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

Customs Appeal No.40683 of 2015

(Arising out of Order-in-Appeal C. Cus. II No. 46/2014 dated 31.10.2014 passed by the Commissioner of Customs (Appeals – II), Chennai)

M/s. Kalpataru Power Transmission Ltd. **Appellant**
101, Part II, GIDC Estate Sector 28
Gandhi Nagar, Gujarat – 382 028.

Vs.

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

APPEARANCE:

Shri Shridev Vyas, Advocate for the Appellant
Smt. Anandalakshmi Ganeshram, Authorized Representative for the Respondent

CORAM

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

FINAL ORDER NO. 40091/2025

Date of Hearing : 21.11.2024
Date of Decision: 16.01.2025

Per M. Ajit Kumar,

This appeal is against Order in Appeal C. Cus. II No. 46/2014 dated 31.10.2014 passed by the Commissioner of Customs (Appeals - II), Chennai.

2. Brief facts of the case are that the appellant had filed Bill of Entry No. 3082961 dated 30.3.2011 for clearance of imported Optical Power Ground Wire Fibre Cable (**OPGW**) and its accessories. They were classified under the Customs Tariff Heading 8544 and the accessories under CTH 853670 respectively. Exemption was claimed under

Notification No. 24/2005-Cus dated 1.3.2005. The Ld. Adjudicating Authority rejected the classification and denied the benefit of the Notification and ordered that the subject goods and its accessories be classified under CTH 9001 and heading 7616 respectively. Aggrieved by the said order, the appellant filed an appeal before the Ld. Appellate Authority who vide the impugned order rejected the appeal and upheld the adjudication order. Hence this appeal.

3. Shri Shride Vyas, Ld. Advocate appeared for the appellant and Smt. Anandalakshmi Ganeshram, Ld. Authorized Representative appeared for the respondent.

3.1 The Ld. Advocate submitted that samples of the impugned goods were drawn at the time of import, before provisional release. However, a copy of the test report has not been supplied to them. The appellant vide letter dated 07/09/2012 addressed to the Original Authority had clearly stated that the imported cables were individually sheathed. In the same letter the appellant had also submitted that since the samples were drawn, the results of the samples were required to be awaited. Although the classification of the goods as per the impugned order has been done after a detailed technical discussion, there is no mention of the samples drawn or the results thereof. Even in the first appeal before the Appellate Commissioner, the appellant had pointed out that the samples were drawn and test results were awaited. However, Ld. Authority was of the opinion that the product, being a composite good it was the function or use which was relevant for classification and that since catalogues were available in the public domain, testing can be waived, and the available material facts were enough to decide the classification. The Ld. Advocate submitted that the issue revolved over a very narrow compass. If the imported goods are individually sheathed fibre cables, as claimed by them, then its classification would be under chapter 85, otherwise under chapter 90. Therefore, it was crucial to decide whether the imported goods were individual sheathed fibre or not. He submitted that the question of use or function becomes irrelevant when the heading itself provides for the basis of classification. The question of technical literature or information available in public domain will have little or no consequences unless it is shown that all OPGW products have the same characteristics and features. He stated that in the absence of test results, the contention of the appellant is required to be accepted and the product is therefore to be classified under chapter 85 and their appeal is required to be allowed, with consequential relief.

