In the Customs, Excise & Service Tax Appellate Tribunal
West Block No.2, R.K. Puram, New Delhi-110066

Appeal No.C-51446,51423/2017
(Arising out of Order-in-Original No.02/NKU(02) ADG(Adj(/DRI/N.Delhi/2017-18 dt 19.05.2017) passed by The ADG (Adj.),DRI, New Delhi)

M/s K.K. Milk Fresh India Ltd …Appellant
Shri C.N. Kuchroo, CMD

Vs

CC New Delhi …Respondent

Appearance:
Present for the Appellant : Shri S.P. Mathew, Ajay Singh, Advocates
Present for the Respondent : Shri R.K. Mishra, AR

Coram:
HON'BLE JUSTICE (DR) SATISH CHANDRA, PRESIDENT
HON'BLE MR B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of hearing: 05.01.2018
Date of decision : 11.01.2018

Final Order No.50094-50095/2018

Per B. Ravichandran,

These two appeals are against order dated 19.05.2017 of Additional Director General (Adj.), New Delhi. The main appeal is by the importer, M/s KK Milk Fresh India Limited and the second appeal is by Shri Chand Narain Kuchroo, Chairman-cum-Managing Director of the main appellant.

2. The brief facts of the case are that the main appellant imported various machines for dairy plant and filed bills of entry for the clearance. The imports were through ICD Tughlakabad and Mundra Port. The period covered is from February, 2015 to June, 2015. These imports were assessed and cleared under

EPCG scheme with zero customs duty. The officers of DRI conducted certain verifications in July, 2015 in the factory premises of the main appellant. The imported goods were examined; expert opinions taken, further examination of various documents were made. On completion of enquiry. the SCN dated 30.12.2015 was issued to both the appellants proposing confiscation of goods seized, demanding differential customs duty and proposing penalties under various sections of Customs Act, 1962. The notice was made unanswerable to the jurisdictional Commissioner of Customs, incharge of ICD, Tughlakabad/Mundra Port. However, by Notification No.1/2016 Customs (NT/CAA/DRI) dated 22.08.2016 ADG, DRI, New Delhi was appointed to adjudicate the case.

4. The first main allegation against the appellants is that they have mis-classified the goods imported in order to avail ineligible exemption from payment to additional duty of customs (CVD) in terms of S.No.245 of Notification No.12/2012 CE dated 17.03.2012. The second main allegation is that the goods imported were actually second-hand/old and used machinery and, as such, were not eligible for zero duty EPCG scheme exemption under Notification Nos.22/2013 CUS dated 18.04.2013 and 16/2015-CUS dated 01.04.2015. The imports were in violation of para 5.1 (e) of Foreign Trade Policy 2009-14 and para 5.10 (f) of Foreign Trade Policy of 2015-19 under which the used capital goods are not permitted to be imported under EPCG scheme.

5. The appellants contested the allegations in the SCN and sought cross-examination of the connected persons in the investigation. The cross-

examination was conducted. The defense submissions were considered. The original authority issued the impugned order holding that the seized goods were liable for confiscation and allowed to be redeemed on payment of various redemption fines under Section 125 of the Act. He confirmed differential customs duty as demanded in the SCN totalling Rs.21,32,59,947/-. He also imposed penalties on the appellants under Section 112 (a) ad 114A of the Customs Act, 1962.

6. The ld Counsel appearing for both the appellants contested the finding in the impugned order on the following grounds:

a) The impugned order was passed without appreciating the inherent contradiction in the proceedings to confirm duty on the value of new machine while holding the imported goods were, in fact, used and old.
b) The original authority should have re-determined the value instead of recording that only assessee officer can deal with correct valuation of the imported goods. This is a mis-conception. The notice was issued to demand duty under Section 28 and, as such, the valuation aspect, as contested by the appellant, should have been considered by the original authority.
c) Once the adjudicating authority found that the goods were mis-declared, the transaction value should have been rejected in terms of Rule 12 of Customs Valuation Rules 2007 and the value should have been re-determined keeping in view the used nature of the imported goods.

d) The original authority failed to appreciate that the 16 machines already imported by the appellant were examined by the Customs Officers and were allowed clearance without any objection. The expert finding upon inspection of the machines at the factory was legally flawed as there were no independent witnesses during the course of such inspection.

e) The machines imported by the appellant were, in fact, used in dairy plant set-up by them. As such, all the goods which are used in such setting-up should have been considered as dairy machinery . The CV duty demand is not sustainable as the appellants were rightly eligible for the exemption.

f) The independent witnesses were not continuously present during the examination of machines by the chartered engineer. The inspection process is vitiated due to improper procedure.

g) The classification of imported goods for duty exemption under Notification No.12/2012 was not properly examined by the original authority. All the machines which are required for setting-up a dairy will be covered under the heading 8434 and in terms of EPCG licenses granted by the DGFT. The exemption granted to the appellant is correctly availed.

h) Alternatively, it is submitted that entry at S.No.232 of the above Notification is available as the goods imported were used in the factory of production in terms of the conditions mentioned therein.

i) The adjudicating authority failed to strictly adhere to the provisions of Section 138B of the Act before admitting the various evidence for arriving at his finding.

7. The ld AR strongly contested the appeals. He submitted that the appellants imported used machines which are not at all eligible for concession under EPCG scheme. This is an admitted fact. This cannot be disputed. The appellants are raising frivolous and irrelevant objections with reference to the admissibility of inspection report by the chartered engineer. In fact, by praying for determination of value applicable to used machines, the appellants manifestly admitted that the goods imported were, in fact, used and are not new. The ld AR submitted that the impugned order has strictly adhered to the principles of natural justice by offering adequate opportunities to the appellants to present their written and oral submissions. Cross-examination of the witnesses, wherever required, have also been permitted and were conducted. The classification of goods were deliberately made wrongly in order to avail ineligible CV duty exemption. This aspect has been dealt with specifically by the impugned order and there is nothing in the present appeal to change such finding. He supported the impugned order in all aspects.

8. We have heard both the sides extensively and perused the appeal record. We first consider the eligibility of the appellant for zero duty EPCG import of the impugned machinery. We note that the goods were used and old is an admitted fact. The appellants, neither in the written appeal nor during submissions before us, have contested the finding of the original authority regarding the goods being not new. As such, it is clear that the appellants are not eligible for import under EPCG scheme. There can be no element of doubt on this finding. The appellants repeatedly pleaded that as the goods were second-hand/used and old, the

adjudicating authority should have revised the value by rejecting the declared transaction value. It would appear that the appellants are trying to solvage something out of a lost case. When the goods were found not to be eligible for concession under EPCG scheme, having found to be old and used, the appellants took a plea that, that being so, the value should be accordingly reduced. We find such submission as untenable. We pointedly asked the ld Counsel, during the course of submission, as to whether the appellants are admitting that the transaction values, as per invoices submitted and declared in the bills of entry, were false. The ld Counsel submitted that they do not claim so. In such situation, it is strange that the appellants are pressing the adjudicating authority to re-determine the value only as a consequence of the fact revealed during investigation as the imported goods being old and used. We note that the original authority has no reason to reject the transaction value in terms of Rule 12 of the Valuation Rules. The Revenue did not collect any evidence in this regard. In fact, there is no allegation with reference to correctness or otherwise of the assessable value. The declared value of the appellant was admitted. The said declared value submitted by invoices is for the imported goods. It is not up to the appellant now to take an alternate view to vary the declared value and insist on the adjudicating authority to reject their own declared assessable value. We find no factual or legal basis for such course of action. Apparently, the whole assertion of the appellant, in this regard, is a consequential after-thought to limit the damage which occurred due to deliberate mis-declaration on their part.

9. Another important aspect which was decided by the original authority is the correct classification and consequently availability of exemption under Notification No.12/2012 CE dated 17.03.2012 (S.No.245) for CV duty. In this connection, we note that the original authority relied on Rule 3(a) of the General Rules of Interpretation of Tariff. He gave preference to more specific description over general description to arrive at correct classification. He has listed-out 10 such items in the table below para 5.4.4.1.2 of the impugned order. Relying on the decision of the Hon'ble Supreme Court in M/s Pioneer Embroideries-2015 (332) ELT 602 SC, the original authority proceeded to classify the goods in the form and state they were presented at the time of import. Relying on various other decisions of the Apex Court, he concluded that the classification declared by the appellant to the DGFT does not by itself entitle them to a customs classification for assessment under the same heading. We note that after due consideration of the HSN explanatory notes, actual nature of the imported goods and applying the General Interpretation Rules, the original authority has rightly came to the conclusion that the classification of goods declared under heading 8434 is not correct and these were to be classified under various different headings like 8421, 8413, 8419,8418. On careful consideration of the finding, we have no reason to interfere with the same. The grounds of appeal also did not bring out any factual or legal factors to pursuade as to do so.

10. We find no merit in the claim of the appellant regarding non-adherence of statutory provisions by the original authority before admitting evidences and report of examination. There is no basis for such claim.

11. Finally, we have also considered the quantum of redemption fine and the penalties imposed on the appellants. The redemption fines were in the range of 20% of the value of goods ordered to be confiscated. We are satisfied that the quantum of redemption fines are reasonable and adequate. Similarly, the penalties imposed under Section 112(a) and Section 114A were also found to be reasonable and within the parameters laid down in the legal provisions of the Act.

12. The ld Counsel specifically pleaded for reduction of penalty imposed on the second appellant. We note that the penalties of Rs.1.8 crores and Rs.35 lakhs have been imposed on the second appellant. Considering that the overall duty involved is more than Rs.21 crores and the deliberate acts involved in such importation have been established in the investigation, we find no reason to interfere with the quantum of penalties.

12. In view of above discussion and analysis, we find no merit in these appeals. Accordingly, the same are dismissed.

(Pronounced in Court on 11.01.2018)

(Justice (Dr) Satish Chandra) President	(B. Ravichandran) Member(Technical)

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