IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No.40404 of 2022

(Arising out of Order-in-Appeal Seaport C. Cus. II No. 316/2022 dated 24.5.2022 passed by the Commissioner of Customs (Appeals – II), Chennai)

M/s. HLG Trading **Appellant**
Space 'E' Third Floor
Surya Kiran Building
92, The Mall
Ludhiana – 141 001.

Vs.

Commissioner of Customs **Respondent**
Chennai II Commissionerate
Custom House
No. 60, Rajaji Salai
Chennai – 600001.

APPEARANCE:

Dr. S. Krishnanandh, Advocate for the Appellant
Shri R. Rajaraman, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 41100/2024

Date of Hearing : 10.07.2024
Date of Decision: 21.08.2024

Per M. Ajit Kumar,

This appeal is filed by the appellant M/s. HLG Grading against Order in Appeal C. Cus. II No. 316/2022 dated 24.5.2022 passed by the Commissioner of Customs (Appeals – II), Chennai (impugned order).

2. Brief facts of the case are that the appellant filed Bill of Entry for clearance of 20445 kilograms of 'Aluminium Foil Paper Ultrathin 5 – 5.5 microns' under CTH 76071910 with the declared value of Rs.16,80,981/- and self-assessed the duty payable as Rs.4,29,284/- without Anti-Dumping Duty (ADD). As per Notification No. 23/2017-

Customs (ADD) dated 16.5.2017, aluminium foil of thickness in the range of 5.5 microns to 80 microns falling under CTH 7607 attracts ADD if originating in or exported from China. SIIB investigated the case. Samples sent to Customs Laboratory by them elicited report dated 12.6.2018 stating that the thickness of the imported goods was 0.010 to 0.012 mm (10 to 12 microns). However, as per the request of the importer a re-test was conducted as provided under CBEC Circular No. 30/2017-Cus dated 18.7.2017 at CRCL, New Delhi. The report as given at para 6 of the OIO, stated the thickness to be 0.006 mm (6 micron). After due process, the original authority confirmed the differential demand of Rs.25,99,374/- under sec. 28(4) along with interest and imposed equal penalty under sec. 114A of the Customs Act, 1962. The goods were confiscated and were allowed to be redeemed on payment of fine of Rs.1,70,000/-. The appellant preferred appeal before Commissioner (Appeals) who vide the impugned order rejected the appeal filed by the appellant. Hence the present appeal.

3. The learned counsel Dr. S. Krishnanandh appeared for the appellant and learned Authorized Representative Shri Anoop Singh appeared for the respondent.

3.1 The learned counsel for the appellant submitted that, aggrieved by the sald order of the Adjudicating Authority, more particularly due to non-consideration/ rejection of their request for a third test of the samples, drawn from the impugned consignment as well as rejection of their request for cross examination of the persons named in their reply to the show cause notice, the importers, preferred a writ petition before the Hon'ble High Court of Madras in W.P.No.23562 of 2019 & WMP No8.23377 & 23380 of 2019. The Hon'ble High Court, directed that a third test be conducted by CRCL, New Delhi and reports be placed before the Hon'ble Court. Accordingly, the samples drawn from the importer’s consignment were re-tested for a third time by CRCL, New Delhi. On submission of the test report before the Hon'ble High Court, the Hon'ble Court vide their order dated 03.03.2021, permitted the appellant to raise all contentions before the Appellate Authority in respect of its appeal including reliance on Indian Standard specifications. The Ld. Counsel submitted that the Appellate Authority rejected the appeal filed by them without taking into consideration, certain crucial communications nor even referred to the same, thereby committing a grave error. Hence the appeal.

3.2 The Ld. AR has taken us through the impugned order and stated that the same has been passed taking into consideration the test report as directed by the Hon’ble High Court and has rightly come to the conclusion that ADD is payable, hence the appeal may be rejected and the appeal upheld.

4. We have gone carefully through the appeal and have heard the rival parties. We find that the issue relates to a question of fact as to whether the imported goods declared as ‘Aluminium Foil Paper Ultrathin 5 – 5.5 microns’ falling under CTH 7607 and originating in or exported from China PR are in the thickness range of 5.5 microns to 80 microns so as to attracts ADD as per Notification No. 23/2017-Customs (ADD) dated 16.5.2017.

5. The goods are declared to be in ‘stock-lot’ and have been tested thrice. We are concerned with the final test of the goods done as per the directions of the Hon’ble Madras High Court order dated 16/09/2020 and 3/03/2021 (supra) and the impugned order that was

passed in compliance of the same. The order dated 3.3.2021 notes that the test report from CRCL dated 06/01/2021 show that the aluminium foil imported is of thickness of 5.83 and 5.84 microns which is adverse to the interest of the petitioner. The appellant prayed to the Lower Authority to consider para 12.1 of the Indian Standard Specification 15392:2003, while deciding the case. The Ld. Commissioner (Appeals) found that the said BIS standard is for 11 micron to 75 micron. Moreover, none of these test reports that came out are 'in favour of the appellant to prove that the imported goods' thickness is less than 5.5 microns as declared by them in the bill of entry. Further, the ADD notification supra does not contain any clause with reference to such tolerance level for exemption and therefore she agreed with the department's plea that such tolerance level is applicable only for the purpose of clearance into the Indian market and it not applicable for the purpose of levy of ADD.

6. The appellant has stated before us that realizing their mistake, they had post the personal hearing and prior to the issue of the impugned order, sent an Email dated 25.07.2021 enclosing and placing reliance on IS 8970: 1991 (instead of IS 15392:2003) more particularly to paragraph 4.4.3 of the said specifications (with amendments), with a specific request that the said IS Specification, may be taken into consideration based on the tolerance limits permitted therein. The Commissioner (Appeals) by rejecting their appeal without even referring to the said email and its contents, has committed a grave error meriting the order to be set aside.

7. We also find that the appellant had taken a fresh plea before the Appellate Authority on the issue that the author of the SCN was not

competent to issue the SCN in the light of the judgment of the Hon'ble Supreme Court in **Canon India Private Ltd Vs Commissioner of Customs** - Civil Appeal No. 1827 of 2018, dated 09/03/2021. The Impugned order has examined the issue at para 7 which is reproduced below.

> "7. As regards the contention of the appellant that exercise of powers under Section 28(4) of the Customs Act, 1962 can be done only by an authority, who had the power to assess / re-assess bill of entry in terms of section 17 of the Customs Act, 1962 read with sec. 28 ibid as per the judgments passed in Civil Appeal No. 1827 of 2018 dated 9.3.2021 and W.P. (MD) No. 10186 and 10187 of 2014 dated 16.3.2021, I find that in the instant case, there is a misdeclaration of thickness by the importers with an intention to evade payment of ADD and thus necessitating adjudication under section 122 of the Customs Act, 1962. Therefore, there is no impropriety in the issue of SCN by the Joint Commissioner of Customs (SIIB) who had only proposed for demand of ADD but the adjudication was done by the competent authority, viz. Addl. Commissioner of Customs, Group – 4 which is the concerned authority to assess/re-assess the bill of entry as well. As there is no merit in the appellant's appeal, the appeal is liable to be rejected so is their plea of waiver of demurrage charges."

We find that the question of a defect of jurisdiction strikes at the very authority of the Proper Officer to pass any order, and such a defect cannot be cured even by consent of parties. The inherent lack of jurisdiction for issue of SCN if found, makes the subsequent order passed by the Authority void in law. The issue hence merits being disposed of first before any other issue is examined on merits. The discussion in the impugned order is cryptic and would require a more detailed treatment on the legal issues involved and merits a remand.

8. It has come to notice that in the 'Record of Proceedings' of the Hon'ble Supreme Court, Court No. 1, in R.P. (C) No. 406/2021 in C.A. No. 1827/2018 it has been stated as under;

> "In order to facilitate the submissions before the Bench, it has been agreed that Ms. Charanya Lakshmikumaran, counsel, for the petitioners and Ms. V. Chandrashekara Bharathi, counsel, for the Department, shall act as the nodal counsel. They shall put together a common compilation of the submissions, pleadings, documents and precedents in terms of the Circular dated 3 April 2024 issued for

> regulating the course of submissions. The compilations together with the written submissions shall be in the electronic form and shall be emailed to the Court Master at cmvc.dyc@gmail.com on or before 31 July 2024."

9. In the circumstances, it would be in the fitness of things to remand the matter back to the Lower Authority to await the outcome of the proceedings in the Hon'ble Supreme Court, with respect to the final decision in the Canon India Private Ltd (supra), so as to first decide the challenge to jurisdiction raised by the appellant and if the SCN was found to be issued as per law, to decide the appeal against OIO 69865/2019 dated 01/07/2019 afresh after following the principles of natural justice and affording a reasonable and time bound opportunity to the appellant to state their case both orally and in writing if they so wish, before issuing a speaking order in the matter. The appellant should also co-operate with the Appellate Authority in completing the process expeditiously.

10. Having regard to the discussions above we remand the matter back to the Commissioner of Customs (Appeals) for de novo decision as per the terms indicated. The appeal is disposed of accordingly.

(Order pronounced in open court on 21.08.2024)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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