IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 1610 of 2008

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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M/S NAVAL OVERSEAS PVT LTD
Versus
COMMISSIONER OF CENTRAL EXCISEAHMEDABAD-I

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Appearance:
MR PARITOSH GUPTA WITH MR YASH MODI FOR M/S TRIVEDI & GUPTA(949) for the Appellant(s) No. 1
MR UTKARSH R SHARMA(6157) for the Opponent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 13/03/2024
CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Mr. Paritosh

Gupta with learned advocate Mr. Yash Modi for M/s. Trivedi and Gupta for the appellant and learned advocate Mr. Utkarsh Sharma for the opponent.

2. This Tax Appeal is filed under section 130 of the Customs Act,1962 (for short 'the Act,1962') arising out of order dated 28.09.2007 in Appeal No.E/141/06 & Appeal No. E/672/07 passed by the Customs, Excise & Service Tax Appellate Tribunal (for short 'the Tribunal').

3. The Appeal was admitted vide order dated 22.09.2009 on the following substantial questions of law:

> "a) Whether the Customs, Excise and Service Tax Appellate Tribunal erred in holding that recovery of Merchant Over Time charges can be made for using the services of Central Excise Officers during office hours under Section 36 of the Customs

Act, 1962 read with Customs (Fees For Rendering Services By Customs Officers) Regulation, 1998 and Circular No.31/2003CUS?

b) Whether the Customs, Excise and Service Tax Appellate Tribunal erred in not following the decision in Sigma Corporation (I) Ltd. Vs.CCE,New Delhi reported in 2004 (165) ELT (Tribunal Delhi) which is a binding precedent of a bench of equal strength and which has been relied upon in a number of cases?

c) Whether the adjudicating authority erred in holding that the recovery of Merchant Over Time charges can be made for using the services of Central Excise Officers during office hours can be made even if such services are rendered within the factory premises of the appellant falling within the normal range only i.e. within the normal place of work, in terms of the decision in Sigma Corporation (I) Ltd. Vs. CCE, New Delhi reported in 2004 (165) ELT (TribunalDelhi)?

d) Whether the CBEC's Circular No. 31/2003 CUS dated 7.4.2003, purportedly issued under

Section 65 of the Act dealing with cost recovery charges, applies to a 100% EOU unit, which has been permitted to work under Self Removal Procedure?

e) Whether the Customs, Excise and Service Tax Appellate Tribunal failed to give a liberal construction to Circular No.709/25/2003CX., dated 23.4.2003 and extending a similar benefit to the appellant, whereby Merchant Over Time charges have been held to be unwarranted in view of the current scenario of liberalization and simplification of law and procedures?

f) Whether the adjudicating authority overlooked the introduction of 24 hours a day, 7 days a week and 365 days a year mandate for Customs Officers in accordance with MF (DR) Circular No.5/2002Cus., dated 17.1.2002 and in view of the fact Merchant Over Time charges tend to increase the transaction cost for imports/exports besides leading to enormous paperwork?

g) Whether the impugned order passed by the Customs, Excise and Service Tax Appellate Tribunal is violative of Principles of Natural Justice in view of the fact that a plethora of judicial pronouncement cited and relied upon by the appellant with regard to demand and recovery of Merchant Over Time charges has not been considered ?

h) Whether the Customs, Excise and Service Tax Appellate Tribunal erred in ignoring the provisions of Part-II of Chapter 18 of the CBEC Excise Manual as well as the clarification of the regulations as given under paragraph 3 of Chapter 13 of the CBEC Custom Manual?”

4. The appellant is 100% EOU engaged in manufacture and export of excisable goods i.e. Plastic Bobbins, Tubes, Cones etc. which falls under Chapter 39 of the Central Excise Tariff Act,1985. The appellant imports Poly Carbonate, Fortron, Sticking Band ABS etc. The appellant holds licenses under sections 58 and 65 of the Customs Act, 1962 (for short ‘the Act’)

for private bonded warehouse. The appellant has also obtained the permission letter dated 24.03.2000 for manufacture and export of aforesaid goods under bond besides central excise registration. The appellant also was having permission for "Self Removal in place of Customs Bonding" to carry out manufacturing activities without customs supervision since 1995 and for the said purpose, the appellant has its unit.

