CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO.1

Appeal(s) Involved:

C/20549/2019-DB

[Arising out of Order-in-Appeal No. 362/2018 dated 13/11/2018 passed by Commissioner of CUSTOMS(Appeals), BANGALORE-I]

Pace India
No 24/1 6th Cross Vinayaka Nagar Old
Guddadahalli Mysore Road
BANGALORE
KARNATAKA
560026

Appellant(s)

Versus

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

Respondent(s)

Appearance:

Shri Raghavendra B Hanjer, Advocate
G.SAMPATH & S. RAGHU
543,12TH CROSS,8TH MAIN J.P NAGARA
2ND PAHASE, BANGALORE 560078
BANGALORE
KARANATAKA
560078

For the Appellant

Shri S.Devarajan, Dy. Commissioner(AR)

For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21227 / 2019

Date of Hearing: 28TH November 2019

Date of Decision: 17th December, 2019

Per : S.S. GARG

The present appeal is directed against the impugned order dt. 13/11/2018 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original.

2.1. Briefly the facts of the present case are that the appellant is a partnership firm, inter alia, engaged in the manufacture of excisable goods out of cut solar cells and was registered with the Central Excise Department and is presently registered with the GST Department and they are also holder of Import-Export Code bearing No.0713029790 for import of raw materials for the manufacture of solar panels. Appellant imported 5488.5 kgs of 'Small Solar Cells' valued at Rs.12,88,743.21 from Singapore and filed Bill of Entry No.214265 on 19/06/2017 for home clearance by claiming exemption under Notification No.s.24/2005-Cus dt. 01/03/2005, 12/2012-CE dt. 17/03/2012 and 21/2012-Cus dt. 17/03/2012.

2.2. On initial examination of the imported cargo by the officers of the Customs, they entertained doubt that the imported goods are scrap and waste. Therefore they handed over the investigation to Special intelligence & Investigation Branch (SIIB) for further investigation with the observation that the imported goods are nothing but scrap of solar cells. The officers of SIIB are re-examined the imported goods on 30/06/2017 and also recorded the statement of Shri Mohammed Asif, the Managing Partner of the appellant and also recorded the statement of Shri D. Narendra, CEO of the Customs Broker's firm M/s. Access Worldwide Cargo on 03/07/2017. In the meantime, the appellant imported another consignment measuring 7214 kgs of solar cells – Uneven cut assorted solar cells valued Rs.15,85,352.07 from Germany and filed Bill of Entry No.2398537 on 11/07/2017 for home clearance by assessing the goods to customs duty of Rs.2,85,363/- and claiming exemption from Basic Customs Duty under Notification No.24/2005-Cus. The said import was also subjected to investigation by the SIIB and they again recorded the statement of Shri Mohammed Asif. Thereafter the officers of SIIB drew representative samples of both the consignments on 24/07/2017 and forwarded the same in envelope to the Indian Institute of Science, Bangalore (IISc, for short) for analysis. The IISc, Bangalore vide its report dt. 08/08/2017 clearly indicated that the samples sent in envelop were broken pieces of solar photovoltaic cells. Thereafter the officers of SIIB vide their letter dt. 21/07/2017 also sought clarification from the Central Pollution Control Board (CPCB), Bangalore as well as the Karnataka State Pollution Control Board (KSPCB), Bangalore. CPCB vide its report dt. 05/09/2017 observed that the solar cells (broken / small pieces of silicon wafer) imported by the appellant does not appear in any of the Schedule of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016. The KSPCB after physical inspection of the imported goods, vide its report dt. 31/10/2017 observed that the material contain cut piece solar cells and silicon wafers which may be used for various solar applications like assembling of solar lantern, solar light etc., based on size of the usage. It has also been observed that the scrap solar cell (broker) does not appear in any of the Schedule of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016. Thereafter the Revenue issued a show-cause notice dt. 03/01/2018 to the appellant with a proposal to declare the imported goods as waste and scrap and to re-classify the same under CTH 38256900 by rejecting the classification adopted by the appellant under CTH 85414011 and also to confiscate the imported goods absolutely under Section 111(d) and (m) of the Customs Act, 1962 and consequent proposal for imposition of penalty under Sections 112 and 114AA of the Customs Act, 1962.

2.3. Appellant filed detailed reply to the show-cause notice contesting the allegations as baseless. After following the due process, the Additional Commissioner of Customs, ICD, Bangalore vide its Orer-in-Original dt. 09-05-2018 / 11-05-2018 held that the goods imported by the appellant were waste/scrap of solar cells and thereby ordered for confiscation of the said imported goods apart from imposing redemption fine and penalty. The Additional Commissioner gave an option to the appellant to redeem the goods for re-export within 30 days on payment of redemption fine, failing which, he has ordered for disposal of goods in accordance with law. Aggrieved by the order of the Additional Commissioner directing the appellant to redeem the goods for re-export of goods on payment of redemption fine, the appellant filed Writ Petition No.WP24397/2018(T-Cus). before the Hon'ble High Court of Karnataka seeking direction to stay the order of re-export and consequently, for release of the seized goods. Hon'ble High Court vide its order dt. 13/06/2018 granted interim stay for disposal of the goods and subsequently vide order dt. 10/10/2019 disposed of the Writ Petition with a direction to the Tribunal to dispose of the appeal in an expeditious manner. Aggrieved by the order passed by the Additional Commissioner, the appellant has filed the appeal before the Commissioner(Appeals) and the Commissioner(Appeals) vide Order-in-Appeal dt. 13/11/2018 rejected the appeal by upholding the order passed by the Additional Commissioner. Hence the present appeal.

3. Heard both sides and perused the records.

3.1. 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, documentary evidence on record, without seeing the statutory provisions of the Customs Act and the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016. He further submitted that the order for re-export the goods on payment of redemption fine within 30 days and / or disposal of the goods at the cost of the appellant is in excess of the statutory provisions and hence, the same is in excess of jurisdiction conferred under the statute. He also submitted that the provisions of the Customs Act does not provide for re-export of the goods imported on payment of redemption fine and hence, the adjudication order goes beyond the statutory provisions of the Customs Act, 1962. He further submitted that allegation of misdeclaration and erroneous classification of the impugned goods is not tenable in law because the appellant who is a manufacturer of solar panels and hence placed order on the foreign supplier for supply of small solar cells for the manufacture of solar panels and accordingly the foreign supplier supplied the impugned goods along with invoices and packing list etc. and thereafter the appellant filed Bills of Entry for assessment and clearance of goods for home consumption by declaring the impugned goods as small solar cells based on the work orders, supplier's invoices, packing list etc. and also filed all the required documents required for assessment. He further submitted that both the lower authorities have proceeded to decide the classification of the impugned goods as 'scrap / waste solar cells' solely on the ground that the imported goods are found to be broken solar cells of different sizes. He also submitted that the appellant imported the small solar cells for the purpose of manufacture of various solar applications like solar lantern, street lights, solar lights, solar lamps, signal lights etc. Further the appellant also relied upon the technical write up of the Cut Solar Cells which clearly shows that the small solar cells can be used for various solar applications depending upon the size starting from 3w to 350w. He also submitted that cut/small solar cells are used for various solar applications in order to reduce cost of solar photovoltaic modules; merely because the imported small solar cells are found to be in small size / breaking condition, that itself cannot be the determinitative factor to decide / change the classification of the impugned goods. He further submitted that the imported solar cells are fragile in nature and the goods have been mishandled during the course of investigation or during the transit and the same resulted in damage to the imported goods, for which appellant cannot be held responsible. He further submitted that out of 13599.5 kgs, only about 70 kgs. of silicon wafer are found to be in broken condition and hence, entire quantity of 13599.5 kgs cannot be held as waste and scrap. He also submitted that the fact of breaking of imported consignment due to mishandling is further corroborated by the report of the IISc dt. 08/08/2017. It is pertinent to note that the samples drawn during the course of investigation were sent in envelope cover which clearly shows the manner of investigation conducted by the investigating authority in the present case. He further argued that Schedule III of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 covers the Hazardous Waste and Other Waste which can be imported with or without permission. However, in the said Schedule, nowhere it covers the small solar cells or waste / scrap of solar cells. Further the Hazardous Waste and other waste listed in Schedule III can be imported after prior permission and hence, the imported small solar cells or waste/scrap of solar cells cannot be considered as prohibited for import. He also referred to the Press information Bureau, Ministry of Environment and Forests of the Government of India vide their decision dt. 05/03/2016 has re-categorised the white industries which do not require environment clearances and Sl.Nos.34 and 35 of the list of White category of Industries covers solar industries. He further submitted that the KSPCB vide its Notification dt. 14/07/2017 has also categorized the solar industry under the category of White Industries. In view of this, the learned counsel submits that there is no requirement of prior permission from the Pollution Control Board or Ministry of Environment for import of cut solar cells. He also referred to the CPCB report dt. 05/09/2017 which has observed that the solar cells imported by the appellant does not appear in any of the Schedule of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 and further the officers of KSPCB, who actually visited the spot and conducted physical verification, vide their report dt. 31/10/2017 has clearly observed that the cut pieces of solar cells of silicon wafers may be used for various solar applications like assembling of solar lantern, solar light etc. The learned counsel also submitted that the observation of the Pollution Control Board will have more binding effect than the report of IISc. which is ambiguous. It is clear that the imported goods cannot be considered as hazarduous waste / scrap and secondly the question of obtaining prior permission from the Pollution Control Board does not arise. He also submitted that the small solar cells are not covered under any of the Schedule to the Environment (Protection) Act read with the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016. Therefore, there is no merit in the claim of the Department trying for confiscation of the imported goods by holding them as hazardous waste. He also submitted that both the authorities have relied upon the statement of the Managing Partner and the Customs Brokers Firm but the copies of their statements were not supplied to the appellant and cannot be relied upon in the absence of corroborative evidence. He further submitted that the burden is always on the Department in the matter of classification of the goods and in the present case, the Department has not made any effort to prove the same with documentary evidences except proceeding to classify the impugned goods as waste / scrap of solar cells solely considering the breakage of some of the imported goods without considering the nature of usage of the said goods. For this submission, he relied upon the following decisions:-

i. Singhla Sales Corporation Pvt. Ltd. Vs. CC, Amritsar [2002 (141) ELT 806 (Tri. Del.)]
ii. MP Dyechem Industries Vs. CC, Bhopal [2002(139) ELT 656 (Tri. Del.)]
iii. Hindustan Ferodo Ltd. Vs. CCE [1997(89) ELT 16 (SC)]
iv. UOI Vs. Garware Nylons Ltd. [1996(87) ELT 12 (SC)]
v. Kapadia Enterprises Vs. CCE [2001(131) ELT 494 (Tri.)]

3.2. The learned counsel also made an alternative submission that in any case, if for argument sake that if the import of impugned goods requires prior permission from any of the authorities, then non-obtaining of prior permission is only a procedural lapse which can be rectified any time before clearances of the imported goods. For this submission, he relied upon the following decisions:-

i. Jeevan Disels & Electricals Ltd. Vs. CCE, Puducherry [2018(359) ELT 198 (Tri. Chennai)]
ii. CC&CE Vs, JS Gupta & Sons [2015(318) ELT 63 (All.)]
iii. National Leather Cloth Manufacturing Co. Vs. CCE(A), Mumbai [1999(108) ELT 303 (Tri.)]
iv. Mangalore Chemical & Fertilizers Vs. Deputy Commissioner [1991(55) ELT 437]

3.3. It is his further submission that provisions of Section 111(d) &(m) of the Act are not applicable to the facts of the present case as the appellant has neither mis-declared the description nor has wrongly classified the goods imported with intent to evade payment of customs duty. On the other hand, the appellant has mentioned the description of the goods based on the purchase order and supplier's invoices. He also submitted that in view of the reports of IISc., CPCB and KSPCB, the imported goods are neither prohibited nor the import of which in contravention of any of the provisions of the Customs rules and in view of this, either confiscation of the goods or consequent imposition of penalty does not arise. For this submission, he relied upon the decision in the case of Rutu Auto Gas Pvt. Ltd. Vs. UOI [2002(149) ELT 10 (Guj.)].

4. On the other hand, the learned AR defended the impugned order and submitted that the original authority as well as the Commissioner(Appeals) has given detailed reasons for holding the goods as waste and scrap and thereby Hazardous and other Waste as provided under the Rules. He justified the classification of the imported solar cells as waste and scrap under CTH 38256900 of the Customs Tariff Act and also justified the confiscation of the imported goods and imposition of redemption fine and penalty.

5.1. After considering the submissions of both the parties and perusal of the material on record, we find that the order of re-export of the goods on payment of redemption fine within 30 days and if not complied with, the goods will be disposed of as per the statutory provisions, is in excess of jurisdiction conferred by the Statute, because the provisions of the Customs Act do not provide for re-export of the imported goods on payment of redemption fine and therefore the adjudication order was beyond the statutory provisions of the Customs rules. This proposition was considered by the Division Bench of the Tribunal in the case of HBL Power Systems Ltd. Vs. CC, Visakhapatnam [2018(362) ELT 856 (Tri. Hyd.)] wherein the Tribunal in identical circumstances has analysed the scope of Section 125 of the Customs Act. It is relevant to reproduce Section 125, which is herein below:-

> ***125. Option to pay fine in lieu of confiscation.*** —
>
> *(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods for, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*
>
> *Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.*
>
> *(2) where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods."*

The Tribunal has considered the scope of application of

Section 125 which provides imposition of penalty in lieu of confiscation and has held in para 10 to 14 reproduced herein below:-

> ***10.*** *A plain reading of the above section shows that it does not confer upon the Authority passing the Order any power to impose any conditions while allowing redemption of goods.*
>
> ***11.*** *The scope of Section 125 of the Act is limited by the words in which it is framed and it is not open to the adjudicating authority or the Tribunal (who are creatures of the statute) to stretch, modify or restrict the scope of this Section; they are bound by it. Hon'ble Supreme Court and High Courts can and do examine the validity of the laws and subordinate legislations and pass judgments annulling or modifying them by neither the officers nor the Tribunal, as creations of the statute cannot do so. This position has been explained clearly by the Hon'ble Supreme Court in UOI v. Kirloskar Pneumatics Company 1996 (84) E.L.T. 401 (S.C.) in which it was held as under :*
>
> *"According to these sub-sections, a claim for refund or an order of refund can be made only in accordance with the provisions of Section 27 which inter alia includes the period of limitation mentioned therein. Mr. Hidayatullah submitted that the period of limitation prescribed by Section 27 does not apply either to a suit filed by the importer or to a writ petition filed by him and that in such cases the period of limitation would be three years. Learned Counsel refers to certain decisions of this Court to that effect. We shall assume for the purposes of this appeal that it is so, notwithstanding the fact that the said question is now pending before a larger Constitution Bench of nine Judges along with the issue relating to unjust enrichment. Yet the question is whether it is permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory provision. We do not think it is, even while acting under Article 226 of the Constitution. The power conferred by Article 226/227 is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State Act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the*

power of a Civil Court. No such delegation or conferment can ever be conceived. We are, therefore, of the opinion that the direction contained in Clause (3) of the impugned order is unsustainable in law."

12. *We also find that not only Section 125 but no Section of the Customs Act, 1962 gives any officer the power to compel anyone to import or export or re-export. This Section also does not give the Adjudicating Authority the right to give a conditional redemption saying "you can redeem only if you agree to re-export". In case of prohibited goods the adjudicating authority has only two options :*

(a) to allow redemption on payment of fine; or

(b) to not allow redemption.

13. *In view of the above, we find that the condition in the Order-in-Original that the goods should be re-exported after redemption is liable to be set aside and we do so.*

14. *Appeal is allowed to the extent that the condition in the Order-in-Original that the goods should be re-exported after redemption is set aside.*

Further we find that the ratio of the decision of the Tribunal in the case of HBL Power Systems Ltd. is squarely applicable in the present case. Therefore we hold that the impugned order ordering for re-export of the goods on payment of redemption fine is not sustainable in law and therefore we set aside this finding of the Commissioner(Appeals).

5.2. As far as classification of the impugned goods is concerned, we find that the appellant is engaged in the manufacture of excisable goods and is also registered with the Central Excise Department as well as GST and they have imported total quantity of 13599.5 kgs of small solar cells from Singapore and Germany. The appellant has also produced before us the Purchase Orders, Bills of Entry and the Packing List as well as the commercial invoices wherein they have clearly mentioned the description of the item as 'small solar cells' (uneven cut solar cells) and there is no misdeclaration on his part because the right classification for the impugned goods is CTH85414011. Further we find that the Customs has from the very beginning proceeded on the premises that the broken solar cells fall in the category of waste and scrap and therefore they have classified the same under CTH 38256900. Further we find that out of 13,599.5 kgs of small solar cells imported, it is only 70 kgs. of silicon wafer / solar cells which was found in broken condition. To classify the imported goods on the basis of broken solar cells as scrap/waste is not tenable in law because substantial quantity was not found to be in broken condition. Further we find that the allegation of the appellant that the imported small solar cells / panel are very fragile in nature and requires very specialized and careful handling and the damage has occurred on account of the mis-handling of the imported goods during the investigation which has resulted in damage to about 70 kgs. of solar cells and in these circumstances, appellant cannot be held responsible for broken silicon wafer found during investigation. Further we find that both the authorities have mis-read and mis-construed the reports submitted by the IISc., CPCB and KSPCB. In fact out of the 3 reports, the crucial and relevant is the report submitted by the KSPCB because their officers visited the spot and after physical verification, they have observed in their report dt. 31/10/2017 that the cut pieces of solar cells of silicon wafers may be used for various solar applications like assembling of solar lantern, solar light etc. Further we find that both the authorities have wrongly relied upon the statement recorded during the investigation. The copies of which have not been supplied to the appellant and has come to the conclusion that the appellants have admitted the misdeclaration. As per the settled law, the burden of classification is on the Department and in the present case, the Department has not made any effort to prove the same by any documents except the proceeding to classify the impugned goods as waste and scrap solely considering breakage of some of the imported goods and without considering the nature of usage of the said goods.

