CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

C/233/2009-DB, C/234/2009-DB

[Arising out of Order-in-Appeal No. 08/2009 dated 28/01/2009 passed by CC(Appeals), Bangalore]

H.M. Leisure
Geneva House, No.14, Cunnigham Road,
Bangalore - 560052

Appellant(s)

H.M.TRADERS & EXPOSITIONS
GENEVA HOUSE, NO.14, CUNNINGHAM
ROAD, BANGALORE

Appellant(s)

VERSUS

Commissioner of Customs
Bangalore-cus
C.R. BUILDING,QUEENS ROAD,
P.B.NO. 5400,
BANGALORE - 560001
KARNATAKA

Respondent(s)

Appearance:
Shri KIRAN S JAVALI, Advocate
NO-37,11 TH MAIN, VASANTHNAGAR
BANGALORE - 560652
KARNATAKA

For the Appellant

For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P.V. SUBBA RAO, TECHNICAL MEMBER

Final Order No. 20659-20660 / 2019

Date of Hearing: 19/08/2019

Date of Decision: 19/08/2019

Per : S.S GARG

These two appeals have been filed against the common impugned order dt. 28/01/2009 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has upheld the Order-in-Original passed by the Jt. Commissioner, ICD, Bangalore and rejected the appeal. Since the issue involved in both the appeals is identical and there is a common impugned order, both the appeals are being disposed by this common order.

2.1. Briefly the facts of the present case are that the appellants imported various types of video games and sought clearance vide three Bills of Entry Nos.3385 dt. 26/09/2001 and No.3387 dt. 26/09/2001 with a declared value of Rs.71,991/- and Rs.1,81,390/- CIF (by M/s. HM Trade and Expositions) & Bill of Entry No.3485 dt. 05/10/2011 with a value of Rs.2,80,525/- by M/s.H.M. Leisures, respectively. As there was no mention in the Bills of Entry about the nature of the goods i.e. new or old, 100% examination was conducted and the goods were seized on 02/01/2002 alleging under valuation. The matter was referred to a Chartered Engineer who after examination of the goods opined that the goods can be fairly valued at Rs.1,76,000/- and Rs.4,38,600/- respectively for the two bills. The goods were released provisionally on execution of a bond and bank guarantee. After issue of a proper show-cause notice and giving the appellants opportunity to present their view points, the lower authority had vide OIO No.148/2006 JC dt. 19/09/2006 ordered finalization of the provisional assessment at the appraised value and imposed fine and penalty on the appellants and ordered appropriation of the said amount from the bank guarantee executed by them. Aggrieved by the said order, the appellants had filed appeals. The said appeals were remanded back to the lower authority for denovo adjudication vide Order-in-Appeal No.05/2007 dt. 23/01/2007 due to following reasons:-

i. No reason is adduced in the OIO for rejecting the invoice price declared by them;
ii. Even on rejection, Rule 5 to 8 have not been sequentially followed for determining the value and the value has been

determined straight-away under rule 8 by accepting the Chartered Engineer's appraised value.

iii. Even while accepting the Chartered Engineer's value, the value recommended by the second Chartered Engineer, which is lower than the one considered, has been rejected which is contrary to provisions of Rule 8(2)(ii).

iv. No cross examination of the Chartered Engineer's was allowed by the lower authority.

2.2. After the remand, the lower authority held that the appellant has mis-declared the description of the goods by not declaring the nature of the goods i.e. either old or new and consequently invoked Section 111(m) and confiscated the said goods and also imposed penalty under Section 112 of the Customs Act. The goods were permitted to be released under Section 125 of the Customs Act, 1962. Aggrieved by the said order, passed on remand, the appellant filed appeals before the Commissioner(Appeals) and the Commissioner(Appeals) rejected the same. Hence the present appeals.

3. Heard both sides and perused the records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the original order was passed by the Jt. Commissioner of Customs on 07/03/2008 whereby he has imposed redemption fine of Rs.10,000/- in respect of Bill of Entry No.3485, Rs.8000/- in respect of bill of Entry No.3387 and Rs.3000/- in respect of Bill of Entry No.3385 in terms of Section 125 of Customs Act, 1962. The Jt. Commissioner has also imposed penalty of Rs.1 lakh in respect of bill of Entry No.3485, Rs.30,000/- in respect of Bill of Entry No.3385 and Rs.80,000/- in respect of Bill of Entry No.3387 under Section 112(a)(ii) of the Customs Act, 1962. The learned counsel further submitted that the Jt. Commissioner on its own issued a corrigendum dt. 28/03/2008 vide which he has passed the following order:-

(ii) In lieu of confiscation, fine of Rs.1,00,000/- (Rupees one lakh only) w.r.t. Bill of Entry No.3485, Rs.30,000/- (Rupees thirty thousand only) w.r.t. Bill of Entry No.3385 and Rs.80,000/- (Rupees eighty thousand only) w.r.t. Bill of Entry NO.3387 are imposed under Section 125 of the Customs Act, 1962.