5. By this appeal, the appellant has challenged the order passed by the Tribunal rejecting the appeal of the appellant for levy of demand and recovery of Merchant Overtime ('MOT' for short) charges for using the services of Central Excise Officers during office hours for the period from 01.04.2004 to 30.09.2005,

from 01.10.2004 to 31.01.2005 and from 01.02.2005 to 15.04.2005 under section 36 of the Act read with Customs (Fees for Rendering Services by Customs Officers) Regulation, 1998(for short 'the Regulation') and Circular No. 31/2003-CUS.

6. The appellant received three show-cause notices dated 20.12.2004, 09.02.2005 and 06.01.2006 for the aforesaid period calling upon to show as to why the MOT charges for using service of Central Excise Officers during office hours should not be recovered under the aforesaid provision and regulation and notification.

6.1 After considering the reply given by the appellant, the Adjudicating Authority passed the Order-in-Original dated 23.02.2006 confirming the demand of MOT charges of Rs. 24,450/- for the period from 01.04.2004 and 30.09.2004 and Rs. 17,100/- for the period from 01.10.2004 to 31.01.2005.

6.2 The appellant being aggrieved by the Order-n-Original dated 23.02.2006 preferred Appeal No. 166 of 2006 before the Commissioner (Appeals), Ahmedabad. However, by order dated 31.07.2006, the said appeal was dismissed.

6.3 With regard to the show-cause notice dated 06.01.2006, the Adjudicating Authority passed the Order-in-original dated 29.09.2006 and confirmed the demand of MOT charges of Rs. 11,100/- for the period from 01.02.2005 to 15.04.2005. The appellant therefore preferred Appeal No.

39 of 2007 before the Commissioner (Appeals). Commissioner (Appeals) by order dated 31.01.2007, quashed and set aside the order of Adjudicating Authority holding that the appellant was not liable to pay MOT charges under section 36 of the Act read with Regulations and the Notification No. 31/2003.

6.4 The appellant as well as the respondent being aggrieved by the aforesaid orders passed by the CIT (Appeals) preferred Appeals No. E/141/2006 and E/672/2007 respectively before the Tribunal. The Tribunal, by the impugned order common order dated 28.09.2007, dismissed the appeal preferred by the appellant and allowed the appeal preferred by the respondent-authority.

7. Being aggrieved, the appellant has preferred this appeal on the aforesaid substantial questions of law.

8. Learned advocate appearing for the appellant submitted that the Tribunal had taken consistent view in similar matters that MOT charges would not be payable for examination and supervision of loading export goods undertaken by the Central Excise Range Officer at the factory premises of the manufacturers within normal working hours situated in their territorial jurisdiction.

9. Reliance was placed on the decision of the Delhi High Court in case of Commissioner of **Commissioner of Central Excise vs. Sigma Corporation India Pvt. Ltd** reported in **2013 (293) ELT 649 (Delhi)** wherein the Hon'ble Delhi High Court held

that no MOT charges would be leviable when services rendered by the officers within his range only for supervision of stuffing work done in the factory of the assessee during the working hours as per section 36 of the Act,1962 read with Regulations, 1998.

10. It was submitted that in case of **CCE vs. Commissioner of Central Excise Garnet India Pvt. Ltd** reported in **2017 346 ELT 243 (Mad)** the Hon’ble Madras High Court followed the decision of the Delhi High Court.

11. Reference was also made to the decision of the Larger Bench of the Tribunal in case of **Commissioner of Central Excise, Rajkot vs. Reliance Industries Limited** wherein also, the

decision of the Delhi High Court in case of Commissioner of Income Tax vs. *Sigma Corporation India Ltd.(supra)* was followed by the Larger Bench.

12. On the other hand, learned advocate Mr. Utkarsh Sharma for the respondent submitted that the collection of MOT charges are payable by the appellant as the Central Excise Officers are discharging their duties in capacity and style of Custom Officers attracting overtime even for work which were admittedly undertaken at the premises of the appellant only on working days of week and even during office hours.

13. Learned advocate for the Revenue referred to and relied upon Regulations, 1998 to submit that the intent and purpose

for claiming such charges by the exporter for attending the stuffing work within the office hours and within the territorial jurisdiction of the officers who are assigned jobs by the Senior Executive Officers for such work and accordingly, section 36 of the Act,1962, should be applied in proper perspective as in the port area, there is no concept of self examination, self clearance and goods are necessarily subject to examination by the officer and charge for such examination being given by the officers to the Central Excise Officer for supervising the stuffing of such goods at the factory premises of the manufacturer. It was therefore, submitted that since this is not the normally assigned work of the Jurisdictional Central Excise Officers, condition of payment of MOT charges has been prescribed even during the working hours of the Central Excise Officers working as Custom Officers. It was therefore, submitted that the Tribunal has rightly followed the decision in Appeal No. 672/2007 decided in favour of the department.

14. It was submitted that Regulations 1998 defines the Custom Officer, Customs work, working hours and levy of fees for rendering of services. Sub-clause (c) of Regulation (3) of the Regulations,1998 provides that in relation to jobs to be performed by any Customs Officer during the working hours, there shall be two blocks-one before lunch and the other after lunch respectively and fees shall be charged for the entire block whether the

request for the services of such officer relates to entire block or the portion thereof.

15. The Hon'ble Delhi High Court in case of Commissioner of Central Excise vs. *Sigma Corporation India Pvt. Ltd* (supra) has held as under:

> "7. The overtime fee is collected under section 36 of the Customs Act read with Customs (Fees for Rendering Services by Customs Officers) Regulations, 1998 made thereunder. section 36 of the Customs Act allows loading/unloading of imported/export cargo from any vessel beyond working hours on any working day or on holiday only on payment of prescribed fees. The rate and the manner of collection of such fee is given in the aforesaid Regulations of 1998.
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> 8. In the present case, it is an admitted position that stuffing work was done in the factory of respondent under the supervision of

jurisdictional Central Range Officer during working hours only. The place of working/supervision was at the factory of the respondent which is at Mayapuri. Learned counsel for the respondent has pointed out that as per Notification No. 14/2002-CE(NT) dated 08.03.2002 as amended by Notification No. 22/2002-CE(NT) dated 04.06.2002, the jurisdiction of Delhi II. Range 26 of Central Excise Division-V includes Mayapuri Indi. Area Ph.-II where the factory of respondent is located, the services were rendered by the officer within his range only. The same fell within the jurisdiction of the Central Excise Range Officer who supervised the work. Chapter 13 of the C.B.E.C's Customs Manual deals with "Merchant Overtime Fee" wherein it is provided that if services are rendered by the Customs Officer at a place which is not his normal place of work or a place beyond the Customs area, overtime is levied even during the normal working hours."

16. Regulation 3 of Regulations,1998 provides for Levy of Fees for rendering of services by Custom Officer. Regulation 3(3) reads as under:

> "(3) The fees levied under sub-regulation (1) shall be subject to the following conditions, namely:-
>
> (a) The levy of fees as aforesaid shall be for a minimum of 3 hours in each case, except in cases of overtime postings immediately preceding or immediately following the working hours of the concerned cadre of officers.
>
> (b) The period between midnight and 6 A.M. shall be treated as a block whether the services are required for the entire block or for a portion thereof.
>
> (c) In relation to jobs to be performed by any customs officer during the working hours, there shall be two blocks one before lunch and the other after lunch respectively and fees shall be charged for the entire block whether the request for the services of such officer relates to the entire block or a portion thereof."

17. It is not in dispute that the place of working/ supervision was at the factory of

the appellant and it is also not in dispute that supervision was made by the Range Central Excise Officer in whose territory the factory of the appellant is located. Chapter 13 of the C.B.E. & C.'s Customs Manuals deals with "Merchant Overtime Fee" wherein it is provided that if services are rendered by the Custom Officer at a place which is not his normal place of work or place beyond the custom area, overtime is levied even during the normal working hours.

18. Therefore, in the facts of the case, none of the condition for levy of the MOT charges is satisfied and accordingly, the appeal is allowed by answering the questions in negative and in favour of the appellant to the effect that the appellant

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would not be liable to pay Merchant Overtime Charges for carrying out examination and supervision of loading of export goods at the factory premises of the manufacturer during the office hours on working day by the Central Excise Officers contrary to the instruction of the Central Board of Excise and Customs.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA,J)

JYOTI V. JANI