IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI

Custom Appeal No. 370/2012

Arising out of Order-in- Original No.64/2011-12 F. No.S/6-Gen-749/2010 DRT(X), Dated: 12.01.2012
Passed by the Commissioner of Customs (E), Nhava Sheva

WITH
Custom Appeal No.371/2012

Arising out of Order-in- Original No.64/2011-12 F. No.S/6-Gen-749/2010 DRT(X), Dated: 12.01.2012
Passed by the Commissioner of Customs (E), Nhava Sheva

Date of Hearing: 07.03.2019
Date of Decision: 07.03.2019

M/s SCHLUMBERGER SOLUTIONS PVT LTD
(NOTICEE NO.1) THANE BELAPUR ROAD, P-21, TIC INDUSTRIAL AREA
MIDC, NHAPE, NAVI MUMBAI - 400700

Vs

COMMISSIONER OF CUSTOMS, (EXPORT)
NHAVA SHEVA, JAWAHAR NEHRU CUSTOM HOUSE, POST URAN
DISTRICT RAIGAD, SHEVA - 400707

Appellant Rep by: Shri J Authur Prem, Adv.
Respondent Rep by: Shri Dharmendra Singh, Supdt (AR)

CORAM: D M Misra, Member (J)
P Anjani Kumar, Member (T)

Cus - The assessee/exporters had filed shipping bills under claim of drawback under Section 74 of Customs Act, 1962, for re-export of imported Oil Well Equipment after completion of project in India - The concerned appraising officers raised objection about the identity of goods - The exporters submitted their explanation on several occasions through letters as well as in person w.r.t. the import documents but the officers refused to accept that goods were actually those which were imported earlier for the Oil exploration project - A SCN was issued to exporters and adjudicated by Commissioner who held that the identity of goods re-exported was not established vis-à-vis corresponding import documents - The imports have occurred during July to September 2010; initially the goods were put for export by filing shipping bills - The goods could not be exported due to the objections raised by department and SCN issued and subsequent proceedings in Tribunal - After fulfilling the conditions laid down by Tribunal, customs have allowed the goods to be re-exported on 08.02.2013; LEO was issued on 29.03.2013 and goods were finally exported on 13.04.2013 - It is not the case of department that the goods presented for export on 01.12.2010 and goods which were

exported finally on 13.04.2013 are not different - Therefore, the time period of two years requires to be reckoned up to the initial filing of the shipping bills i.e. 01.12.2010 and not the date on which LEO was given after prolonged litigation - The assessee is not responsible for the delay - Having initiated such a litigation, department cannot hold that as the LEO was issued on 29.03.2013 the re-export is beyond the period of two years - In fact the assessee have lost some goods due to pilferage at the CFS in bargain - At this juncture not denying them the benefit of drawback at least on the part of the goods that were exported would be grave injustice to the assessee and is not maintainable - It is settled principle of law that while computing the limitation, time taken for litigation should be excluded - Assessee cannot be put to jeopardy due to the objections raised by department which to a greater extent got nullified by report of Intertek, the exports appointed for this purpose - Therefore, Tribunal is inclined to consider the submissions of assessee that the reexport should be treated as made in time and drawback should be allowed to the extent of the part of goods that were actually reexported - The impugned order is set aside: CESTAT

Appeals allowed

FINAL ORDER NOS. A/86429-86430/2019

Per: P Anjani Kumar:

Heard both sides and perused the records of the case.

2. Briefly stated the facts of the case are that the Appellants/exporters had filed 7 shipping bills dated 01-12-2010 under claim of drawback under Section 74 of the Customs Act, 1962 (hereinafter referred to as the Act), for re-export of imported Oil Well Equipment after completion of the project in India. The concerned appraising officers raised objection about the identity of goods. The exporters submitted their explanation on several occasions through letters as well as in person w.r.t. the import documents but the officers refused to accept that goods were actually those which were imported earlier for the Oil exploration project. A SCN dated 12.04.2011 was issued to the exporters and adjudicated by Learned Commissioner of Customs (Export) vide OIO dated 19.01.2012 held that the identity of the goods re-exported was not established vis-à-vis corresponding import documents and

(i). Rejected drawback of Rs 50,08,413, (Rupees Fifty Lakh Eight Thousand Four Hundred Thirteen only) claimed vide 7 Shipping Bills i.e. No.3000004501, 3000004502, 3000004503, 3000004505 and 3000004506 all dated 01.12.2010 filed by M/s. Schlumberger Solution Pvt. Ltd, holding that the identity of the goods exported,

(ii). Rejected the drawback claim of Rs.1, 91,996 (Rs. One Lakh Ninety One Thousand Nine Hundred and Ninety-Six only) claimed by M/s. Schlumberger Asia Services Ltd, vide Shipping Bills No.3000004499 and 3000004504 both dated 01.12.2010.

(iii). Imposed a penalty of Rs.20, 00,000 (Rupees Twenty Lakh only) on M/s. Schlumberger Solutions Pvt. Ltd and a penalty of Rs 1, 00,000 (Rupees One Lakh only) on M/s Schlumberger Asia Service Ltd, Mumbai under Section 114 (iii) of the Customs Act, 1962.

2.1. The Aggrieved by the above order, appellants preferred Appeals No.C/370/2012-DB and C/371/2012-DB before this Bench, which ordered, vide interim order dated 10.07.12, that the goods be reexamined by an expert to establish the identity of goods and thereafter goods be allowed to be re-exported on execution of bonds. Accordingly, the Commissioner of Customs (Export), JNCH had appointed M/s. Intertek Testing Services as an Export on 22.10.2012 to re-examine the goods in question in the presence of Officers of Customs and representatives of Appellants. A report dated 25.10.2012, confirming establishment of identity of the goods, was submitted. Available goods were allowed to be re-exported by against bond in compliance with the CESTAT's interim Order dated 10.07.2012. Customs have allowed re-export on 8-2-2013 and the goods were re-exported on 13.4.2013. Thereafter, Drawback claim was filed with Customs on 24.06.2013 within the statutory time limited.

3. Learned counsel for the appellants submits that they have received a Deficiency Memo from Customs drawback department on 17.09.2013. When the goods were allowed for re-export in February 2013, the concerned office has put a remark that "S/bill assessed provisionally as per DC(X) Order vide file No. S/6-Gen-892/2012(X)DNode dated 29.03.2013 pending for re-export time limit to be decided by CESTAT. Counsel submits that the concerned officers are not in a position to decide about the validity of exporter's claim of drawback being within the statutory time limit. As a matter of fact, Section 74 (1) (b) makes it abundantly clear that the drawback Shipping Bill should be entered within two years from the date of payment of the imports duty, which had been complied with by the exporters. The shipping bills were filed on 01.12.2010, whereas the imports were during July to Sept, 2010, well within the statutory time period of two years. Thus for all practical purposes, imported goods were entered for re-export in Dec, 2010 but the department did not allow the said goods to be exported as they apprehended non-establishment of identity of the goods. In order to justify that exporters claim was correct and legal, they had to go through the appellate remedy before Hon. CESTAT and got justice.

3.1. Learned Counsel also submits that another condition for being eligible for drawback under Section 74 is the compliance of Rule 5 of Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 which requires claim of drawback to be filed in the prescribed format within three months from the date on which and order permitting clearance and loading of goods for exportation under Section 51 is made by the proper officer of Custom. Since claim for drawback was made on 24.06.2013 after 'Let Export Order' given on 29.03.2013, this condition was also fulfilled. As such, there does not seem to be any non-compliance of statutory requirements for being eligible for drawback under Section 74 on the part of the exporters.

3.2. Learned Counsel further submits that on account of prolonged detention as a result of customs procedures, adjudication, appeal before CESTAT, re-examination by experts etc., a large quantity of equipment worth Rs.66.35 lakhs as per the details appended to appellants' letter dated 29.08.2012 to the Manager DRT CFS, were found pilfered from the total consignment brought for export against six shipping bills as far back as on 06.12.2010. This is indeed an irreparable loss to the exporters as the custodians of the goods are expressing their inability to restore the pilfered goods to the exporters. He

submits that in view of the above, the exporters' claim at the time of filing the Shipping Bills in question under Section 74 stands vindicated. O-in-O No.64/2011-12 dt.12.01.2012 passed by the Commissioner of Customs (Exports) , may be set aside so that the Exporters may at least salvage the permissible drawback on the goods they could actually re-export so far.

4. Learned Authorised Representative for the department submits that Shipping Bills were assessed provisionally with remark "Shipping Bills assessed provisionally as per DC (X) order vide F. No.S/6-Gen- 892/2012 (X) D' Node dated 29.03.2013 pending for re-export time limited to be decided by CESTAT. As per section 74(i) (b) "the goods are entered for export within two year from the date of payment of duty on the importation thereof. In this case goods were imported through Bills of Entry dated July to September 2010, however the goods were re-exported in February 2013 hence the condition of 2 years under section 74 (i)(b) is not fulfilled; As per Section 51 of Customs Act 1962, for the export to be treated as complete, the proper office should order permitting clearance and loading of the goods for exportation. Thus, it is abundantly clear that the conditions that, the goods should be entered and that they should be cleared for loading for export within 2 years are not fulfilled. In this case the goods were re-exported on 29.03.2013 which is beyond two years condition specified under Section 74(i) (b). The LEO was granted on 29.03.2013 and the exporter has filed the claim with Drawback Section on 24.06.2013 which is within time limit as prescribed under Rule 5 of Re-export of imported Goods (Drawback of Customs Duties) Rules 1995.

5. We find that the Learned Commissioner observed that parts of the distinctive/declared marks or numbers have been scrapped by machining and fresh numbers have been chiseled, engraved or embossed on it; differential wear and tear is not explainable; the Appellants contention that such tools are used under extreme geographic condition and the markings embossed on them got washed away and hence Sr. No. of such tools were chiseled manually on them for identification purpose was not accepted by the Commissioner. On an appeal filed by the Appellants the Tribunal vide order dated 10.07.2012 has directed the concerned authority to let the goods be examined by some expert and the expert opinion be obtained and thereafter goods be allowed to be exported on execution of a bond. Customs Authority have appointed M/s. Intertek to examine the goods. M/s. Intertek vide their report dated 25.10.2012 are satisfied that goods of a total declared invoice value of Rs.2,51,42,452.37 (as listed therein) are fair and reasonable; they confirm that the goods described in the certificate are identified to be the same as described in import/export documents. On certain queries raised by the customs Intertek have clarified vide their letter dated 14.01.2013. We find that the Appellants claimed that some goods have been pilfered and they have lodged a police complaint. Therefore, it is evident from the records of the case that identity of at least part of the goods has been established by the report of the experts i.e. Intertek. To this extent one should not have any doubt regarding the admissibility of re-export of the imported goods. We find that it is not the case of the department that the imported goods have been sold or diverted and some other goods were presented for export. No evidence to that extent has been adduced by Revenue. The only question that was raised was with reference to the establishment of identity and the same is answered by the report of Intertek in respect of the goods mentioned in their report.

Therefore, the issue of admissibility of drawback on the goods re-exported is settled in the appellants favour.

6. Department has raised the issue of time limit for the filing of drawback shipping Bills. We find that originally both the Appellants have filed seven numbers of shipping bills on 01.12.2010. Only due to some issues regarding the identification of the goods, on the basis of marks and numbers, with the imported goods the Show Cause Notice was issued and was confirmed by the Commissioner holding as detailed above. We find that Tribunal has directed vide order dated 10.07.2012, CESTAT directed to obtain the opinion of an expert. Goods were allowed to be re-exported by customs on 08.02.2013 and were exported on 13.04.2013. The Department contends that imports were made during July to September 2010; the LEO was granted on 29.03.2013 and therefore, the export cannot be considered to have taken place within two years in terms of Section 74(i) (b) of Customs Act, 1962. However, the department does not dispute that the drawback claim has been filed on 24.06.2013 and is within the prescribed time limit under Rule 5 of re-export of imported goods (draw-back of custom duty Rules 1995).

7. In the instant case, the imports have occurred during July to September 2010; initially the goods were put for export by filing shipping bills on 01.12.2010. The goods could not be exported due to the objections raised by the department and the Show Cause Notice issued and the subsequent proceedings in the Tribunal. After fulfilling the conditions laid down by the Tribunal customs have allowed the goods to be re-exported on 08.02.2013; LEO was issued on 29.03.2013 and goods were finally exported on 13.04.2013. It is not the case of the department that the goods presented for export on 01.12.2010 and goods which were exported finally on 13.04.2013 are not different. Therefore, the time period of two years requires to be reckoned up to the initial filing of the shipping bills i.e. 01.12.2010 and not the date on which LEO was given after prolonged litigation. The Appellants are not responsible for the delay. The department could have taken all steps to get the goods properly identified to their satisfaction including making reference to an expert well before CESTAT order for the same. Having initiated such a litigation department cannot hold that as the LEO was issued on 29.03.2013 the re-export is beyond the period of two years. We find that in fact the Appellants have lost some goods due to pilferage at the CFS in the bargain. At this juncture not denying them the benefit of drawback at least on the part of the goods that were exported would be grave injustice to the appellants and is not maintainable. It is a settled principle of law that while computing the limitation time taken for litigation should be excluded. In view of the same, we find that he Appellants cannot be put to jeopardy due to the objections raised by the department which to a greater extent got nullified by the report of Intertek, the exports appointed for this purpose. Therefore, we are inclined to consider the submissions of the Appellants that the reexport should be treated as made in time and drawback should be allowed to the extent of the part of the goods that were actually reexported.

8. In view of the above, the impugned order is set aside. We hold that the goods shall be treated as re-exported