CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 56249 of 2013

[Arising out of Order-in-Appeal No. CCA/CHD/11/2012 dated 21.12.2012 passed by the Commissioner (Appeals), Customs & Central Excise Chd-I, Central Revenue Building, Sector 17-C, Chandigarh]

M/s Inder Kumar and Sons ......**Appellant**
R/o 210a, Raj Guru Nagar, Ferozepur Road
Ludhiana, Punjab

VERSUS

Commissioner of Customs-Amritsar ......**Respondent**
Preventive Custom House, Near IGI Airport, New Delhi

APPEARANCE:

Shri Sudhir Malhotra and Shri Poojan Malhotra, Advocates for the Appellant
Shri Pawan Kumar, Authorized Representative for the Respondent

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

FINAL ORDER NO. 60642/2024

DATE OF HEARING: 09.08.2024
DATE OF DECISION: 05.12.2024

PER: S. S. GARG

The present appeal is directed against the impugned order dated 21.12.2012 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant and confirmed the Order-in-Original.

2. Briefly the facts of the present case are that the appellant imported 41.363 MT of HMS Scrap vide invoice No. 2010-06-15/112 dated 15.06.2010 from Canada and filed Bill of Entry No. 2123393 dated 28.07.2010 thereto at ICD, Ludhiana under first check. Further, the appellant vide letter dated 26.07.2010 requested customs that first check be allowed as seller had informed that goods sent were purchased in auction of kettle/thermal plant and due to high cost of cutting & labour charges, same are sent as such. The appellant further stated in their letter that if items do not conform to description of scrap, mutilation of same may kindly be allowed under Section 24 of Customs Act and undertook to bear the cost of mutilation. The Ld. Asstt. Commissioner of Customs, CFS Ludhiana denied the first check and aggrieved by the denial of the first check the appellant filed appeal before Ld. Commissioner (Appeals), who vide Order-In-Appeal dated 20.08.2010 directed proper officer/Asstt. Commissioner, CFS (Ludhiana to accede to request of the appellant made vide their letter dated 26.07.2010 for first check in terms of provisions of Section 46(1) of Customs Act, 1962. The Department did not file appeal and accepted the said order dated 20.08.2010 of Ld. Commissioner (Appeals).

2.2 Instead of complying with the order of the Ld. Commissioner a show cause notice dated 18.04.2011 was issued to the appellant alleging that the appellant mis-declared the goods imported vide Bill of Entry No. 2123393 dated 28.07.2010 in violation of Section 46 of Customs Act in as much as they had declared serviceable old and used machinery and other serviceable material. The opinion of the

Chartered Engineer who vide his certificate dated 16.10.2010 opined CIF value of goods imported as 19,90,591/- (i.e. machinery valued at Rs. 16,06,500/- heavy melting scrap valued at Rs. 2,16,591/- and other goods valued at Rs. 1,67,500/-). After allowing 70% depreciation, the value of machinery comes to Rs. 16,06,500/- and the customs duty of Rs. 4,62,818/- on re-determined value of Rs. 19,90,591/- was demanded under Section 28 of Customs Act along with interest. After following the due process, the Assistant Commissioner confirmed the demand along with interest and also imposed penalties. Aggrieved by the said order, the appellant filed the appeal before the Commissioner who rejected the same, hence the present appeal.

3. Heard both the parties and perused the material on record.

4. Ld. Counsel for the appellant submits that the impugned order is not sustainable in law and the same has been passed without properly appreciating the facts and the law. He further submits that the goods imported were purchased on "as is where is basis" by the appellant and the customs has sought opinion of Chartered Engineer Sh. Rajesh John, who in his report dated 16.10.2010 stated that machines appeared as not reconditioned; the machines appeared to have been lifted on "as is where is basis" and machines were 20-50 years old, expected residual life of the machine opined more than 8 years. He further submits that as per the opinion of the Chartered Engineer CIF value of new machines opined as Rs. 53,55,000/- and the seizure value of machinery has been taken as Rs. 16,06,500/-

but the said valuation is without any basis. He further submits that the appellant prayed for another expert opinion to be taken on the value of the machines but the same was denied. He further submits that the chartered engineer has not disclosed the basis of opining value of impugned goods. There is no reference of technical manual or information based on which value of machine has been opined. He further submits that the impugned goods has been purchased as scrap from the overseas seller on "as is where is basis" and the same is not disputed. He also submits that the machinery is 20-50 years old as opined by Chartered Engineer and the maximum life of the machinery is about 8 years.

4.2 He further submits that transaction value has been arbitrarily rejected as there is neither any contemporaneous import nor any flow back nor any market opinion brought on record. The value has been incorrectly and arbitrarily loaded without following the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 sequentially. In support of his submissions, he relied upon the following decisions:

- Rave Graphics Vs. Commissioner of Custom 2018 (359) ELT 193 (T).
- Dewan Steel Industries Vs. Commissioner of Customs 2008 (226) ELT 722.

- Madhu Sudan Metals Vs. Commissioner of Customs 2006 (205) ELT 311.

4.3 Ld. Counsel further submits that the appellant earlier imported similar goods i.e. 187.12 MT heavy melting scrap by 8 containers covered vide bill of entry No. 2084168 dated 15.06.2010 through CFS, Ludhiana and same were seized. The present consignment covered by BOE No. 2123393 dated 28.07.2010 was part of the earlier consignment as stated by Sh. Inder Kumar prop. in his statement dated 22.10.2010 and the same is mentioned in para 6 of the show cause notice also. He further submits that in the earlier consignment, the Additional Commissioner vide Order-in-Original dated 24.03.2011 ordered classification of the goods as referred in para 3 of show cause notice and demanded the custom duty of Rs. 22,12,714/- on the impugned goods and also imposed penalty of Rs. 10,00,000/- each under Section 112 & 114AA resp. of Customs Act, 1962 for violation of Section 46 of Customs Act and rule 11 of Foreign Trade (Regulation) Rules, 1993 & Rule 11 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Aggrieved by the said order, the appellant filed the appeal before the Commissioner (Appeals) Chandigarh, and the Commissioner (Appeals) vide Order-in-Appeal dated 09.05.2011 set aside the Order-in-Original dated 24.03.2011 and directed that impugned goods be released to appellant after effective mutilation under customs supervision as per prescribed procedure at the appellant’s expenses, thereby rendering them as scrap which shall be assessed as scrap and cleared on payment of appropriate duty as applicable to scrap. He further submits that the Revenue challenged the order dated 09.05.2011 before CESTAT and CESTAT vide Final Order dated 10.01.2012 dismissed the appeal of the Revenue as reported at 2013 (294) ELT 124 (T).

4.4 He further submits that once the earlier similar consignment has been held as scrap by the Tribunal vide its Order dated 10.01.2012 there was no reason not to consider the impugned goods as scrap and assessed accordingly.

5. On the other hand, Ld. AR reiterated the findings of the impugned order.

6. We have considered the submission of both the parties and perused the material on record and the various decisions relied upon by the appellant (cited supra), we find that in the present case, appellant imported 41.363 MT of HMS Scrap from Canada and filed Bill of Entry No. 2123393 dated 28.07.2010 at ICD, Ludhiana under first check. Further, the appellant vide letter dated 26.07.2010 requested the custom to give first check and appellant has also requested that if the goods do not confirm to description of scrap, then mutilation of the same may be allowed under Section 24 of the Customs Act, 1962 at their cost, but the Ld. Asstt. Commissioner denied the first check and the appellant filed the appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide order dated 20.08.2010 directed the Asstt. Commissioner, Ludhiana to accept to request of the appellant for first check. It is a fact that department did not challenge that order but at the same time did

not implement the order of the Ld. Commissioner and instead issued the impugned show cause notice dated 18.04.2011 alleging mis-declaration of the goods imported vide Bill of Entry 2123393 dated 28.07.2010. After obtaining the report of the Charter Engineer the Original Authority confirmed the demand of custom duty of Rs. 4,62,818/- on re-determined value of Rs. 19,90,591/- under Section 28 of the Customs Act, 1962 along with interest. Further, the order of the Original Authority was confirmed by the Commissioner (Appeals) vide the impugned order.

7. Further, we find that the chartered Engineer in his report dated 16.10.2010 has opined that machines do not appear to be reconditioned and appears to have been lifted on 'as is where is basis' and machines were 20-50 years old and expected residual life is more than 8 years and further he has opined that the value of the new machines is approximately Rs. 53,55,000/- and on that basis seizure value has been taken as 16,06,500/- after allowing 70% depreciation on the machinery as per Board circular no. 07/2008 Custom dated 12.02.2008. Further the Chartered Engineer has not disclosed the basis of opining value of impugned goods and there is no reference to any technical manual or information based on which he has determined the value of the machines.

8. Further, we find that the appellant has imported the impugned goods as scrap and sought first check also which was denied by the Assistant Commissioner but was allowed by the Commissioner (Appeals); the said order of the Commissioner (Appeals) has not

been complied and we do not find any reason for not complying with the same wherein the Commissioner has directed the lower authority to allow the first check, in spite of that Revenue proceed to issue the show cause notice.

9. Here it is pertinent to mention that the appellant before the disputed consignment also filed Bill of Entry No. 2084168 dated 15.06.2010 of similar goods imported from the same supplier as heavy melting scrap of 187.12 MT by 8 containers. It is a fact that the present consignment is also imported from the same seller and also of the same plant purchased by the supplier of the appellant. Those consignment were also seized and the Additional Commissioner vide Order-in-Original dated 24.03.2011 confirmed the demand of custom duty of Rs. 22,12,714/- and also imposed penalty of Rs. 10,00,000/- under Section 112-114 AA of the Customs Act, 1962.

10. Further, it is also a fact that the said decision was set aside by the Commissioner (Appeals) vide order dated 09.05.2011 and also directed that impugned goods be released to appellant after effective mutilation under Custom supervision as per prescribed procedure at appellant's expenses by holding that it is scrap and should be assessed as scrap. Revenue filed appeal against said decision but the revenue's appeal was dismissed as reported at 2013 (294) ELT 124. It is pertinent to note that once the similar goods of the appellant was held to be scrap and the same was upheld, then there is no reason to take contrary view with regard to the

impugned goods; in the present case also, keeping in view, the earlier litigation as cited (Supra) we hold that the impugned goods are scrap and should be assessed as scrap after effective mutilation under Custom supervision and the cost of the mutilation will be borne by the appellant as held by the Commissioner (Appeals) vide its order dated 09.05.2011. It is a settled position in law that the Department cannot take contrary stands in proceedings on the same issue for the same assessee. This has been so held in the case of Rosemarta Technologies Ltd. Vs. Comm. of Central Excise 2020-TIOL-316-CESTAT-CHD affirmed by the Hon'ble Supreme Court vide order dated 10.07.2023 in Civil Appeal No. 177/2021.

11. In view of our discussion above, we allow the present appeal on the same terms as was given by the Commissioner (Appeals) vide its order dated 09.05.2011 for earlier imports and direct the Original authority to assess the goods as scrap after effective mutilation under custom supervision at appellant's cost. The appeal is accordingly allowed on the above terms.

(Order pronounced in the open court on 05.12.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Kailash