# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# CHANDIGARH

REGIONAL BENCH - COURT NO. I

## Appeal No. C/3420/2012-CU-[DB]

(Arising out of Order-in-Original No. 38/SA/CCE/2012 dt.1.8.2012 passed by the Commissioner, Central Excise, Delhi-III, Udyog Vihar Minar, Vanijya, Nikunj, Phase V, Gurgaron-122 016)

**M/s L.S.Cables India Pvt.Ltd.** **......Appellant**
(Plot No.28-31, Sector 5, Growth Centre, Bawal, Phase-III, Rewari-123501)

*VERSUS*

**CCE, Delhi-III** **......Respondent**
(Udyog Vihar Minar, Vanijya, Nikunj, Phase V, Gurgaron-122 016 )

WITH

## Appeal No. C/650/2011-CU[DB]

(Arising out of Order-in-Original No. 09/SSS/CCE/2011 dt.28.2.2011 passed by the Commissioner, Central Excise, Delhi-III, Udyog Vihar Minar, Vanijya, Nikunj, Phase V, Gurgaron-122 016)

**CCE, Delhi-III** **......Appellant**
((Udyog Vihar Minar, Vanijya, Nikunj, Phase V, Gurgaron-122 016 )

*VERSUS*

**M/s L.S.Cables India Pvt.Ltd.** **......Respondent**
(Plot No.28-31, Sector 5, Growth Centre, Bawal, Phase-III, Rewari-123501)

**APPEARANCE:**

Shri B.L.Narasimhan, Advocate for the Appellant and vice versa

Shri Amarinder Singh, Advocate

Shri Tarun Kumar, AR for the Respondent and vice versa

**CORAM:** **HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**
**HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO.61036-61037/2019**

DATE OF HEARING: 22.02.2019
DATE OF DECISION:22.02.2019

**PER ASHOK JINDAL:**

Both sides are in appeal. As the issue is common in both appeals, therefore these appeals are disposed of by this common order.

2. The Revenue has filed appeal against the impugned order wherein the proceedings have been dropped against the respondent-assessee whereas the appellant-assessee has filed appeals against the impugned order wherein the demand of duty has been confirmed by denying the benefit of exemption on the goods imported under Notification No.25/2005-Cust dt.1.3.3005 against Sl.No.33 of the notification.

3. The facts of the case are that the assessee is manufacturer of Flexible Foam Dielectric EF Feeder Cable, Super Flexible Foam Dielectric RP Feeder Cable, Flexible Foam Dielectric Aluminium RP Feeder Cable and Low Loss Flexible Foam Dielecric RF Cable, chargeable to Central Excise duty under Chapter 85 of the Central Excise Tariff. They have obtained Central excise registration under Section 6 of the Central Excise Act for manufacture of finished goods. They import certain inputs, which are exempt from customs duty under Notification No. 25/2005-Cus., dated 1-3-2005, as amended, subject to following the procedure prescribed under Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996. The respondent accordingly in accordance with the provisions of these Rules applied to the jurisdictional central excise authority for registration, which was granted to them. The department alleged that the respondent have imported certain goods

by declaring their false description in the imports documents and in this manner, they have wrongly availed duty exemption under Notification No. 25/2005-Cus., dated 1-3-2005. It is on this basis that a show cause notice dated 22-4-2010 was issued to the assessee for -

(a) Denying the benefit of exemption Notification No. 25/2005, dated 1-3-2005, as amended, in respect of the goods, in question, and on this basis, recovery of customs duty amounting to Rs. 4,25,16,681/- under Section 28(1) of the Customs Act, 1962 read with Rule 8 of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996, along with interest on this duty at the applicable rate under Section 28AB of the Central Excise Act, 1962;

(b) Confiscation of the goods imported under Section 111(o) of the Customs Act, 1962; and

(c) Imposition of penalty on the respondent under Section 112(a) read with Section 114A of the Customs Act, 1962.

3.1 This show cause notice was adjudicated by the Commissioner, Central Excise, Delhi-III vide order-in-original dated 28-2-2011 by which the Commissioner holding that the assessee is eligible for the benefit of Notification No. 25/2005-Cus. in respect of the goods, in question, dropped the proceedings initiated against them by the above mentioned show cause notice.

4. Therefore, the Revenue is in appeal No.C/650/2011 for dropping proceedings against the respondent- assessee whereas the appellant-assessee is in appeal No.C/3420/2012 against the confirmation of

demand of duty by denying the benefit of exemption Notification No.25/2005-Cust dt.1.3.3005 for show cause notice dt.7.10.2016 for the period 14.03.2011 to 26.8.2011. Against the said orders, both sides are in appeal before us.

5. Ld. Counsel for the appellant submits that the show cause notices are without jurisdiction as the same have been issued by invoking Rule 8 of the Rules to deny benefit of Notification. The Central Excise officer is not authorized to issue a show cause notice as the assessment of the goods was done by the Customs Officers at the port of import. Relying on the decision in the case of Molex India Limited vs. CCE,2012 (275) EL& 607 (Tri.-Bang.), which has been affirmed by Hon'ble Karnataka High Court reported in 2015 (317) ELT (Kar.), further affirmed in 2015 (326) ELY A184 (SC) and Havells India Limited vs.CCE-2017-VIL-953-CESTAT-DEL-CU.

6. He further submits that the classification adopted by the assessee is correct on the following grounds:-

a. The certificate issued by the Chartered Engineer certifying that the products being manufactured by the appellant are different and distinct from coaxial cables.

b. A perusal of purchase orders placed by the buyers and invoices raised by the assessee are on their buyers evidences that the buyers had placed order for supply of Feeder Cable which has been supplied by the assessee to their buyers.

c. Further, vide clarification issued by the Joint Secretary, Ministry of Finance, Government of India, TRU Section, New Delhi dated

28.2.2005 in the budget 2005-06 clarifies that the Customs duties have been exempted on all the ITA Bound Items. There is no dispute to the fact that the product manufactured by the Assessee are covered under such ITA Bound Cables.

d. Moreover, the PIB press release issued by the Ministry of Communication and Information Technology, Government of India, New Delhi states that the Customs Duty on import of components and raw materials required for manufacture of telcom equipment shall be reduced to zero.

e. Further, the appellants- assessee have been given an 'Infrastructure Assessment Advice' from BSNL wherein the name and address of the manufacturer is that of the appellants –assessee and the name of the product is mentioned as 'Feeder Cable for 900 MHz, 1800 Mhz & 2.1Ghz/UMTS Frequency Bands'. Also a perusal of the List of Approved Vendors of BSNL' depicts that the name of the appellants- assessee is mentioned as manufacturer Feeder Cables, which is appearing at Sr.No.28 to 30 of the said List.

f. Reliance is also placed on the Release Report (Test Report) dated 23.08.2012 issued by BSNL wherein the name of the vendor is that of the appellant-assessee and M/s. ZTE Telcom India Private Limited is the suppliers name. A perusal of the aforesaid report makes it evident that the name of the product manufactured by the appellant is 'Feeder Cable' and not, Co-axial Cable'.

7. He further submits that the goods are appropriately classifiable under entry 8544.49.92, which deals with electric conductors, which are plastic insulated and are of a voltage not exceeding 1000V, to be

used in telecommunication. Whereas the department has sought to classify the goods under entry 8544.20.10 which is simply coaxial cables. Entry 8544.49.92 specifically deals with the cables which are used in the telecommunication therefore the use of the products makes this entry more specific. Whereas in entry 8544.20.10 there is no usage specified therefore it is a more general entry. Therefore, as per Rule 3(a) of the General Rules of Interpretation, the impugned goods will be more appropriately classifiable under 8544.49.92.

8. Further, sub heading 8544.42 was substituted for the first time in 2007, which coincided with the Government's policy decision to give an impetus to expand India's telecommunication infrastructure. The focus on the telcom sector is clear from the PIB Press Release. The department has adduced no evidence other than Wikipedia references to allege that the impugned goods are coaxial cables. Wikipedia evidence is not applicable as held by the Hon'ble Apex Court in the case of Ponds India Limited-2008 (227) ELT 497 (SC).

9. Heard the parties and considered the submissions.

10. The issue arose before us is whether the Central Excise officer can open the assessment done by the Customs Officer in the case of import of goods or not? And

Whether merit classification of the goods in question is under tariff entry 8544.20.10 or under tariff entry 854449.92?

11. It is admitted position in the case in hand, that the show cause notice has been issued by the Central Excise officer when the assessment of the goods has been done by the Customs Officer.

Therefore, relying on the decision of this Tribunal in the case of Molex (I) Limited vs. CC, Bangalore-2012 (275) ELT 607 (Tri.-Bang.), we hold that the Central Excise officers have no jurisdiction to issue show cause notice. This Tribunal in the case of Molex (I) Limited (supra) observed as under:-

> **"12.** The question now to be considered is whether the differential amount of Customs duty was sought to be collected in the manner authorized by law. The supreme law in this domain is Article 265 of the Constitution of India, which forbids levy and collection of taxes *except by authority of law*. The statutory provision which authorizes collection of Customs duty not levied or short-levied or erroneously refunded is Section 28 of the Customs Act. Under sub-section (1), *the proper officer* may serve notice on the person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice. "Proper officer" stands defined under Section 2(34) of the Act thus: " *'Proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs"*. The period of limitation for service of the show-cause notice has also been laid down under sub-section (1) of Section 28. Where the amount of duty is rupees one crore or less, the show-cause notice has to be served by the Commissioner of Customs or, with his prior approval, by any officer subordinate to him. Where the amount is more than one crore rupees, the show-cause notice has to be served only with the prior approval of the Chief Commissioner of Customs. It is under sub-section (2) that the proper officer, after considering the reply (if any) to the notice, determines the amount of duty due from the person concerned. This sub-section also requires such person to pay the amount determined by the proper officer. Thus Section 28 of the Customs Act is the only provision for collection, from a person through a process of adjudication, any amount of customs duty which has not been levied or has been short-levied or erroneously refunded. Therefore, for recovery of customs duty from a person without doing violence to Article 265 of the Constitution, the proper officer of Customs has to issue a show-cause notice to that person under sub-section (1) of Section 28 of the Customs Act within the period of limitation prescribed thereunder and, after considering his representation if any, the duty recoverable has to be determined under sub-section (2) of the said Section. The same is the statutory mechanism for collection of interest on customs duty as well.
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> **14.** The show-cause notices in question were issued under Rule 8 of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996. These rules were made under Section 156 of the Customs Act and came into force on 1-9-1996. Section 156 as it stood on the said date reads as follows :-
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> "**Section 156. General power to make rules.** - (1) Without prejudice to any power to make rules contained elsewhere in this Act, the Central Government may make rules consistent with this Act generally to carry out the purposes of this Act

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) the manner of determining the transaction value of the imported goods and export goods under sub-section (1) of Section 14;

(b) the conditions subject to which accessories of, and spare parts and maintenance and repairing implements for, any article shall be chargeable at the same rate of duty as that article;

(c)******

(d) the detention and confiscation of goods the importation of which is prohibited and the conditions, if any, to be fulfilled before such detention and confiscation and the information, notices and security to be given and the evidence requisite for the purposes of such detention or confiscation and the mode of verification of such evidence;

(e) the reimbursement by an informant to any public officer of all expenses and damages incurred in respect of any detention of any goods made on his information and of any proceedings consequent on such detention;

(f) the information required in respect of any goods mentioned in a shipping bill or bill of export which are not exported or which are exported and are afterwards re-landed;

(g) the publication, subject to such conditions as may be specified therein, of names and other particulars of persons who have been found guilty of contravention of any of the provisions of this Act or the Rules."

Before us, it was nobody's claim that the said Rules were made for any of the specific purposes mentioned under sub-section (2) of Section 156 *ibid*. The submission of the learned SDR was that the Rules were made under sub-section (1) and this submission was not contested by the learned advocate. We also agree. The said Rules were made under sub-section (1) of Section 156. But, as held by the Tribunal in the case of *N.B. Footwear* (supra), any rules made by the Central Government under Section 156 for carrying out the provisions of the Act should be consistent with the Act itself. If any rule is inconsistent with any provision of the Act, it is redundant and ineffective to the extent of such inconsistency. Therefore, if the SDR's contention that Rule 8 of the 1996 Rules provided a self-contained mechanism for recovery of customs duty is accepted, the same will be tantamount to accepting a situation where Section 28 of the Act (statutory provision for collection of customs duty) is overridden by a rule which is inconsistent with the statutory provision. Rule 8 reads as follows :

"**8. Recovery of duty in certain case.** - The Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise shall ensure that the goods imported are used by the manufacturer for the intended purpose and in case they are not so used take action to recover the amount equal to the difference between the duty leviable on such goods but for the exemption and that already paid at the time of importation."

The expression "take action to recover" appearing in the text of the rule was interpreted by the Tribunal in the case of *APP Enterprises* (supra). We quote :

"*Prima facie*, it appears to us, the Assistant Commissioner/Deputy Commissioner of Central Excise having jurisdiction over the factory may, under Rule 8 *ibid*, alert the proper officer of Customs regarding any non-user of the imported raw material in terms of the 1996 Rules r/w the Customs Notification so that the latter can issue notice under Section 28 of the Customs Act for recovery of the duty forgone under the Notification. Such an action on the part of the Assistant Commissioner/Deputy Commissioner of Central Excise is envisaged by the expression 'take action to recover'."

We adopt the above view and hold that the show-cause notices issued in the present case under Rule 8 *ibid*, by the Deputy/Assistant Commissioner of Central Excise for recovery of differential duty of customs from the appellant in respect of the goods imported by them and cleared on payment of duty at concessional rate in terms of the relevant Customs Notifications are without jurisdiction. The notices should have been issued under Section 28(1) of the Customs Act by the proper officer of Customs.

**15.** The demands of customs duty in this case were confirmed also under Rule 8 *ibid*, unlike in the case of *Samtel Color Ltd.* (supra) wherein the demand of customs duty was confirmed under Section 28 of the Customs Act.

**16.** Having found that the show-cause notices were issued without jurisdiction, we set aside the impugned orders without examining other issues. The appeals stand allowed."

12. The said order of this Tribunal has been affirmed by the Hon'ble Karnataka reported in 2015 (317) ELT 250 (Kar.), which has been affirmed by the Hon'ble Apex Court reported in 2016 (326) ELT A-184 (SC). Therefore, relying on the decision of this Tribunal in the case of Molex (I) Limited (supra), we hold that the Central Excise officers have no jurisdiction to issue show cause notices. Therefore, on this ground alone, the show cause notices issued to the appellant are not sustainable. In view of this, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is allowed.

13. As we have decided the matter on jurisdiction, therefore we are not going into the merit of the case.

(Operative part of order was pronounced in the open court)

**(ASHOK JINDAL)**
**MEMEBR (JUDICIAL)**

**(BIJAY KUMAR)**
**MEMBER (TECHNICAL)**

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