CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Customs Appeal No.C/3495-3496/2012-CU [DB]

[Arising out of Order-in-Appeal No.18-19 (RDN) CUS/JPR-I/2012 dated 31.08.2012 passed by the Commissioner (Appeals), Customs & Central Excise, Jaipur]

Ocean Marketing &
Shri Mukesh Goel Partner …Appellant

Vs.

C.C.E. & S.T., Jaipur … Respondent

Present for the Appellant : Mr.Jatin Mahajan, Advocate
Present for the Respondent: Mr. K. Poddar, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. ASHOK K. ARYA, MEMBER (TECHNICAL)

Date of Hearing: 27/10/2016

Pronounced on : 09.01.2017

FINAL ORDER NO. 50171-50172/2017

PER: S.K. MOHANTY

Brief facts of the case are that the appellant had imported 'Brass Honey Scrap as per ISRI' from Hong Kong and filed the Bill of Entry dated 28.09.2010 for assessment. The appellant declared the claimed assessable value of the imported goods at Rs. 43,42,278/- and claimed the classification under sub-heading No. 7404 0022 of the Customs Tariff Act, 1975. Import of subject goods are regulated by the EXIM Policy, providing for certain conditions to be fulfilled by the importer. On arrival of the imported goods at the port of import, the same were examined by the Department and reported that the imported scrap is not covered under the definition of 'Brass Honey Scrap' and thus, the same can be considered as 'Mixed Scrap'. Since there was mis-match of the description of imported goods in the Bill of Entry vis-a-vis the report furnished by the Department, the goods were examined through a Chartered Engineer, Shri Ramesh Chandra Agrawal, who vide his report dated 09.09.2010 had confirmed that the goods imported was 'Brass Honey Scrap'. Such report of the examiner, Shri Agrawal was not accepted by the Department, and accordingly, the goods were again got examined by the Department through the Chartered Engineer, Shri. IPS Arora, who had certified that the 'goods can be treated as Mixed Scrap'. Since, the above two reports furnished by different Chartered Engineers were not in conformity with each other, the Department got the goods again examined by a third Chartered Engineer, Shri M. N. Mathur. He has confirmed in his report dated 17.09.2010 that the 'imported scrap is mixed scrap of brass and copper and hence, is not covered by any of the grade of the brass and copper specified by the ISRI'. On the basis of the report furnished by Shri M.N. Mathur, Chartered Engineer, the Department classified the imported goods as 'Mixed Brass and Copper Scrap' under sub-heading 74040029 and determined the value for the purpose of assessment at Rs.53,15,287/-. Vide the adjudication order dated 30.09.2011, the ld. Additional Commissioner of Customs has confirmed the Customs duty of Rs.11,13,075/- and appropriated the said amount deposited by the appellant to the Government account. Besides, the goods were confiscated and penalty of Rs.5,00,000/- was imposed on the appellant. In addition, penalty of Rs.2,00,000/- was also imposed on Shri Mukesh Goyal, partner of the appellant company. In appeal, the ld. Commissioner, (Appeals), Central Excise, Jaipur-I vide the impugned order dated 31.08.2012 has confirmed the adjudication order. Feeling aggrieved with the impugned order, both these appeals are filed by the appellants.

2. Shri Jatin Mahajan, the ld. Advocate appearing for the appellant submitted that all the documents required for assessment were submitted by the appellant before the assessing authority; that the Department had obtained three reports, till it got the favorable one and that no explanation were furnished as to why the other two reports should not be considered for assessment; that Shri M.N. Mathur, whose report had been relied on by Department for enhancing the assessable value is a Civil Engineer, who is not competent to issue the reports concerning the field of Metals; that cross examination of the said engineer was not allowed by the Department, and thus, his report cannot be relied on for enhancement of value of goods; that in absence of non-availability of data showing similar imports, the transaction value declared by the appellant cannot be discarded. To justify his stand that the impugned order is not sustainable, the ld. Advocate has relied on the judgment of Hon'ble Supreme Court in the case of Collector of Customs, Madras - Vs. - Lotus Inks, 1996 (87) ELT 580 (S.C.), Poulose And Mathen - Vs. - Collector of Central Excise, 1997 (90) ELT 264 (S.C.), Andaman Timber Industries - Vs. - Commissioner of Central Excise, Kolkata-II, 2015 (324) ELT 641 (S.C.) and also the decision of this Tribunal in the case of Sunrise Corporation - Vs. - Commissioner of Customs, Bangalore, 2007 (220) ELT 209 (Tri.-Bang.).

3. On the other hand, Shri K. Poddar, the ld. A.R. appearing for the respondent reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the records.

5. As the imported goods on physical examination were not found matching with the description furnished by the appellant in the import documents, the Department got the same examined by the Chartered Engineer, Shri Ramesh Chandra Agrawal, who had certified that the imported goods are confirming to the definition of 'Brass Honey Scrap'. Without considering such report, another Chartered Engineer, Shri IPS Arora was engaged, who had reported that the goods are to be considered as 'Mixed Scrap'. Ignoring both the above reports, the Department engaged the third Chartered Engineer, Shri M.N. Mathur and based on his report, the assessment was done classifying the imported goods as 'Mix Scrap of Brass and Copper'. It is an admitted fact on record that both the authorities below have not recorded any findings as to why the earlier reports furnished by the experts should not be considered for classification of goods. Further, the submissions of the appellant recorded in the impugned order at paragraph 7.3 (page 6) that Shri M.N. Mathur being a Civil Engineer, is not competent to furnish the report in the field of Metal and that the Department has influenced him for issuing the report, has not been addressed by the ld. Commissioner (Appeals). On the contrary, the earlier reports furnished by the experts in the field of Metals have been discarded by the Department for assessment of the Bill of Entry. Since, the standing of Shri Mathur is doubtful, we are of the opinion that his views cannot be considered as the expert report in terms of Section 45 of the Indian Evidence Act, 1872, and thus, cannot be relied upon for change in the classification of

the impugned goods. Further, in view of the divergent reports of different Chartered Engineers, the position with regard to classification of impugned goods was not free from doubt. Thus, in such a case, the Department should have extended the benefit of favorable report submitted earlier to support the classification declared by the appellant. In this context, the Hon'ble Supreme Court in the case of Poulose And Mathen (supra) have held that where two opinions are possible, assessee should be given benefit of doubt and the opinion favourable to it should be given effect to.

6. Principles of natural justice have been violated in this case inasmuch as cross examination of the Chartered Engineer, Shri Mathur, whose report has been solely relied on for change in the description and classification of imported goods has not been allowed by the authorities below. We find that even though the appellant had specifically requested the ld. Commissioner (Appeals) for cross examination of Shri M.N. Mathur, but the request was turned down on the ground that cross examination cannot be claimed as a matter of right under Section 124 of the Customs Act, 1962. Since, the appellant has been denied with its rights to cross-examine the expert, his report cannot be relied on for assessment of the Bill of Entry, which is contrary to the claim of the appellant. The Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) have held that if cross-examination of witness is denied, the same amounts to violation of natural justice and the order passed against the assessee cannot be sustained. The relevant paragraphs in the said judgment are extracted herein below:-

> ***"6.*** *According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority*

though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

8. *In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice."*

7. In view of the foregoing, we are of the considered opinion that the report dated 17.09.2010 of Shri M.N. Mathur cannot be relied on for change in classification of goods and for confirmation of duty demand, confiscation of goods and imposition of penalties on the appellants. Therefore, by setting aside the impugned order, we allow the appeals in favour of the appellants.

[Pronounced in the open Court on 09.01.2017)

(ASHOK K. ARYA)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita