CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 20069 of 2021

(Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-147/2020-21 dated 22.12.2020 passed by Commissioner of Custom (Appeals), Cochin)

HFCL Ltd. .....**Appellant**
Plot No.38, Sector 32, Institutional Area
Gurgaon, Harayana-122002.

VERSUS

Commissioner of Customs (Appeals) Cochin .....**Respondent**
Custom House, Willingdon Island, Cochin,
Kerala- 682009.

Appearance:
Mr. Vipin Kumar Jain, Advocate
Mr. K.B. Nanaiah, Asst. Commissioner (AR)

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 20067 / 2022

Date of Hearing: 31.08.2021
Date of Decision: 25.02.2022

PER : S. K. MOHANTY

This appeal is directed against the impugned order dated 22.12.2020 passed by the learned Commissioner of Customs (Appeals), Cochin. In the said impugned order, the appellant's appeal was dismissed by upholding the original order dated 03.08.2020 passed by the learned Deputy Commissioner of Customs (Cochin SEZ), wherein the disputed goods namely, 'Fiber Intrusion Proof System' (FIPS) procured by the appellant were classified under CTH 90318000, as against the classification claimed by the appellant under CTH 90304000. The Tariff Item 90318000 described the goods as "other instruments, appliances and machines", attracting BCD @ 7.5%. The description of goods under

Tariff Item 90304000 claimed by the appellant for assessment is "other instruments and apparatus specially designed for telecommunications", attracting 'nil' BCD.

2. Briefly stated, the facts of the case are that the appellant herein is a regular importer, manufacturer and supplier of telecommunication equipment, optical fiber cables etc. In the month of July' 2018, the appellant received a Purchase Order from Bharat Sanchar Nigam Limited (BSNL) on turnkey basis for procurement, supply, installation, testing and maintenance of GIS Based Optical Fibre Cable Network Management System (GOFNMS) and accessories for exclusive optical NLD Backbone and Optical Access routes and site preparation requirements for defense network. Pursuant to the above work/purchase order, the appellant procured FIPS from their vendor M/s. SFO Technologies (SFO), situated in Cochin Special Economic Zone (SEZ). Any clearance of goods from SEZ to the Domestic Tariff Area (DTA) is considered as an import under the customs statute and is chargeable to applicable customs duties on their importation. The appellant in this case, had filed the Bills of Entry dated 22.07.2020, describing the goods as "Distortion Factor Metals for Telecommunication" [FIPS-2165S, 700002578 INTRUSION PROOF SYSTEM (IPS). The appellant had claimed the classification of said imported goods under CTH 9030 4000. However, the learned Dy. Commissioner of Customs, CSEZ had passed a speaking order dated 03.08.2020, in terms of which the declared classification of the subject goods was changed to CTH 9031 8000. Based on assessments made on the Bills of Entry, the appellant had paid the duty under protest and cleared the consignments for home consumption. Against the speaking order dated 03.08.2020 passed by the assessing authority, the appellant

had preferred appeal before the learned Commissioner (Appeals), which was dismissed vide the impugned order dated 22.12.2020. Feeling aggrieved with the impugned order, the appellant had filed this appeal before the Tribunal.

3. In support of change in classification of the subject goods, the learned Dy. Commissioner had assigned the reasons, stating that the Fiber Intrusion Prevention System (FIPS) developed and manufactured by M/s. SFO was not an instrument for measuring electrical quantities in telecommunication systems, but was a Fibre Optic based sensing device that ensures optical fibre links are intrusion proof, enable advance warning and continuous monitoring of optical infrastructure health and also perform proactive maintenance. He also observed that the system shoots a laser beam along the existing fibre optic communication cable, which is well outside the band of the signals in use by the fibre and the returned signal is automatically monitored and analyzed for disturbances and defects minute changes that happen due to intrusion activity. He further held that the equipments is also capable of being used for perimeter protection, border security, and intrusion detection over extremely long distances such as, grid power lines, and also to be used in the transportation sector such as, railways and highways for security and tracking of train/automobile movement. With the above observations, he concluded that since FIPS was having an individual function and was not an instrument for measuring electrical quantities in telecommunication and had not been specifically included elsewhere in Chapter 90, the item was rightly classifiable under CTH 9031 8000 as "Other measuring or checking instruments, appliances and machines not specified or included elsewhere in this chapter" viz. chapter 90. The said

views expressed by the learned Dy. Commissioner of Customs, were endorsed by the learned Commissioner (Appeals) in the impugned order passed by him.

4.1 Shri Vipin Jain, Ld. Advocate for the appellant submitted that the observations made by the Ld. Commissioner (Appeals) is contrary to the findings recorded in the adjudication order that the product in dispute i.e. FIPS is a 'distortion factor meter', as claimed by the appellant in the Bills of Entry. In this context, he submitted that an order of the Appellate authority cannot travel beyond the case set up by the Revenue at the stage of adjudication.

4.2 Ld. Advocate further submitted that FIPS was manufactured by SFO in Cochin SEZ as per a specific order placed upon them by the Appellant, which required that the said vendor should supply Intrusion Proof System (IPS) complete with related modules and accessories as per technical specification of BSNL Tender inquiry dated 22.11.2013. He further submitted that the classification under CTH 9030 4000 claimed by the Appellant was a specific entry covering "Instruments and apparatus specifically designed for telecommunication (for example cross-talk meters gain measuring instruments, distortion factor meters, psophometers)'' and as such, the classification of the product claimed by the appellant is proper and justified.

4.3 By referring to the terms and conditions contained in paragraphs 4.3(v) and 5 in the BSNL's purchase order dated 19.7.2018, Ld. Advocate submitted that the Intrusion Proof Systems (IPS) to be supplied under the said order was meant for deployment at defence communication sites across India to "protect the fibre network from illegal monitoring". It was further submitted that the contract with BSNL was one for turnkey development, operations and maintenance of communication network for the Indian Army and that the equipments had to be procured from M/s SFO. Thus, the Ld. Advocate submitted that since, the equipments in question were custom made, specifically designed to cater to the requirements of BSNL for providing telecommunication business, the description provided in CTH 90304000 is more appropriate for classifying the subject goods. The Ld. Advocate further contended that the findings recorded in the original as well as the impugned order in support of change in classification of goods are not justified inasmuch as the equipments in question were in fact, capable of measuring electrical quantities also.

5. On the contrary, the Ld. AR, Shri K.B. Nanaiah appearing for Revenue reiterated the findings recorded in the impugned order and further submitted that since the equipments in question were multi-purpose equipments and not merely an equipment for checking electrical quantities, the same cannot be classifiable under CTH 9030 4000, which cover only equipments and apparatus for measuring or checking electrical quantities.

6. Heard both sides and examined the case records, including the additional submissions together with various documents/records submitted by the Ld. Advocate during the course of hearing.

7. We find that the main function of the equipment in question is to detect distortions in a Fibre Optic Telecommunication Network, so as to ensure that the links are intrusion proof. This function is performed in

the following manner as explained by the manufacturers in their technical write-up, which is extracted below:

"<u>Technical Write-up:</u>

<u>Fiber Intrusion Proof Sysem (FIPS)</u>

*FIPS is a specially designed telecom equipment for use in fiber optic networks. The name of "Secure link FIPS" itself is indicative of the device functionality, i.e. to **<u>secure</u>** the optical communication **<u>links</u>** from third party intrusions including data tapping and eavesdropping. The devise measures the distortions in optical links and thus helps to ensure the quality of fiber optic signal transmission. FIPS helps to remotely monitor the optical link health status and thus to secure critical fiber optic communication infrastructure. (Ref. page 8 of User Guide).*

The device measures variations in optical signal by converting it into electrical domain (using photo detectors) and analyses its time frequency domain patterns to identify the distortions associated with intrusion and data theft attempts. The device uses laser transmitter and Optical-to-Electrical convertors to monitor dark or active fibers. Wavelength of supervisory laser signal is selected based on in-band or out of band monitoring method. The distortions in light levels are detected using photo detectors (optical-electrical convertors) and the corresponding degradation against set thresholds to detect events and send out alarms. The alarms are received at Telecom Network Operating Canter and it is displayed on the Network Management System dashboard (Ref. page 18 of User Guide: System Block Diagram).

SFO's FIPS/SL-FIPS is a custom designed telecom equipment to detect anomalies in optical transmission line to predict link failure or to warn about possible network threats and thus, to reduce the network down time and to improve the physical layer network security."

8. We find that the Ld. Original Authority did not dispute that the primary function of the equipment was to detect distortions and prevent intrusion and for such reason, he also did not dispute the description of goods as "distortion factor meters" declared by the appellant in the Bill of Entry. The main ground assigned by him for rejecting classification under CTH 9030 4000 was that the equipments in question did not measure electrical quantities in telecommunication systems. We note

that appreciating the evidence available on record, the Ld. Commissioner (Appeals) seems to have accepted the position that the equipments do measure electrical quantities in telecommunication. However, he has chosen to reject the appeal on another ground namely, that the primary function of the equipment was not detection of distortions, but of a 'sensing device'. On this basis, the Ld. Commissioner (Appeals) has held that the description "Distortion detection meter" provided in the Bill of Entry was an incorrect description of goods. This finding of the Ld. Commissioner (Appeals) is not supported with the observations made either by the adjudication order or the audit objection, which seems to have been the genesis of the dispute in the present case. Since there was no dispute at the adjudication stage that the primary function of the equipment was to check distortion in the telecommunication network, the finding of the Ld. Commissioner (Appeals) to the contrary is beyond the scope of the appeal before him. This finding is otherwise unsupported by the technical brochure, BSNL purchase order, the tender document the user manual and the technical note available on record. Those documents clearly demonstrate that the main function of the disputed equipment was to detect distortions in the telecommunication network by a process of converting optical signals into electrical quantities. While holding that the detection of distortions was an auxiliary function, the Ld. Commissioner (Appeals) has not really explained as to what was the primary function of the equipment. He has merely stated that the equipment was a "sensing device". The fact that the equipment is a sensing device is not inconsistent with the appellant's claim and the ultimate function and object of the said sensing device was to detect distortions in the network. Hence, on careful examination of the documents placed in the case file, we are of the considered view that the equipment in question is indeed equipments for sensing and detecting distortions.

9. The further finding of the Ld. Commissioner (Appeals) that the Appellant is no longer describing the equipments as Distortion Factor Meters also seem to be incorrect as the Appellant has pointed out that in all subsequent Bills of Entry too, the products continuously to be described in the same manner as before. No basis has been given by the Commissioner (Appeals) in the order for making this observation also goes beyond the scope of appeal before Commissioner (Appeals). Neither the adjudication order nor the audit objections seems to have made out a case of mis-declaration of description. In the absence of any review or appeal having been filed by the Revenue against the adjudication order, it was not within the competence of Commissioner (Appeals) to make out entirely a difference case, while dealing with an appeal filed by an assessee against the adjudication order.

10. On close scrutiny of the purchase order and the tender documents placed on record, we are convinced that the equipments in question were custom made, exclusively meant for catering to the requirements of BSNL. Thus, the findings of the Ld. Commissioner (Appeals) that the appellant had failed to substantiate the custom made nature of the equipments before the Deputy Commissioner is factually incorrect. The additional documents that we have called for in the form of BSNL tender are referred to specifically in the purchased orders and support what the purchase orders clearly state. The equipments in question are therefore,

equipments used and meant for use in telecommunication network and are custom made as per BSNL requirement.

11. We also note that even if the equipments are not considered as distortion detection meter, they would still be covered under 9030 4000 as the Entry is wide enough to cover all apparatus and equipment's for use in telecommunication, provided they measure electrical quantities. The description distortion factor meters, cross talk meters, etc., are only examples given in 9030 4000 and are therefore illustrative and not exhaustive.

12. The finding of the Commissioner(Appeals) and the Deputy Commissioner that the equipment can be used in various fields and sectors such as defence, banks, sensitive Government establishment, etc is also irrelevant as telecommunication networks are not only public telecommunication network, but also private ones owned and operated by public authorities such as railways, defence establishments, banks etc. The references in heading 9030 to the telecommunications are not a reference only to public networks.

13. The documents on record, namely the BSNL purchase orders and the BSNL tender makes it clear that the primary function of the equipments is to detect distortion in a fibre optic telecommunication network, which objective is achieved by converting optical signals at the transmitting point and the reception point to detect the extent and pattern of the distortion in the electrical quantities so measured. The BSNL purchase order describes the equipment as 'Inclusion Proof Systems'. This description along with the description 'Distortion Detection Meter', are both appropriate and correctly describe the true

function of this equipment. We are therefore, not able to agree with the conclusion reached by the Commissioner (Appeals) that the equipment were not 'Distortion Factor Meters'.

14. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order, in sofas as it has denied the claim of classification of the subject goods under CTH 9030 4000 by the appellant. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the appellant.

(Order pronounced in the open court on 25/02/2022)

(S. K. MOHANTY)
MEMBER (JUDICIAL)

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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