CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

BENCH-DB

COURT –IV

Customs Appeal No. C/53028/2016-Cu [DB]

[Arising out of Order-in-Original No. ALW-EXCUS-O-I-O-COM-31/16-17 dated 24.08.2016 passed by the Commissioner, Central Excise Commissionerate, Alwar]

M/s. Shilpi Cables Technologies Ltd. ...Appellant

Vs.

C.C.E.- Alwar …Respondent

Appearance:

Mr. S. C. Jain & Mr. Rajat Dosi (Advocates) for the Appellant
Mr. Govind Dixit, AR for the Respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Date of Hearing.24.10.2017
Date of Decision._23.02.2018

Final Order No. 50782 /2018

Per S.K. Mohanty:

Brief facts of the case are that the appellant is registered with the Central Excise Department for manufacture of the excisable goods namely, Feeder Cable/BTS RF Feeder Cable. During the disputed period, the appellant imported the raw-material/ inputs, through ICD, Garhi Harsaru, without payment of Customs Duty, in terms of the Notification No.25/2005 –Cus., dated 01.03.2005, as amended. The duty exemption claimed by the appellant as per the said Notification was sought to be denied by the Department on the ground that the imported goods were being used by the appellant in the manufacture of Coaxial Cables, classifiable under CTH 8544 20 10 and that since RF Feeder Cable is the same as Coaxial Cable, the appellant cannot claim the classification of the said goods under sub-heading 8544 42 & 8544 49 of the Tariff Act. Thus, the Department contended that when the manufactured product was not covered under the exemption Notification, the goods imported by the appellant for manufacturing of the said goods will not be eligible for the duty exemption provided under the Notification dated 01.03.2005. In this context, the Show Cause Notice dated 03.12.2015 issued by the Department was adjudicated by the Commissioner of Central Excise & Service Tax, Alwar vide the Adjudication Order dated 24.08.2016 (for short, "the impugned order"), wherein Customs Duty demand of Rs.5,92,39,164/- alongwith interest was confirmed on the appellant under the proviso to Section 28 (1) of the Customs Act, 1962 and Rule 8 of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 (for short, referred to as "the Customs Rules, 1996"). Besides, the impugned order has also imposed equal amount of penalty on the appellant under Section 114AA of the Act. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. The ld. Advocate appearing for the appellant, at the outset, submitted that the Customs Rules, 1996 has limited the power of the jurisdictional Central Excise officers to "take action for

recovery", if the imported goods are not used for the intended purpose. Thus, he submitted that the Central Excise officers only have the powers to alert the proper officer of Customs to recover the duty amount, when the imported goods were not used by the manufacturer for the intended purpose. To support such stand, the ld. Advocate has relied on the decision of Tribunal in the case of APP Enterprises – 2008 (231) ELT 110 (Tri.- Madras) and N.B. Footwear – 2007 (209) ELT 102 (Tri.-Mad.).

2.1 With regard to the classification of the product, the ld. Advocate submitted that RF Feeder Cable are classifiable under sub-heading 8544 42(fitted with connectors), or under 8544 49 (when not fitted with connectors). He accordingly, submitted that since Feeder Cables have specific use in telecommunication, the said two sub-headings are more specific entries and sub-heading 8544 20 as claimed by the Department, is a general sub-heading, having no specification in relation to their use in telecommunication. Therefore, the ld. Advocate submitted that the appellant should be eligible for the duty exemption provided under Notification dated 01.03.2005.

2.2 The alternative submission of the ld. Advocate is that though the Notification No.44/2011 – Cus. (N.T.) dated 06.07.2011 has been issued in terms of Section 2 (34) of the Customs Act, 1962 assigning Central Excise Officer to function as the 'proper officer', but no Notification has been issued under Section 4 (1) of the Act, in appointing such officer as the 'Customs Officer'. Thus, he submitted that the Central Excise

Officer having jurisdiction over the factory of the appellant is not empowered to issue the Show Cause Notice for recovery of the Customs Duty. In this context, ld. Advocate has placed reliance on the judgement of Hon'ble Karnataka High Court, in the case of Molex India Ltd. -2015 (317) ELT 250 (Kar.) and affirmed by the Hon'ble Supreme Court, reported in 2015 (326) ELT A-184 (S.C.).

3. On the other hand, the ld. DR appearing for the Revenue submitted that the Department of Electronics, Malviya National Institute of Technology, Jaipur, upon examination of goods had confirmed that the same is Coaxial Cable, which has been accepted by the Plant Head and the authorised signatory of the appellant company in their voluntary statement recorded under Section 14 of the Central Excise Act, 1944. Thus, he submitted that since the goods manufactured by the appellant is classifiable under sub-heading 8544 20 10 of the Tariff Act, the benefit of Notification No. 25/2005–Cus., dated 01.03.2005 claimed by the appellant for import of the inputs should not be available. He further submitted that since the period in the present case is from 01.11.2014 to 31.08.2015, issuance of Show Cause Notice by the Commissioner of Central Excise is proper and justified, in terms of the Notification No. 44/2011-Cus. (NT) dated 06.07.2011, inasmuch as such officer was assigned with the function of proper officer, for the purpose of Section 28 of the Act. Therefore, he submitted that the judgement of Hon'ble Karnataka High court in the case of Molex India Ltd. (Supra) is not applicable, since the

period involved in such decided case was prior to issuance of such Notification.

4. Heard both sides and examined the case records.

5. It is an admitted fact on record that the appellant had imported Copper Strips, Copper Tuber, Polythene Compound etc. at ‘nil ‘rate of duty, for manufacture of RF Feeder Cable, by claiming the benefit under Notification No. 25/2005-Cus., dated 01.03.2005 (Sl. No. 33), as amended. The said Notification exempts all goods specified in the appended table, when imported into India, from the whole of Customs duty. Sl. No.28 of the said exemption Notification covers *“Electric conductors, for a voltage not exceeding 80 V, of a kind used for telecommunications”* falling under sub-heading 8544 49. Whereas, Sl. No.29 covers *“Electric conductors, for a voltage exceeding 80V, but not exceeding 1000 V, fitted with connectors, of a kind used for telecommunications”*, falling under sub-heading 8544 42. Serial No.33 covers all goods that are imported for the manufacture of goods specified against Serial No.1 to 32. In other words, the said Notification provides that if any goods are imported for the manufacturing of electric conductors (of the prescribed electrical voltage), falling under sub-heading 8544 42 or 8544 49, they would be exempt by virtue of Serial No.33 of the Notification.

6. In this case, the appellant had claimed the duty exemption under the Notification dated 01.03.2005 on the ground that RF

Cables manufactured by it were electric conductors, classifiable under sub-heading 8544 42 and 8544 49, and therefore, should fall under Serial No.28 and 29 of the Notification. Accordingly, the appellant had claimed that the goods imported by it for the manufacturing of said RF Cables were exempt by virtue of Serial No.33 of the Notification. On the basis of the declaration/bond executed by the appellant, the Customs authorities at the port of import had assessed the Bill of Entry and cleared the goods for home consumption. Subsequently, the officers of the Central Excise Department drew samples of the cables from the factory of the appellant and sent to the Department of Electronics, Malviya National Institute of Technology, Jaipur for the purpose of test. After testing of samples, the said institute vide their letter dated 30.03.2011 sent the test report to the Department, confirming that the tested sample is "co-axiable cable". We find from the impugned order that Shri M.K. Sethi, Plant Head and Authorised Signatory as well as Shri B.R. Mishra, Manager (Excise) of the appellant, in their voluntary statements dated 22.02.2011 and 17.03.2011 tendered under Section 14 of the Central Excise Act, 1944 have admitted that the cable manufactured by the appellant is a type of "Coaxial Cable", as both the conductors are in the same axis. Further, those officers of the appellant have also admitted that the product BTS RF Feeder is in-fact, a cable used for radio frequency signal travel and it is not a conductor for transmission of electric current. Since the officers of the appellant furnished such statements voluntarily, which had never been retracted; and in view of the fact that the appellant had not produced any credible evidence in support of its claim of classification of the goods under sub-heading 8544 42 and 8544 49, we accept the classification of the finished goods made by the Department as "co-axial cable", under Tariff heading 8544 20 10. We find that "co-axial cable", under Tariff heading 8544 20 10 is not finding place as the eligible goods for the benefit of exemption provided under the Notification dated 01.03.2005. The classification of the impugned goods are supported by technical test opinion and due admission of such technical specification. Therefore, we are of the considered view that the appellant is outside the scope and purview of the Notification dated 01.03.2005 and accordingly, was liable to pay applicable Customs duty on the goods imported by it.

7. In view of the fact that the appellant was not entitled for the benefits provided under the Notification dated 01.03.2005, the condition of observance of procedures provided under Customs Rules, 1996, does not arise. Since the bill of entry was finally assessed by the Department, for recovery of the duties not levied or short levied, the proper officer should have taken steps under Section 28 of the Act. In this case, since the Customs Officer at the port of import had assessed the bill of entry and cleared the goods for home consumption, he is the only competent authority to issue the notice under Section 28 of the Act. As discussed above, since the provisions of Rule 8 of Customs Rules, 1996 do not have any application to the case of the appellant, there was no jurisdiction on the part of the Central

Excise Officer, having jurisdiction over the factory of the appellant to issue the Show Cause Notice and adjudication of the matter under Section 28 of the Act.

8. Even otherwise, we note that the claim of Revenue that Rule 8 of the Customs Rules, 1996 provides for recovery of Customs Duty by the jurisdictional Central Excise officer by enforcing bond is not tenable. The Customs duty on the imported goods was assessed by the officers at the port of import. They are only competent to vary the assessment on the basis of additional/new evidence unearthed after the initial assessment. In the present case, without reference to or action by such assessing officer, the Central Excise officer in-charge of factory, where such imported goods were used, initiated action for recovery of duty. Such re-assessment can be done by the competent jurisdictional proper officer, who assessed the goods and allowed such concession at the time of import. In other words, there cannot be two proper officers for assessing the imported goods. Such dual jurisdiction is not shown to be supported by legal provision. The claim of the Revenue that the Central Excise officer also has been declared as 'proper officer' under Section 2(34) of the Act is not directly relevant to the re-assessment in the present case, as the same will result in dual jurisdiction for assessment. The recovery of differential duty cannot be done by enforcing a bond, without first adjudicating the differential duty. Therefore, we are of the considered opinion that the impugned order passed by the Commissioner of Central Excise and Service Tax, Alwar cannot be

sustained, as he is not the Jurisdictional Customs Officer, who assessed the imported goods, cleared by the appellant on filing the bill of entry.

9. We have also perused the case laws relied on by the appellant. The decisions were either as interim order or on facts, not applicable to the present case. Regarding the decision in Molex India (supra), we note that while certain ratio mentioned by the Tribunal regarding enforcing bond is applicable here, the Hon'ble Karnataka High Court examined the issue in the angle of proper officer in terms of Section 2(34) of the Act. The Revenue contended that the said decision is for the period, prior to notifying Central Excise officer also as 'proper officer' under said section. In this case, we have examined the assessment powers for imported goods and proper officer for such work.

10. In view of above discussion and analysis, we hold that the adjudged demand confirmed in impugned order should be set aside on the ground of jurisdiction. Therefore, after setting aside the impugned order, we allow the appeal in favour of the appellant.

(Pronounced in the open court on 23.02.2018)

(**B. Ravichandran**)
Member(Technical)

(**S. K. Mohanty**)
Member (Judicial)

Sakshi