(ii) Penalty of Rs.10,000/- (Rupees ten thousand only) in respect of Bill of Entry No.3485, Rs.8,000/- (Rupees eight thousand only) in respect of Bill of Entry No.3387 and Rs.3000/- (Rupees three thousand only) in respect of Bill of Entry No.3385 are also imposed in terms of Section 112(a)(ii) of the Customs Act, 1962.

4.2. Learned counsel further submitted that once the original authority has passed the order and imposed fine and penalty, subsequently the same authority cannot alter the amount of fine as well as penalty since the said officer becomes functus officio once the order is passed. He further submitted that on this ground alone, the original order has to be set aside. In support of his submission, he relied upon the following decisions:-

i. Flash Forge (P) Ltd. Vs. CC&CE(A), Visakhapatnam [2009(233) ELT 126 (Tri. Bang.)]
ii. CCE, Kolkata-VII Vs. Bharat Lub Industries (P) Ltd. [2004(173) ELT 138 (Tri. Kolkata)]

4.3. Learned counsel argued that though he has a very good case on merits and has raised number of grounds in the grounds of appeal but this case will go only on account of the fact that the corrigendum was issued after about 20 days without notice to the other party hence unsustainable under law.

5. On the other hand, the learned AR defended the impugned order and submitted that the appellant did not raise the ground of corrigendum before the Commissioner(Appeals) as well as before this Tribunal. Therefore the Tribunal should not look into corrigendum at all and decide the case on the basis of the impugned order passed by the Commissioner(Appeals).

6. After considering the submissions of both sides and perusal of material on record, we find that the issue raised by the appellant is purely legal in nature and can be raised first time before this appellate Tribunal at the time of argument and the Tribunal has the power to examine the legal issue even if not raised in the grounds of appeal. Further we find that the Jt. Commissioner while passing the Order-in-Original on 07/03/2008 imposed redemption fine of Rs.10,000/-, Rs.8000/- and Rs.3000/- in respect of different Bills of Entry in terms of Section 125 of the Customs Act, 1962. Similarly, he imposed penalty of Rs.1 lakh, Rs.30000/- and Rs.80000/- in respect of different Bills of Entry under Sectgion 112(a)(ii) of the Act. Thereafter on 28/03/2008, he has passed a corrigendum changing the amount of redemption fine and penalty without giving any notice to the parties. Further we find that the corrigendum issued to the Order-in-Original dt. 07/03/2008 passed on 28/03/2008 is not appropriate under law in view of the Board's Circular No.502/68/99-CX dt. 16/12/1999. Further we find that the Division Bench of this Tribunal in the case of Flash Forge (P) Ltd. cited supra has held in para 7 as under:-

> *7. On a careful consideration of the issue, we find that the facility of deferred payment has been withdrawn without issuing show cause notice. This is in violation of the principles of natural justice. The Punjab & Haryana (cited supra) in the case of Krishna Engineering Works Ltd. has held that the facility and payment of duty on fortnightly basis should be forfeited only after affording opportunity of hearing to the petitioners.*

> *Moreover, the Original Authority has issued a corrigendum enhancing the penalty without giving any reasoning. A corrigendum cannot substantially alter the original order. Further, the Commissioner (Appeals) had not noticed the corrigendum. It is also seen that the appellant had discharged the duty liability by debiting in the Cenvat account. In any case, in view of the violations of principles of natural justice and also issue of corrigendum without giving any reasoning, the Order-in-Original cannot be sustained. Therefore, the impugned order upholding the original order is also liable to be set aside. In any case payment by Cenvat credit is also duty payment in terms of the Central Excise Act. In these circumstances, we set aside the impugned order and allow the appeals with consequential relief.*

7. In view of the ratio of the decision cited supra, we are of the considered view that the original order passed by the Jt. Commissioner and the corrigendum passed on 28/03/2008 are not sustainable in law and therefore we set aside the same and remand the case back to the original authority to pass a fresh order after giving an opportunity of hearing to the appellant. and after following the principles of natural justice.

(Operative portion of the Order was pronounced
in Open Court on **19/08/2019**)

S.S GARG
JUDICIAL MEMBER

P.V. SUBBA RAO
TECHNICAL MEMBER

Raja...