3.2 The Ld. Authorized Representative submitted that the LAA has, based on the technical, commercial and legal literature clearly demonstrated that grounding and fault current conduction were the main functions of the OPGW. The actual issue here is whether the term "sheathed" in the tariff schedule means coating as contested by the appellant or "covering" as held by the LAA. Based on the Chapter notes and Explanatory Notes to the Chapters 85 and 90, it is seen that if individual fibre is sheathed, then that will fall under the heading 8544 and under the heading 9001, if otherwise. The appellant submits that as the optical fibre will only have core and cladding, the coating is to be treated as sheath. This submission leads to a surmise that the fibres falling under the heading will not have coating and those falling under the heading 8544 will have a coating. The Ld. AR submitted that since, the tariff heading 9001 specifically covers "optical fibre cables" other than those of heading 8544, the imported goods (OPGW) are classifiable under the heading 9001. In short, the OFC made up of fibres that are not "individually sheathed" would be classifiable under the heading 9001. According to the Ld. AR, the imported goods' (OPGW) main function is for telecommunication, thus the same are rightly classifiable under the tariff heading 90011000. And the LAA has rightly denied the benefit of the Notification No 24/2005, S.I. No 28 as claimed by the appellant. She hence prayed that the appeal may be rejected.

4. We have gone through the appeal Memorandum, connected records and have heard the rival parties. We find that the issue involved is the classification of imported Optical Power Ground Wire Fibre Cable.

5. As per the Hon'ble Supreme Court's decision in **Union of India Vs Garware Nylons Ltd.** reported in 1996 (87) E.L.T. 12 (S.C.), the burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. [Also see: **Commissioner of Central Excise, Nagpur Vs Vicco Laboratories - 2005 (179) E.L.T. 17 (S.C.)**].

6. The background for this classification dispute appears to stem from Boards instruction contained in Circular 12/2006-Cus dated 28/02/2006 issued from F No 528/8/2006-Cus(TU), on the subject of mis-classification of 'optical fibre cables' under heading 8544 instead of heading 9001. The circular states that the optical fibres of Heading

8544 are made of individually sheathed fibres, whereas cables of Heading 9001 are not individually sheathed and specifically excluded products of 8544. This alert was all the more reason to preserve clinching evidence of the product by drawing samples and seeking the opinion of an expert. This critical evidence is missing in the present case. The goods have also been cleared for home consumption and are not available for examination. It is seen that the imports were made against a contract with TNEB. It was very likely that the contract would specify the product description and requirement which could have been used as a reference point. However, the same has also not been relied upon in the impugned order.

7. While seeking to classify a product it was for the departmental authorities to gather the product specification / literature, process of manufacture, compliance to a recogonised standard, contract copy and if required even a test report/ opinion from the appropriate authority and make it a part of the SCN. Classification cannot be made by assumptions and presumptions however so nuanced the order may be, when OPGW available in the market can be both sheathed and unsheathed, as recogonised in the Boards circular above. Moreso when it is this characteristic which is critical for the products classification. Further ultimate usage of a product is not relevant for classification, when the tariff entry refers to no such end use.

8. Without there being clarity on the factual nature and characteristics of the product, the eloquence of the discussion and findings in the impugned order will not suffice. The matter is also mysterious as the appellant has repeatedly stressed, before the

Original Authority, that a sample was drawn at the time of import and a copy of the test report may be provided but has been met with stony silence. This aspect is fatal to the case of revenue.

9. The Commissioner Appeals in the impugned order has accepted inferior proof by taking a fallacious argument that since catalogues of OPGW's were available in the public domain, testing can be waived, and the available material facts were enough to decide the classification. He has not demonstrated how the impugned goods satisfy the description given therein by referring to one such catalogue on which he has rested his arguments. The rule of best evidence states that, so long as higher or superior evidence could have been produced or may be reached, no inferior proof shall be submitted in relation to it. Hence in this case there can be no substitute for going by the actual physical characteristics and description of the impugned goods. Further it is not even the case of revenue that the goods were shown to be manufactured adhering to a recogonised standard that incorporates the characteristics relevant for the classification. Revenue has hence failed to prove its case on the classification of the goods under Tariff Heading 9001 and the impugned order merits to be set aside.

10. In the circumstances, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law. The appeal is disposed of accordingly.

(Order pronounced in open court on 16.01.2025)

Sd/-
(**M. AJIT KUMAR**)
Member (Technical)

Sd/-
(**P. DINESHA**)
Member (Judicial)

Rex