IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No. III

CUSTOMS APPEAL No.41785 OF 2014

(Arising out of Order-in-Appeal C. Cus.No.675/2014 dated 15.04.2014 passed by Commissioner of Customs (Appeals), No.60, Rajaji Salai, Custom House, Chennai 600 001)

M/s. Salzer Electronics Ltd. .... **Appellant**
Samichettipalayam,
Jothipuram Via,
Coimbatore 641 047.

Versus

The Commissioner of Customs
(Seaport-Export) ... **Respondent**
Custom House,
No.60, Rajaji Salai,
Chennai 600 001.

APPEARANCE :

Mr. J. Shankarraman, Advocate
For the Appellant

Mr. Anoop Singh, Deputy Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 12.02.2024
DATE OF DECISION : 16.02.2024

FINAL ORDER No.40168/2024

ORDER : [Per Ms. Sulekha Beevi. C.S]

Brief facts of the case are that the appellant filed Bill of Entry dt. 12.02.2014 for clearance of 14 sets of Plastic Injection Moulds imported from M/s.Amer Sonic International, China vide invoice dt. 21.01.2014 by declaring the value as US$ 94900 CIF (AV Rs.60,33,695/-) against EPCG authorization No.3230019994 dated 07.02.2014 at NIL rate of duty under Notification No.22/2013 dated 18.04.2013. The Bill of Entry was assessed on 2nd check basis on 12.02.2014. During the examination, it was found that the goods are old and used and was sent to the Assessment Group on 15.02.2014.

2. Appellant vide letter dt. 02.02.2014, enclosed a clarification received from the foreign supplier which stated that moulds are not old and only trials have been conducted on these moulds. It was stated by the supplier that the moulds are new and meant for the importer (appellant).

3. In view of the above, the consignments were examined by a Chartered Engineer who in his report stated that the items are old and used. It was also stated in the report that the goods are two to three years old, but found to be not rapidly used and not reconditioned.

4. As per para 5.1 (e) of the Foreign Trade Policy "second hand capital goods shall not be permitted to be imported under EPCG Scheme".

5. The appellant vide letter dt. 10.03.2014 requested for adjudication of the matter waiving the issuance of the show cause notice and personal hearing. Subsequently, the original authority passed the order dt. 02.04.2014 by which the benefit of Notification No.22/2013 dt. 18.4.2013 was denied and ordered for clearance of the goods on payment of appropriate duty. The value of the goods was enhanced to Rs.79,01,295/- and penalty of Rs.3,50,000/- under Section 112 (a) of the Customs Act, 1962 was imposed. A Redemption fine of Rs.7,90,000/- was imposed under Section 125 of the Customs Act, 1962. Aggrieved by such order, the appellant preferred an appeal before the Commissioner (Appeals) who vide order impugned herein upheld the same. Hence this appeal.

6. The Ld. Counsel Shri J. Shankarraman appeared and argued for the appellant.

6.1 In the present case the appellant placed a purchase order No.CG/2009 dated <u>15.6.2012</u> on M/s Amer Sonic International Ltd., Hongkong, China for Supply of 14 moulds with **<u>drawing and specification</u>** for USD 94,900/-. On inspection of the said moulds it was felt that it required lot of corrections and therefore, it took longer time to correct the moulds. Subsequently, the appellant was not in a hurry to import the same immediately as the market conditions for their finished product was not very conducive. In view of the above there was a delay in importing it and imported only on 12.02.2014. These moulds are exclusively made for use in the manufacture of finished goods of the appellant. The appellant had given specific drawing and dimension to the supplier. Further the name ‘SALZER’ is etched on the mould and it is incorrect to say that it is a second hand capital goods. The appellant prayed before the Commissioner (Appeals) for examination of the same before passing an order. Since the moulds are unique and are made exclusively for SALZER, the impugned orders by the adjudicating authority and Commissioner (Appeals) in not permitting the same to be cleared against EPCG in terms of paragraph 5.1(e) of the Foreign Trade Policy and denying exemption under Notification No.22/2013 dated 18.4.2013 is incorrect.

6.2 Though the moulds were manufactured in 2012 according to the specification of the appellant, yet the same cannot be treated as second hand moulds as there is nothing on record to indicate that the moulds were used by any other manufacturer/person.

6.3 The moulds are unique in nature in the sense that they can be used only to manufacture the switches of the appellant's Company and further the name SALZER was etched on the moulds. Once the name SALZER is etched then it goes to show that no other manufacturer could have used the moulds for the manufacture of their finished product. The appellant does not have any other manufacturing unit in any other country to manufacture their product.

6.4. Paragraph 5.1(e) of the Foreign Trade Policy is as follows:

> **"(e) Second hand capital goods shall not be permitted to be imported under EPCG Scheme."**

From the above, it could be seen that what is not permitted is second hand capital goods. In the present case, there is nothing on record to show that moulds are second hand. Further the etching in the moulds clearly indicates the name SALZER and therefore, the moulds are not second hand.

6.5. The Chartered Engineer has not given copies of photo/video taken inside the moulds which would clearly indicate/show that the moulds are etched with the name SALZER. For reasons best known the above factual position has been conveniently ignored by the Chartered Engineer in his Certificate of Inspection. This is a crucial piece of evidence which is very much necessary to decide the issue. Further, it will also reveal the fact whether there is wear and tear of the etching. In this connection the appellant has furnished the drawing of the moulds sent along with their purchase order dated 15.6.2012 which would clearly indicate specifications and the etching of the name SALZER. Since the above etching has not been reported by Chartered Engineer, which is crucial to decide the present issue, the certificate of opinion is bad in law and facts. Hence no credence can be given to the above report of the Chartered Engineer.

6.6. The disputed moulds are not second hand. Hence it is not hit by paragraph 5.1(e) of the Foreign Trade Policy and the benefit of exemption under EPCG scheme ought to have been allowed.

6.7. The appellant in order to avoid delay in adjudication requested the adjudicating authority to pass an order without issuing a show cause notice. Further the appellant wanted to avoid heavy demurrage. This does not mean that the appellant had conceded that the moulds are old.

6.8. The Commissioner (Appeals) as a first appellate authority ought to have considered the submissions of the appellant by examining the imported moulds which were still with the Customs Department. The examination of the same would have shown that it carries an etching viz., "SALZER", This aspect does not require any expert's opinion.

6.9 There is nothing on record to show that the moulds were used by any other person. The Commissioner (Appeals) only presumes without any evidence that the said moulds might have been used by other production units of SALZER. The appellant does not have any other unit outside the country or no other person is using the mould on behalf of the appellant outside the country.

6.10 The appellant before getting the disputed moulds out of the Customs control requested for taking photographs of the same and the same was permitted. The appellant has placed these photographs on record and the same would show that it carries the etching of the mould as required by the appellant. A perusal of the drawings would also show that it required the monogram "SALZER" etched on it. Hence it cannot be held that the goods are second hand.

7. Without prejudice to the above grounds, it is submitted by the counsel that the adjudicating authority while holding that the value adopted by the appellant is fair and reasonable ought not to have enhanced the assessable value to Rs.79,01,295/-. There is no finding rendered as to why the transaction value is rejected and the value enhanced even though department contends that these are used moulds.

8. In view of the above the adjudicating authority ought not to have imposed penalty on the appellant. Similarly, the question of redemption fine does not arise in the present facts. Ld, Counsel prayed that the appeal may please be allowed.

9. The Ld. A.R Sri Anoop Singh appeared and argued for the Department. It is submitted that the appellant had accepted the misdeclaration of the imported goods and waived the SCN. Therefore, it is not legally correct for the appellant to take somersault and contest the assessment made by the original authority. If the appellant had contested the nature of the goods, a show cause notice would have been issued and the remaining procedures followed. As the appellant waived the show cause notice, the department could not proceed with further investigations.

9.1 It is submitted by Ld.A.R that the goods were examined on the request of the appellant and a Chartered Engineer’s report was obtained. The said report confirms that the goods are used ones. The Commissioner (Appeals) in para-7 of the impugned order has discussed in detail with regard to the certificate issued by the Chartered Engineer. It has been clearly reported that the goods were found to be 'used' and 'not new'. As per para 5.1 (e) of the FTP, the import of second hand capital goods is not permitted under EPCG scheme and the appellant is not eligible for the benefit of notification.

9.2 The arguments put forward by the Ld. counsel for appellant that there is an etching of the word 'SALZER' on the mould is only an exercise to create evidence based on afterthoughts. These pictures lack evidentiary value and such documents cannot be entertained at the appellate stage. The other document relied upon are the drawings submitted along with the appeal. Since the Chartered Engineer has given an expert opinion that the goods are used items, merely because there is an etching of the word "SALZER" on the moulds it cannot be said that the goods have been made only for the appellant and that these have not been used at all. The possibility of old machine being exported from China or some other buyer selling it or using it or some other supplier exported it cannot be overruled. So also, it is not clear from the documents whether the seller is the actual manufacturer of the goods. It is submitted by the learned counsel that the demand of duty by denying the exemption benefit and the enhancement of value is legal and proper. Ld. A.R prayed that the appeal may be dismissed.

10. Heard both sides.

11. The issue that arises for consideration is whether the imported goods viz. '14 sets of Plastic Injection Moulds' are eligible for the benefit of Notification No.22/2013 dt. 18.04.2013. The department has denied the benefit of exemption from duty alleging that the goods are used / second hand goods. As per para 5.1 (e) of FTP, the second hand goods are not permitted to be imported under EPCG scheme. From the records, it is seen that the goods were examined by a Chartered Engineer who has reported that the goods are 'used' and 'not new'. The relevant part of the report is as under :

> "1) The make, model, serial no, U.O.M. – details were not found on the items. Only identification tags as per packing list were found pasted on the moulds.
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> 2) The items were found '**used'** and '**not new'**. They appear to be two to three years old.
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> 3) The goods / moulds were found not rapidly used and also found **Not Reconditioned**. The goods / moulds need only cleaning, or servicing before taking into used.
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> 4) The expected **Residual life** of the moulds will be around 5 to 6 years, depends upon the usage and proper maintenance."

12. The main contention put forward by the learned counsel for appellant is that the appellant had placed the purchase order on 15.06.2012 and the moulds were imported only after delay of 1 ½ years. The import has taken place only on 12.02.2014. It is thus argued by the counsel that due to the delay in import, the goods must have lost its new appearance. It is to be noted that in

the purchase order the appellant has mentioned the supplier to comply with the specifications / requirements. So also, the purchase order shows the drawing number, description of the material (As per Annexure to Purchase Order No.00029). This proves that the appellant had submitted drawings of the items to their supplier. The said drawings are enclosed in the appeal paper book. These drawings show that the word 'SALZER' has to be etched on the moulds. The photographs of the imported goods have been placed before us. On perusal of these photographs, it is seen that the item bears the etching of the word 'SALZER'. The appellant has submitted that they do not have any other company outside India. It can be strongly inferred that a product which has the name 'SALZER' etched on them is intended to be used by the said company only. The appellant is using these moulds for the manufacture of switches. From the drawings attached to the purchase order as well as the photographs, the probable inference that can be drawn is that the goods have been manufactured and imported only for the purpose of supplying to the appellant. Further, though the Chartered Engineer has stated that these are used and not new has not mentioned the details of wear and tear on the goods so as to arrive at such a conclusion. Therefore, the opinion of the Chartered Engineer that the moulds are 'used' and 'not new' does not seem to be factually proper. It requires to be mentioned that even though the etching of word 'SALZER' is prominent in the photographs, the Chartered Engineer has not mentioned anything about this in the report. Further, the report says that it is not rapidly used. The appellant has stated that other than the trial runs, the moulds have not been used and are entirely new.

13. Further, the goods have been imported after 1½ years of placing the purchase order. The learned counsel submitted that due to certain market constraints, their import was delayed. The report given by the Chartered Engineer that the goods appear to be used is not supported by any scientific or technical basis. The expert opinion cannot be used as a conclusive proof and is only corroborative in nature. Unless the expert gives an appropriate reason for his opinion, the same cannot be blanketly accepted in evidence. Such report cannot be given precedence over other evidence. In the present case, the moulds do have the etching of the word 'SALZER'. The expert in his report has not mentioned this for reasons best known to him. Though opinion of an expert does help Court to arrive at a satisfactory conclusion; but this not mean that an expert opinion has to be accepted invariably in all situations. This would amount to delegation of judicial function. The report does not state the facts on which the Chartered Engineer made the conclusion that the moulds are used, second hand moulds. The expert is not to expected to give his impressions but has to state the facts on which he draws the opinion. The reliance placed by the adjudicating authority and Commissioner (Appeals) solely on the expert opinion cannot be accepted.

14. The appellant has contested the enhancement of value of goods. In the report issued by the Chartered Engineer, it is stated that the declared value of the goods is correct with regard to the market conditions. However, interestingly, the value has been enhanced. For eg. The value of of USD 4800 declared for the item Plastic Injection Mould (1 Module Wrap Around Plate Mould) has been enhanced by the department to USD 7500. We do not understand how the department was able to arrive at this enhanced value. The impugned order does not give how such enhanced value has been arrived at by the department. There are no satisfactory reasons given for doubting and rejecting the transaction value. Though the department has accepted the report of the Chartered Engineer in regard to the opinion that the imported items are used and second hand, surprisingly, the opinion given by him that the value declared by the importer is fair and reasonable, has been rejected. The reasons for such rejection is not available before us.

15. From the above discussion, we find that as per the records such as date and description in purchase order, drawings and the photographs, the contention of the appellant that the goods imported are new is probable and acceptable. The overseas supplier has issued a certificate stating that the goods are new. The said certificate though produced before the authorities, was not considered at all. We find that there are no grounds to deny the benefit of exemption of Notification No.22/2013 dt. 18.04.2013. So also, there is no legal basis for enhancement of the

value. The duty demand, confiscation or redemption fine and the penalties cannot sustain.

16. In the result, the impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Pronounced in court on 16.02.2024)

sd/-	sd/-
(VASA SESHAGIRI RAO)	**(SULEKHA BEEVI. C.S)**
Member (Technical)	Member (Judicial)

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