IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 40174 of 2022

(Arising out of Order-in-Appeal Seaport C.Cus. II No. 100/2022 dated 14.02.2022 passed by the Commissioner of Customs (Appeals-II), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Refex Industries Limited **: Appellant**
No. 67, Bazullah Road, T. Nagar,
Chennai – 600 017

VERSUS

The Commissioner of Customs **: Respondent**
Chennai-II Commissionerate,
No. 60, Rajaji Salai, Custom House, Chennai – 600 001

APPEARANCE:

Shri R. Srinivasan, Consultant for the Appellant

Smt. Anandalakshmi Ganeshram, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40318 / 2022

DATE OF HEARING: 25.08.2022

DATE OF DECISION: **08.09.2022**

Order :

The appellant in this case is engaged in the business of packing, supply and selling of various refrigerant gases since the year 2002, for which they have been importing certain refrigerant gases in cylinders as well as empty cans used for packing such gases for re-filling purposes. During the year relevant for the purposes of this appeal, the appellant had imported 76,000 units of such empty cans vide Bill-of-Entry No. 7879073 dated 11.06.2020 through their Customs House Agent (CHA) which, after being selected for physical verification by the Customs

Authorities, was held to be requiring licence for importing the same. Vide application dated 21.08.2020, the appellant sought clarification from the Public Information Officer/Assistant Commissioner of the Customs House, Chennai, under the RTI Act since, according to the appellant, there was no requirement of licence by the appropriate authority for importing the goods in question under the Gas Cylinders Rules, 2016 ("the Rules" for short). The Public Information Officer/Assistant Commissioner issued a communication dated 29.09.2020, which is a half-hearted reply.

2. Thereafter, a Show Cause Notice dated 30.09.2020 was issued *inter alia* proposing to confiscate the goods in question under Section 111(d) of the Customs Act, 1962 apart from proposing to levy penalty under Section 112(a) of the Customs Act, 1962. The appellant seriously rebutted the proposals made in the Show Cause Notice, standing firm on its ground that no such licence was required and that the impugned goods were not 'prohibited goods' under law. However, vide Order-in-Original No. 78192/2020 dated 18.12.2020, the Adjudicating Authority chose to hold that the appellant had imported the goods in question without furnishing the mandatory licence required in Form-D of the Rules ibid. and thus, proceeded to order confiscation of the goods and levy penalty, as proposed. The appellant filed an appeal before the First Appellate Authority, but the First Appellate Authority having rejected the same, the present appeal has been filed before this forum.

3. Heard Shri R. Srinivasan, Learned Consultant for the appellant and Smt. Anandalakshmi Ganeshram, Learned Superintendent for the Revenue.

4. The contentions of the Learned Consultant for the appellant, *inter alia*, are that:-

- The goods in question were not covered under the Rules and hence, did not require licence in Form-D.

- The impugned goods are meant for packing the refrigerant gas R134a, which is nothing but 1,1,1,2-tetrafluoroethane.

- 1,1,1,2-tetrafluoroethane has a boiling point of (-)26.3°C and a critical temperature of 101°C.

- This gas is packed in a liquefied form in the impugned goods using pumps located in the appellant's facility and remains packed in the cans in a liquefied form even at room temperature.

- In other words, 1,1,1,2-tetrafluoroethane gas can be liquefied at temperatures above (-)10°C and therefore, it is not a 'permanent gas'.

- The fact that the gas remains in a liquefied form even at room temperature indicates that it is not in the nature of 'liquefiable gas'. The type of 'liquefiable gas' covered under the Gas Cylinders Rules is that gas which can be liquefied at (-)10°C by pressure.

- Even though all the above arguments were taken before both the lower authorities, none of the authorities below have considered or even discussed the above arguments.

- Without prejudice to the above, even if it were to be assumed that the provisions of the Gas Cylinders Rules are applicable, the impugned goods cannot be absolutely confiscated since they are not prohibited goods and hence, the appellant should have been given the option of redemption.

- Penalty under Section 112(a) ibid. has also been imposed mechanically without considering the *bona fide* explanation offered by the appellant, since the Adjudicating Authority has never doubted the *bona fides* of the appellant.

5.1 Learned Superintendent for the Revenue would submit that the goods in question i.e., empty cans, have been imported with an intention to fill the same with compressed gas and hence, the importer should obtain licence in terms of Rule 51 of the Rules ibid.

5.2 She would also submit that the refrigerant gas which is represented as R134a [chemically known as 1,1,1,2-tetrafluoroethane] is a non-flammable gas and, as per the Material Safety Data Sheet available in the appellant's own website, they have shown the classification of R134a as 'compressed gas' only. She would refer to the Safety Data Sheet of another chemical and pharmaceutical company website viz. www.siad.com, wherein R134a is shown as a 'liquefied gas'. Hence, she would conclude that R134a, when compressed, would automatically become a liquefied gas and would fall within the definition of "compressed gas" under Rule 2(v) of the Rules ibid.

5.3 She would also refer to the Test Report of the Petroleum and Explosives Safety Organization (PESO) wherein the said authority has very conveniently replied to refer to Rule 2(xxiii) of the Rules ibid.

5.4 She would further refer to the Bill-of-Entry filed by the appellant through its CHA wherein, in the description column, the volume / capacity of the 'Empty Tin Can' has not been specified, for which reason the Adjudicating Authority has held that the capacity of the empty cans was more than 500 ml.

5.5 For the above reasons, she sought for upholding the confiscation as well as the penalty imposed.

6. I have considered the rival contentions and have also gone through the documents and case-law referred to during the course of arguments.

7. Rule 29(1) of the Rules ibid. states that "*no person shall import any gas cylinders filled or intended to be filled with any compressed gas except under and in accordance with the conditions of a licence granted under these Rules and the relevant provisions of the Foreign Trade (Development and Regulation) Act, 1992…*". If the gas intended to be filled in the 'Empty Tin Cans' in question by the appellant is held to be "compressed gas", then the appellant is required to obtain licence in terms of Rule 29 ibid. Hence, the issue before me, in view of the above factual matrix, is: whether the authorities below were correct in holding that the impugned goods are covered under the Gas Cylinders Rules and thereby order confiscation for want of licence?

8.1 The appellant, as could be seen from its reply to the Show Cause Notice as well as the arguments extracted in the orders of lower authorities, had taken technical contentions to plead that R134a gas stands excluded from the definition of "compressed gas", which has not at all been considered by any of the lower authorities. When such technical arguments are being advanced, the concerned authority should examine the issue in the light of such technical arguments, but the same having not been done, both the orders of the lower authorities become non-speaking orders.

8.2 Further, to add to the agony of the appellant, both the appellant as well as the Revenue had approached the authority under the Petroleum and Explosives Safety Organization (PESO) seeking clarification, but surprisingly, the said authority has issued an incomplete communication, to refer to Rule 2(xxiii) of the Rules ibid., and much worse is the communication issued by the Public Information Officer/Assistant Commissioner of the Customs House, Chennai. Both the authority under PESO as well as the Public Information Officer/Assistant Commissioner of Customs have replied to the application under the RTI Act in a slipshod manner, which is not in accordance with the requirement of the RTI Act.

8.3 Further, the Adjudicating Authority has, at paragraph 12 of the Order-in-Original, held that "*there is no doubt.… … … closed metal/tin container having capacity more than 500 ml…*", but from where did he get that is not brought on record and hence, such conclusions are nothing but imagination and not borne out of record.

9. The order of confiscation / demand is one aspect, but before that, it is for the Adjudicating Authority to establish first that the goods in question were prohibited and hence, the order of absolute confiscation also lacks merit.

10. In view of the above, the orders of lower authorities cannot be sustained and hence, I deem it proper to set aside the same and remand the matter back to the file of the Adjudicating Authority, who shall pass a *de novo* Adjudication Order after hearing the appellant, after meeting the arguments of the appellant and after affording reasonable opportunities to the appellant.

11. In the result, the impugned order is set aside and the appeal is treated as partly allowed by way of remand.

(Order pronounced in the open court on **08.09.2022**)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd