandla, the main appellant and their CHA were well aware that there are earlier examples where transshipments have been granted and certain importers like M/s Adani Enterprises Ltd have already explored the possibility of supply of HSD to EOUs, units in SEZ and as bunkers for internationally sailing vessels, after warehousing the same. It is observed from the submissions made by ld. A.R. that in the electronic format of IGM there are fields for port of destination and cargo movement code. Such procedural requirements cannot be expected to be ignored by the CHA of the main appellant who is well aware of the transshipment provisions/procedures when acting on behalf of the main appellant and was well aware of the

Government of India and Government of a foreign country, a declaration for transshipment instead of a bill of transshipment shall be presented to the proper officer in the prescribed form.]

(2) Subject to the provisions of section 11, where any goods imported into a customs station are mentioned in the import manifest or the import report, as the case may be, as for transshipment to any place outside India, such goods may be allowed to be so transshipped without payment of duty.

(3) Where any goods imported into a customs station are mentioned in the import manifest or the import report, as the case may be, as for transshipment -

(a) to any major port as defined in the Indian Ports Act, 1908 (15 of 1908), or the customs airport at Mumbai, Calcutta, Delhi or Chennai or any other customs port or customs airport which the Board may, by notification in the Official Gazette, specify in this behalf, or

(b) to any other customs station and the proper officer is satisfied that the goods are bona fide intended for transshipment to such customs station, the proper officer may allow the goods to be transshipped, without payment of duty, subject to such conditions as may be prescribed for the due arrival of such goods at the customs station to which transshipment is allowed."

6.1 As per Section 54 (1) of the Customs Act, 1962, appellant is required to file a Bill of transshipment in addition to the cargo declaration or IGM. It is observed from the case records that at the time of storing the liquid cargo (gas oil) into the shore tanks main appellant, through its CHA, filed an application dt.30.11.2009 for storing the liquid cargo (gas oil) into the shore tanks. The description given in the IGM (Form 'C' cargo declaration) dt.24.11.2009 indicated the goods as follows:-

"Gas Oil 0.5% (This is a transshipment cargo and to be transshipped to any foreign port)"

7. It is observed from the cargo declaration that liquid cargo in bulk was not declared as 'HSD'. The word 'HSD' along with gas oil was first mentioned by the main appellant in letter dt.08.04.2010 written by the agent of the appellant to the DGFT seeking clarification that no violations are done by the appellant in view of Rule 3 of the Foreign Trade (Exemption from application of rules in certain cases) Order 1993. All the documents like transshipment application, bill of lading, IGM was, therefore, contained the description of the imported liquid cargo as 'gas oil' at the time when the goods were

v) That in view of the above incomplete description, no prospective recipients indicated and no destination country mentioned in the IGMs clearly convey that the main appellant had no intention to transship the cargo which was for diversion within India or for consolidation as claimed and that the transshipment was insisted by the main appellant only once Revenue started investigating into the case. It was strongly argued by ld. A.R. that the adjudicating authority in Para 27.25 of the adjudication order has correctly held that the goods in question do not qualify to be a transshipment cargo as there was no intention to transship the cargo as required under Section 54 of the Customs Act, 1962.

vi) That the imported goods kept in the bonded tanks do not remain transshipment cargo if the clearances are not effected within 6 months as required under Section 48 of Customs Act, 1962. That the main appellant did not seek any extension of time even after 6 months of the import.

vii) That in the electronic manifest proforma there are fields for specifying (a) port of destination, and (b) cargo movement code. For cargo movement, there are three codes which need to be filled correctly with proper port of destination.

viii) That international transshipment of cargo needs to be effected within 30 days of entry inward of the importing ship as per the prescribed procedure which CHA, acting as agent of the main appellant, is expected to know.

ix) It was, therefore, the case of the Revenue that redemption fines and penalties have been correctly imposed upon the appellant.

6. Heard both sides and perused the case records. The issue which requires to be decided in the present proceedings is whether the gas oil brought into the shore tank at Mundra and Kandla should be considered as transshipment cargo or not. In this regard, it is relevant to see the provisions regarding transshipment as given under Section 54 of Customs Act, 1962 which are reproduced below:-

"SECTION 54 - Transhipment of certain goods without payment of duty

(1) Where any goods imported into a customs station are intended for transshipment, a bill of transshipment shall be presented to the proper officer in the prescribed form.]

[Provided that where the goods are being transshipped under an international treaty or bilateral agreement between the

are imposable upon his clients as none of the persons was individually going to gain from the transshipments. On a specific query from the Bench it was explained by the ld. Advocate appearing on behalf of the main appellant that one consignment came from Middle East and the second consignment came from Indonesia. It was also explained that cargos were full vessel loads and taken out of India by the same owner of the goods to Middle East countries from where one of the consignments originated.

4. Shri R. Subramanya (Advocate) appearing on behalf of Shri D. Mahapatra argued that his client was only a paid employee of the custodian and was not to gain personally in any means. It was his case that penalty is not imposable upon him as he had no knowledge that the goods stored were liable for confiscation and has no idea that goods kept with the custodian are not meant for transshipment.

5. Shri K. Sivakumar (AR) appearing on behalf of the appellant argued that the appellant had no intention to transship the cargo and has been correctly denied transshipment permission by the adjudicating authority and that imposing redemption fine and penalties is correct, in view of the following reasons:-

i) That the main appellant on their own admission has accepted that cargo was brought into India for consolidation and subsequent sale from two different sources without indicating the possible buyers or the destination country of the cargo stored in the shore tanks.

ii) That no classification of the 'gas oil' was indicated in the documents presented before the Customs and the description given in the IGMs was only 'gas oil' and not HSD.

iii) That as per the appellants letter, dt.30.04.2010 written to Joint Commissioner Customs Kandla, the appellant was having the knowledge that transshipment could be asked for as such transshipment was given to a chemical tanker 'Borneo Pioneer' carrying methanol as contested in Para 'd' of their letter dt.30.04.2010.

iv) That as per 2nd Para on Page 4 of their letter dt.30.04.2010, appellant was aware, before the cargo was brought into Indian Territorial Waters, that HSD can be imported into India by keeping the same in bonded warehouses for supply to 100% EOUs, manufacturers of SEZ and as bunkers for foreign going vessels but did not declare the same as HSD in the cargo declarations.