Here it is pertinent to reproduce the report of KSPCB which is the most authentic report, which is as under:-

96

Annexure-12

ಫ್ಯಾಕ್ಸ್/Fax : 080-25586321
ಈ-ಮೇಲ್/E-mail : ho@kspcb.gov.in
ವೆಬ್‌ಸೈಟ್/Website : http://kspcb.gov.in

25581383, 25583112
25588151, 25588272
25588142, 25586520

ಕರ್ನಾಟಕ ರಾಜ್ಯ ಮಾಲಿನ್ಯ ನಿಯಂತ್ರಣ ಮಂಡಳಿ

Karnataka State Pollution Control Board

"ಪರಿಸರ ಭವನ", 1 ರಿಂದ 5ನೇ ಮಹಡಿಗಳು, ನಂ. 49, ಚರ್ಚ್ ಸ್ಟ್ರೀಟ್, ಬೆಂಗಳೂರು - 560 001, ಕರ್ನಾಟಕ, ಭಾರತ

"Parisara Bhavana", 1st to 5th Floor, # 49, Church Street, Bengaluru - 560 001, Karnataka, INDIA

No. PCB/WMC/2017-18/ 4207 Date: 31 OCT 2017

To
The Assistant Commissioner,
Office of the Addl. Commissioner of Customs,
Inland Container Depot, White Field,
Bangalore – 560 066.

ADDITIONAL COMMISSIONER OF CUSTOMS
08 NOV 2017

Sir,

Sub: Customs – Import of E- Waste/ Hazardous Waste of Solar Cells at Inland Containers Depot, Whitefield, Bengaluru – reg

Ref: Your Letter C.No.VIII/48/637/SIIB ICD/3009, Dated: 21-08-2017.

*****

In your letter cited ref (1) you have sought clarification whether there are any prohibition / restriction under the Hazardous and Other Wastes (Management and Transboundary Movement) Rules 2016 for importing of waste / broken Solar cells and requirement of NOC from the Pollution Control Board. In the said letter you have also indicated that the samples of material contains mostly Lead, Tin, Silver and traces of Arsenic .

The Officers of the Board have inspected the material and reported that the material contain cut pieces of Solar Cells of Silicon wafers and this material may be used for various solar applications like assembling of Solar lantern, Solar Light, etc.., based on the size of the usage, but not aware of purpose of usage of the present consignment.

"ಪ್ಲಾಸ್ಟಿಕ್ ಬಳಕೆ ನಿಲ್ಲಿಸಿ, ಪರಿಸರ ಹಾನಿ ತಪ್ಪಿಸಿ" AVOID USE OF PLASTICS-BE 'ECO' FRIENDLY

5 97

The Hazardous and other wastes are governed by the Hazardous and other waste (Management and Transboundary Movement) Rules, 2016. The process generating hazardous waste and constituents with concentration limits and others are indicated in Schedule I,II and III of the said Rules. The Scrap solar cell (broken) does not appear in any of the above schedule.

However, Schedule II contains list of waste constituents with concentration limits. The contents indicated in your letter are coming under Schedule II of the Rules, but your report does not indicated about the concentration of the said metals. In the absence of concentration of the metals, it is not possible to ascertain whether the material is covered under the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016.

This is the Annexure I stated in the Affidavit of Mohammed Asif

K, Advocate & Notary, Bengaluru

Yours faithfully,

Member Secretary.

5.3. Further we find that even in the report of CPCB, the Board has clarified that the scrap of solar cells (broken/small pieces of silicon wafers) does not appear in any of the Schedule of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016. Further, we find that the appellant has also placed on record the technical write up of the cut solar cells which clearly proves that the small solar cells can be used for various solar applications depending upon the size starting from 3w to 350w. Further as per the technical write up, the cut/small solar cells are used for various solar applications in order to reduce the cost of solar photovoltaic modules. We also note that the imported solar cells are precise in nature and therefore there is always likelihood of some damage during the process of transit and the present case, only 70 kgs. has been damaged out of 13599.5 kgs. and even the damaged goods can also be used for various solar applications as per the technical write up produced by the appellant on record.

6. In view of our discussion above, we are of the considered view that the impugned order is not sustainable in law and therefore we set aside the same by allowing the appeal of the appellant and direct the Customs authorities to release the consignments of the appellant within a period of two weeks after receipt of a certified copy of this order. Appeal is allowed.

(Order was pronounced
in Open Court on **17/12/2019**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja...