

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH

CUTSOMS APPEAL NO. 27557 of 2013

[Arising out of Order-in-Original No. No. 09/2013(BVSNK), DATED 26-04-2013 passed by The Commissioner of Central Excise and Customs, Vishakhapatnam-II.]

**The Commissioner of Central Excise
And Customs**

...Appellant

Vishakhapatnam II Commissionerate,
Vishakhapatnam 530035

Versus

M/S Reliance Infrastructure Ltd.

...Respondent

35:220 MW Samalkot Power Station
IDA Peddapuram
Samalkot Mandal,
PB No. 22, Samalkot Head PO.

APPEARANCE:

Shri L V Rao, Authorised Representative for the appellant Revenue
Shri Srinivas Chaturvedula and R. Narasimha Murthy Advocates for the
respondent Assessee.

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**DATE OF HEARING: 06.01.2022
DATE OF DECISION: 31.01.2022**

FINAL ORDER No. A/30026/2022

P.V. SUBBA RAO

This appeal has been filed by the Revenue assailing Order in Original dated 26-4-2013¹ passed by the Commissioner of Customs and Central Excise, Vishakhapatnam-II partly dropping the demand in the Show Cause Notice² dated 13.9.2012 partly confirming it. Revenue is aggrieved by the dropping of part of the

-
1. Impugned order
 2. SCN

demand. There is no appeal by M/s. Reliance Infrastructure Ltd.³, the assessee (respondent herein) against that part of the demand which was confirmed.

2. The factual matrix which lead to the dispute is as follows.

3. The assessee was awarded an Engineering, Procurement and Construction⁴ contract by M/s. Reliance Power Ltd⁵, Mumbai to set up a 2,400 MW Gas Power Project at Samalkot, East Godavari district, Andhra Pradesh. The assessee, in turn, entered into an "Offshore Equipment Supply" contract dated 7.8.2010 with M/s. Reliance Infra Projects International Ltd⁶., British Virgin islands for supply of various material and equipment to execute the EPC project. It also placed a Purchase Order dated 29.7.2011 with M/s Zhejiang Hangxiao Steel Structure CO. Ltd.⁷ Hangzhou, China for supply of some material and equipment.

4. The assessee imported various equipment from Reliance Infra Projects and Zhejiang and cleared them by filing 36 Bills of Entry between June 2011 and February 2012 with the Customs at Kakinada. Bills of Entry filed in the Customs EDI system are either marked to an officer for assessment or marked for examination of goods or both or may be cleared without either assessment by the officer or examination of the goods by the Customs Risk Management System⁸. These 36 Bills of Entry were facilitated by the RMS, i.e., cleared without assessment or examination by the officers. As per the practice, these Bills of Entry were audited post

³ assessee

⁴ EPC

⁵ Reliance Power

⁶ Reliance Infra Projects

⁷ Zheijang

⁸ RMS

clearance and it was noticed that there was a variation between the classification of the goods in the Bill of Entry under the Customs Tariff and the classification in the supplier's documents such as invoice, packing list and Country of origin certificate under the Harmonised System of Nomenclature⁹. The Customs Tariff is drafted on the pattern of the HSN which is an internationally recognised system of classifying all goods. Therefore, the Customs tariff mirrors the HSN although there could be variations in some cases. Both the HSN and the Customs Tariff classify goods into Sections, Chapters and under each Chapter, Headings and Sub-headings. The classification is such that any article can fall under only one heading. Section notes and Chapter notes are provided at the beginning to explain the scope of the Section, or as the case may be, the Chapter including what is specifically included or excluded within its scope. Further, there are Rules of Interpretation of the HSN as well as Customs Tariff which help decide the classification. For instance, if a question arises if an automobile gear box made of steel should be classified as an article of steel or a part of an automobile, the Chapter notes, Section notes and Rules of Interpretation clear doubts. It is now a well settled legal position that in classifying the goods under the Customs Tariff or Central Excise Tariff, the Explanatory Notes in the HSN can be referred to as they provide the context and the tariff is based on the HSN.

5. During post clearance audit of the Bills of Entry filed by the assessee, it was noticed that in respect of six Bills of Entry, the classification of the goods in the Bills of Entry by the assessee

⁹ HSN

were at variance with the HSN classification of the same goods mentioned in the documents of the overseas suppliers. After issuing a consultative letter asking the assessee to pay the differential duty and as the assessee disputed, a SCN was issued proposing to re-classify the goods as per the HSN indicated in the supplier's documents, recover the differential duty under section 28(4) along with interest under section 28AA and impose penalties under sections 114A and 114AA on the assessee. The specific proposals in the SCN were that the assessee was called upon to explain as to why:

"(i) The goods imported under Bills of Entry No. 5051226/31.10.2011, 5218089/17.11.2011, 6011406 /15.02.2012, 4789656/29.09.2011, 521873/ 17.11.2011 and 6070324/22.02.2012 as mentioned in the Annexure should not be classified under customs tariff item 73089090 of the Customs Tariff Act, 1975;

(ii) The duty amount of Rs. 9,39,30,711 (Rupees Nine crores thirty nine lakhs thirty thousand seven hundred and eleven only) being the differential duty of customs as a result of incorrect classification of the goods imported with an intention to evade payment of duty should not be recovered from them under section 28(4) of the Customs Act, 1962;

(iii) The interest under section 28AA of the Customs Act, 1962 should not be recovered from them on the amount mentioned at (ii) above;

(iv) A penalty should not be imposed on them under section 114A of the Customs Act, 1962 as detailed above; and

(v) A penalty should not be imposed on them under section 114AA of the Customs Act, 1962 as detailed above.

6. After considering the submissions made in defence by the assessee, the Commissioner passed the impugned order giving findings with respect to the goods imported under each of the Bills of Entry. She concluded that all the goods imported under the six Bills of Entry merit classification under Customs Tariff Heading

8406 (which was the same as classification by the assessee), except support structures, Lifting Steel with Slings and Shackles imported under Bill of Entry No. 521874/17.11.2011 which she classified as articles of iron and steel under Chapter Heading 73129000. Accordingly, she confirmed a differential duty of Rs. 3,40,069/- and ordered its recovery along with interest under Section 28AA. She also imposed a penalty to equal to this amount on the assessee under Section 114A and imposed a penalty of Rs. 1,00,000/- on the assessee under Section 114AA. There is no appeal by the assessee against the impugned order.

7. This order was reviewed by the Committee of Chief Commissioners of Central Excise, Customs and Service Tax who concluded that the impugned order was not legal and correct and passed Review Order No. 07/2013 dt. 25.07.2013, setting out 37 grounds which are numbered (i) to (xxxvii) in paragraph 1 of the grounds of appeal. Accordingly, this appeal has been filed for correct determination of the following points arising out of the said order:

- (i) Whether, after taking into consideration the above facts and the Order-in-Original, the said order of the Commissioner, in so far as it relates to classification of the goods imported vide the impugned six Bills of Entry under CTH No.: 84068200 as "Steam Turbines and other Vapour Turbines of an output not exceeding 40 MW" instead of under CTH No.: 7308 9090 of Customs Tariff Act, 1975 as "Structures and Parts of Structures of Iron or Steel" and consequential dropping of differential

customs duty of Rs.9,35,90,642/- with interest and penalties is legal and proper; and

- (ii)** Whether, by an order passed under Section 129B of the Customs Act 1962 the Hon'ble Tribunal should set aside the order passed by the Commissioner to the extent pointed out in this Review Order after upholding the allegations made in the show cause notice and the issues raised in the present review order, or pass such other orders as the CESTAT deems fit.

8. Learned Counsel for the assessee supports the impugned order and submits that there is no legal infirmity in the impugned order and that the SCN proposed to classify the goods as articles of Iron and Steel. After considering the assessee's submissions and examining the detailed drawings and designs, the expert opinion and the certificate by the Chartered Engineer, the Commissioner concluded in the impugned order that the goods which were imported were not general articles of Iron and Steel but were specifically designed for the power plant and hence were correctly classifiable under 8406. Learned counsel submits that there is no dispute to the factual findings recorded by the Commissioner in the Department's appeal. He also submitted that the HSN mentioned by the supplier is beyond the assessee's control and even if wrong HSN is mentioned by the supplier it does not change the classification of the goods under the Customs Tariff. He, therefore, prays that the department's appeal may be rejected.

9. Before considering the grounds of this appeal, we proceed to examine the scope of the HSN code and other details mentioned in the documents of the overseas supplier in determining the classification of goods under the Customs Tariff. Since the Customs Tariff is based on HSN, it is a well settled principle that while determining the classification of goods, classification under HSN and the Notes therein can be referred to.

10. The next question is what is the scope of classification of goods under the Customs Tariff? Customs Act imposes duties on goods imported into and in some cases, exported out of India and to specify the rates of duties, the goods are classified and the rate of duty appropriate to that category of goods is applied. Thus, classification of goods under the Customs Tariff is a process of assessment. The definition of assessment under the Customs Act was amended from time to time but it is indisputable that determining the classification of the goods under the Customs Tariff is a part of assessment of the duty on the goods. The definition of assessment under Section 2(2) has been as follows:

Upto 8.4.2011

"assessment" includes provisional assessment, reassessment and any order of assessment in which the duty assessed is nil;

From 8.4.2011 to 29.3.2018- Due to amendment of Section 17 providing for self assessment in 2011, the definition was modified so as to include self assessment in it

"assessment" includes provisional assessment, **self-assessment**, re-assessment and any assessment in which the duty assessed is nil;

From 29.3.2018- The definition of assessment was only an inclusive one before 2018 but it did not specify what the term assessment entails. This was made explicit by substituting the definition as follows:

"assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-

(a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;

(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;

(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;

(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil

11. It is explicit from the definition after 2018 and it was implicit before that date that classification of goods under the Customs Tariff is a part of assessment. This power of assessment is conferred under Section 17 of the Customs Act. Prior to 2011, the assessment had to be done by 'the proper officer' under section 12. After 2011, the importer or exporter has to self assess the duty under section 17(1) and the officer could re-assess the duty under section 17(4). This section, as it stood during the relevant period, was follows.

Section 17. Assessment of duty. -

(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

(3) For verification of self-assessment under sub-section(2) the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, any thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

(6) Where re-assessment has not been done or a speaking order has not been passed on re- assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.

Explanation. - For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.

13. Thus, the power of assessment of duty under the Customs Act, which includes the power to classify the goods under the Customs tariff, lies with the importer and 'the proper officer'. In case of a demand of duty under section 28, this power of classification and determining the duty extends to the adjudicating officer and to those higher in the chain of appeals. In classifying goods they may refer to the description of the goods, literature, the HSN declared by the supplier, etc. but the HSN indicated by the supplier cannot bind either the importer or the proper officer or the adjudicating authority or the appellate authority in classifying the goods- a process which must be done on merits.

14. The supplier has no *locus standi* in the classification of the goods or assessing the duty. **If the HSN indicated in the documents by the supplier is held to bind the importer or the proper officer in assessing the goods, it can result in absurd results with disastrous consequences. Any unscrupulous importer can simply find an equally unscrupulous supplier and ask him to indicate so and so HSN so as to lower his duty liability.**

15. Duties of the Customs are levied under Section 12 of the Act which states "**duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.**" So, what is essential to levy duty is that the goods must be imported or exported. There is no levy of duty on the goods declared by the supplier but only on the goods imported. The supplier's

documents are important to determine what is imported and usually the documents reflect what is actually imported. However, in case of a difference between what is declared in the overseas supplier's documents and what is actually imported, the duty has to be on what is imported because the charge is on the goods imported and not on the goods declared by the supplier. For instance, if 100 pieces are declared in the invoice and actually 200 pieces are imported, the duty has to be collected on 200 pieces which are actually imported. Similarly, if goods are described as, say, iron bars and instead gold is imported, duty has to be on the gold and not on iron. Classification of the goods (in the form of HS code) on the exporter's documents also cannot similarly prevail over what is actually imported. If cars are imported and as they are made of iron and steel, declared as articles of iron and steel by the overseas supplier, they should be classified as and charged to duty as car and not as articles of iron and steel. **To sum up, the description, quantity and HSN indicated in any documents by the supplier may be helpful in determining the classification and assessing the duty but it does not estop either the importer or the proper officer in deciding the classification which must be based on the actual goods which were imported.**

16. We now proceed to examine the findings of the Commissioner in the impugned order. The Show Cause notice was based on:

- a) Offshore equipment supply contract dated 7.8.2010 between the assessee and Reliance Infra Projects.

- b) Purchase order dated 29.7.2011 for supply of pre-engineered power house building structures from M/s. Zhejiang
- c) Bills of Entry along with their commercial invoices, packing lists, bills of entry certificate of origin

17. Before issuing the SCN, a consultative letter dated 7.5.2012 was issued to the assessee requesting it to pay the differential duty and in its reply, the assessee declined stating that the goods imported by them under three Bills of Entry from Zhejiang were components of OT crane system which they imported in different consignments since they were very large. With respect to the goods imported under the other three Bills of Entry, they explained that they were part of the HRSG system for heat recovery. Thus, their stand was that the goods were declared correctly and appropriate amount of duty was paid.

18. The Commissioner asked the Deputy Commissioner for a report on the imported goods and he replied that the goods were no longer in the Customs area. The Commissioner had then formed a team of officers of the Special Intelligence and Investigation branch (SIIB) of the Commissionerate to examine the goods. They visited the assessee's premises and after inspection, reported that all the goods were actually installed in the plant. The assessee also submitted its defence in response to the SCN and also appeared personally before the Commissioner. The assessee submitted detailed designs and drawings of the OT Crane System and the HRSG system of its power plant and explained where each of the imported goods was in those drawings. These submissions were recorded in various sub-

paragraphs of paragraph 11 of the impugned order running into 17 pages.

19. In brief, the submissions of the assessee before the Commissioner were that they were installing a 2,400 MW Gas based power plant which has three modules of 800 MW each of which has two Gas Turbine Generators (GTG) and a Steam Generation Turbine (STG). The GTGs use Liquefied Natural Gas (LNG) to run the turbine and the exhaust generated in the process itself has still a lot of heat left which is used to generate steam which is used in the STG to generate power.

20. The part of the power plant which recovers this heat and uses it to generate steam is called the Heat Recovery Steam Generator System (HRSGS) and this steam is use to run the STG. The goods imported by them and cleared under the three Bills of Entry dated 29.09.2011, 17.11.2011 and 22.02.2012 were parts of the HRSGS. Various imported parts were explained as parts of Structural and auxiliary steel components, Casing and Gas ducts, Tube bundles, seismic bumpers, walkways for personnel operating the system and a gas stack (Chimney).

21. The goods imported from Zhejiang and cleared under the other three Bills of Entry dated 31.10.2011, 17.11.2011 and 15.02.2012 were explained as parts of Overhead Travelling Crane Systems and other components.

22. They also provided expert opinion of Shri RD Gupta, who had served for a long time in the power industry including in NTPC and a Certificate from the Chartered Engineer Shri Paresh K Chedda confirming all the parts that were imported were parts

and components of the power plant specifically designed for the purpose.

23. The Commissioner considered:

- a) The consultative letter sent by the Deputy Commissioner and the assessee’s reply;
- a) The SCN and its annexures including the Bills of Entry, Packing Lists, Invoices and certificates of origin
- b) The reply to the SCN submitted by the assessee
- c) The expert opinion and the Certificate of the Chartered Engineer certifying that the imported goods were parts of the power plant specifically designed for the purpose;
- d) The submissions made during the personal hearing;
- e) A clarificatory letter from the Zhejiang that they had supplied only specific, made to order components for the power plant and they had not supplied general purpose articles and that they had using their normal formats, applied for the Certificate of origin and prepared the invoices, etc. mentioning the HS code for general articles of iron and steel; and
- f) The detailed designs and drawings and explanation by the assessee as to where each of the parts fit into the systems.

24. After considering all the above, the Commissioner observed that there were six Bills of Entry as follows:

S.No.	Bill of Entry	Date	Description of goods	Classification claimed by the assessee	Classification proposed in the SCN
1	5051226	31.10.2011	Steel structures/PPBS	84068200	73089090
2	5218089	17.11.2011	Steel structures/PPBS	84068200	73089090
3	6011406	15.02.2011	Steel structures/PPBS	84068200	73089090
4	4789656	29.09.2011	Structural steel casings and gas	84068200	73089090

			ducks, stack		
5	5218734	17.11.2011	Tube bundles, lifting steel with slings and shackles	84068200	73089090
6	6070324	22.02.2012	Structural steel casings and gas ducks, stack, auxiliary steel walkways, seismic bumpers	84068200	73089090

25. Of the above, S.No.1 to 3 were explained by the assessee to be parts of OT crane systems and S.No. 4 to 6 were explained to be parts of Heat Recovery Steam Generation System (HRSGS). According to the SCN, these were merely articles of iron and steel. Based the drawings and designs submitted, the opinion of the expert, the certificate of the Chartered Engineer and the submissions by the assessee and the clarification provided by the supplier, the Commissioner held that the goods imported under Bills of Entry at S.No. 1 to 3 above were parts of the OT crane system designed for the purpose and the goods imported under Bills of Entry at S.No.4 to 6 above were parts of the HRSGS designed for the purpose and not general articles of iron and steel as alleged in the SCN.

26. She examined the relevant provisions of the Customs Tariff and observed that in terms of Rule 1 of the Rules of Interpretation, the Section and Chapter titles are only for ease of reference and classification has to be done as per the Tariff Headings and any Section and Chapter Notes. She found that Section Note 1 (f) of Section XV under which Chapter 72 falls, excludes articles of Section XVI. Thus, if goods are machinery or parts thereof falling under Section XVI, they cannot be classified under Chapter 72 or any other chapter under Section XV.

27. She further observed that Section Note 2 of Section XVI reads as follows:

1. Subject to note 1 to this section, note 1 to Chapter 84 and note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

(a) Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings.

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517, and parts which are suitable for use solely or principally with the goods of heading 8524 are to be classified in heading 8529;

(c) All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8487 or 8548.

28. Based on her finding that the goods were indeed parts of the OT Crane System and the HRSGS and were designed for the purpose and considering the above Rules of Interpretation and Section Notes, she held that since the imported goods were parts of the OT Crane System and the HRSGS which were part of the entire power plant, classified the imported goods under Chapter Heading 8406 as parts of the power plant. However, she made an exception to the goods described as 'structural steel, casing (gas ducts), stack, tube bundles, lifting steel with slings and shackles,

auxiliary steel walkways, seismic bumpers', which she found were structural items to make structures to support the boilers and not parts of the machinery and hence, she classified them under 73089090 of the Customs Tariff (as proposed in the SCN) and ordered recovery of differential duty along with interest and also imposed appropriate penalties.

29. Revenue's appeal is that the Commissioner should have classified all the goods and demanded duty as proposed in the SCN. The questions to be decided by us in this appeal are:

- a) Were the imported goods general articles of iron and steel or whether they were parts of the OT crane system and HRSGS specifically designed for the purpose?
- b) Should the imported goods (except the structural goods on which the demand has been confirmed in the impugned order) be classified as iron and steel classifiable under Customs tariff heading under 7308 as alleged in the SCN or as parts of the power plant as held in the impugned order?
- c) Consequently, was the Commissioner correct in dropping part of the demand, interest and penalty?

30. The impugned order was assailed on 37 grounds. For ease of convenience, we have grouped the 37 sub-paragraphs of paragraph 1 of the grounds of appeal and proceed to examine them.

31. In sub-paragraphs (i) to (v), the appeal is on the ground that from the agreements between the assessee, M/s. Reliance Infra projects, its OES supplier from Thailand, M/s. Zheijang, it is

evident that the supplier was legally bound to indicate product description, marks & Numbers, quantity, unit price, invoice value, gross & net weight, **HS Code**, details of packing, etc in the import documents such as commercial invoice, certificate of origin, packing list, etc at appropriate places. It has also been indicated with respect to some of the contracts, failure to mention the required details may result in cancellation of contracts or delays in payment. The submission of the Department, therefore, is that the HS Code mentioned in these documents should be accepted and goods should be classified under the corresponding Customs Tariff Heading.

32. We are unable to accept this proposition because what is mentioned in the contract, including the HS Code may be relevant to but not determinative of the classification of the goods. If on examination of the goods and the product literature, the goods are found to be more appropriately classifiable under a different Heading of Customs Tariff, there is no reason to stick to the HS Code mentioned in the documents of the overseas suppliers in contracts and other documents. As discussed above, classification is a part of assessment which should be done by the importer, the assessing officer or the adjudicating authority based on what goods were actually imported and how they deserve to be classified under the Customs Tariff. The binding nature of the contracts binds the parties and not the adjudicating authority who has to decide classification based on merits. If the Revenue's proposition is accepted and if it is held that the HS Code mentioned in the contracts and other documents by the overseas suppliers binds the assessing officer or an adjudicating authority,

it will open a Pandora's Box with disastrous consequences for the Revenue. By managing a pliant overseas supplier, any importer can change the classification of the goods which he imported to misclassify and evade duty. Further, identical goods imported by different importers will have to be classified differently depending on how their contracts and invoices classify them. The discretion of the adjudicating authority cannot be exercised by the overseas supplier nor can it be circumscribed by anything mentioned in the documents from such supplier.

33. In sub-paragraph (vi), it has been submitted that in the three Bills of Entry viz., 5051226 dated 31.10.2011, 5218089 dated 17.11.2011 and 6011406 dated 15.2.2012 the product was described in the Purchase Order as Pre-Engineered Power House Building Structures(PPBS) and the HS Code mentioned in the Country of Origin Certificate was 73089000 which shows that what was imported was not Parts of OT Crane System which were parts of Vapour Turbines and hence fall under 8406 as classified by the Commissioner. It has also been submitted (sub-paragraph vii) that the argument that there was an error on the part of the supplier in mentioning the HS Code while applying for the Certificate of Origin cannot be accepted as there was meeting of minds between the supplier and the assessee. It has further been submitted (sub-paragraph viii) that the website of Zhejiang, the supplier shows that they specialise in supplying pre-engineering industrial buildings. Relying on the case of **M/s Ranjita Agencies¹⁰**, it has been argued (sub-paragraph ix) that the evidence in invoice, packing lists, certificate of origin, etc. cannot

¹⁰ **2001(133) ELT 388 (Trib- Kol)**

be discounted unless otherwise, they are legally proved to be wrong. It has been submitted (sub-paragraph x) that in **M/s. Consolidated Coil Co. Pvt. Ltd**¹¹, the appellant had a prima facie case in their favour based US Customs Ruling of Coin Blanks under 7409. It has further been submitted (sub-paragraph xi) that merely because the parts which are imported under these Bills of Entry were subsequently used in setting up the OT crane system, they cannot be classified as part of the crane system since the goods must be classified as they are imported and not based on what use they are subsequently put to. Reliance was placed on **M/s. Dunlop India Ltd.**¹², **M/s. New India Industries Ltd.**¹³, **M/s. Shri Ram Refrigeration Industries Ltd.**¹⁴, **M/s. Carrier Aircon Ltd.**¹⁵, **M/s Netlon India Ltd.**¹⁶, **M/s. Tata Hydro Electric Power Supply**¹⁷, **Mukesh Kumar Agarwal &Co.**¹⁸, **M/s. Muller and Phipps (India) Ltd.**¹⁹, **M/s LE Industries**²⁰ and **Bharat Electronics Ltd.**²¹ (sub-paragraphs xiii to xviii) to assert that goods should be classified as they are imported and that they should be classified as they are understood in the trade. Reliance was also placed (sub-paragraph xii) on the product description in the documents between the supplier Reliance Infra projects and its original equipment supplier in Thailand to assert what were imported were individual articles of iron and steel.

¹¹ 2013 (287) ELT 221 (Trib-Del)

¹² 1983 (13) ELT 1566 (SC)

¹³ 1994(73) ELT 723 (Trib-LB)

¹⁴ 1993 (63) ELT 593 (Tribunal)

¹⁵ 2006 (199) ELT 577 (SC)

¹⁶ 2000 (121) ELT 675 (Trib)

¹⁷ 1996 (83) ELT 642 (Trib)

¹⁸ 2004 (178) ELT 3 (SC)

¹⁹ 2004 (167) ELT 374(SC)

²⁰ 2005 (180) ELT 409 (Tri- Mumbai)

²¹ 1996 (102) ELT 717 (Trib)

34. We agree that the goods should be classified as they were imported and not based on what use they are put to after import. A screw, for instance, will be a screw and will not become a component of a chair if it is subsequently used in making a chair. The submission of the department is that the supplier is, according to its website, engaged in supplying pre-engineering building structures and that the purchase order was for PPBS and that the certificate of origin, invoice and other documents mention HSN Heading meant for articles of iron and steel and therefore, the Commissioner should not have classified the goods as part of OT crane at all and what use the parts are put to after import is irrelevant. We find that the Commissioner has, in paragraphs 15 and 16 of the impugned order given reasons for holding what were imported were parts of an OT crane system. She examined the technical literature and drawings submitted by the assessee and gave a finding that each part that was imported was specifically designed, engineered and made to order for assembly of the OT crane system and they were not parts of general use. Relying on the Chapter Notes and Section Notes, she observed that Chapter 73 is only meant for articles of general use and parts of machinery cannot be classified as articles of iron under Chapter 73. The Committee of Chief Commissioners would have had access to all the files and records at the time of review. No error in the Commissioner's understanding or interpretation of the drawings and designs have been brought out. The case laws relied upon by the Revenue do not carry their case any further because, in this case, the Commissioner has examined the drawings and designs and gave a specific finding that the imported goods were

part of the OT crane system and therefore, the classification based on this finding must be upheld as **Revenue has produced no evidence to show that the imported goods were not parts of crane but were articles of general use apart from relying on the HSN and description given in the documents by the supplier.** The documents of the supplier cannot prevail over a specific finding by the adjudicating authority. It would have been a different case if Revenue could establish through some evidence that the Commissioner has not understood or interpreted the literature, drawings and designs correctly and that each of the pieces imported was not designed for the OT crane but that they are all articles of general use, etc. No such evidence has been put forth.

35. Relying on **Sony India Ltd.**²² and **PR Trivedi**²³, it has been submitted (sub-paragraphs xix and xx) that components imported under various Bills of Entry over a period of time cannot be clubbed together to hold that it is an incomplete article or an article in completely knocked down (CKD) condition. The case of **Larsen &Toubro Ltd.**²⁴ (sub-paragraphs xxi) in which Revenue's proposal to classify iron and steel towers manufactured and cleared as iron and steel structures was accepted on the ground that the remaining parts of the windmill were not manufactured or supplied by the same manufacturer was relied upon. It has been argued that even in this case, the importer has procured some other parts of the plant from other suppliers. **M/s. Promostyle**

²² **2002(143) ELT 411 (Tri-LB)**

²³ **2005 (19) ELT 801 (Tri-Mum)**

²⁴ **2009 (239) ELT 373 (Tri-Chennai)**

Exports²⁵ (sub-paragraph xxii) was relied upon to assert that contrary claims in the invoice and in the Bill of Entry is not permissible. **Joshi Steel Industries**²⁶ was relied upon to argue that while goods are to be classified according to the real nature of the goods, if the assessee seeks to dispute the description and classification in the documents, the burden is on the assessee to prove it. It has been submitted (sub-paragraph xxiii) that the classification **claimed by the importer and upheld by the Commissioner is 8406 8200 while the classification under the HSN indicated by the supplier Zhejiang was 73089000.** In the next sub- paragraph xxiv, a contrary submission has been made that **the Commissioner has held the goods to be classifiable under 8406 but has not given the sub-heading in the Customs Tariff.**

36. We have considered these submissions. It cannot be disputed that the goods should be classified as per their nature and as they are imported and that they cannot be clubbed with some other goods imported under other Bills of Entry to determine the classification. It also cannot be disputed that if the invoices describe or classify the goods differently, the assessee has to explain. In this case, the assessee discharged this burden by providing drawings and designs, explanation as to where each of the parts is used, an expert opinion that the goods were specifically designed for use in the plant and were not goods of general use, a Chartered Engineer's certificate to the same effect. After physical verification, the officers of SIIB have also confirmed that the imported goods were, in fact, installed as part of the

²⁵ **1997 (96) ELT 217 (SC)**

²⁶ **2004 (177) ELT 522 (Tri- Del)**

plant. Considering all these, the Commissioner found that the imported goods were parts of OT crane system and parts of HRSGS and except a few, they were not goods of general nature. Revenue has not put forth anything at all by way of evidence to prove the contrary or to show why the Commissioner's finding or the expert opinion or the Chartered Engineer's certificate is wrong. It is only based on the original documents of the supplier which were relied upon in the SCN and which were also considered by the Commissioner. Revenue's appeal can succeed if only the documents relied upon in the SCN are considered and everything else submitted in defence including expert opinions are ignored which is impermissible.

37. The scope of sub-headings and the Explanatory Notes in HSN and in the tariff with respect to the competing entries were reproduced (sub-paragraphs xxv to xxviii) and it is submitted (sub-paragraph xxix) that the description of the products were 'Steel structures' or 'Pre-engineered power house building structures (imported from China) with individual products being described such as structural steel, stack, casing, Gas ducts, tube bundles, lifting steel with slings and shackles, auxiliary steel, walkways, structural steel seismic bumpers, structural steel-sidewall baffles, columns, bottom beam and top beam, beam and bracket steel, pattern support beam, bolts and nuts, stair tower, ship loose, module casing, roof panel, inlet duct roof, inlet duct casing, stack lift, stack inlets, handrails for stack, ladder for stack, stack platform, grating for stack, false bottom, lifting frame, lifting beam, shackle and slings, rigging & handling bolts, handrails, etc. which are all articles of iron and steel and not articles of

machinery or mechanical appliances. The Commissioner has wrongly classified these parts as parts of Overhead Travelling (OT) crane system which in turn, is a part of vapour turbines falling under 8406. Similarly, it has been submitted that the Commissioner has wrongly classified the Heat Recovery Steam Generator System (HRSG) which in turn, forms an essential part of the vapour turbine systems under 8406. It has further been argued (sub-paragraph xxx) that the goods were imported individually and not as a part of Project Import and hence they should have been classified individually based on their nature and not as a part of the system.

38. We have considered these submissions. It is undisputed that the goods were imported individually and not as a Project Import. Goods required for completion of a project can, at the option of the importer, be imported as per the Project Import Regulations. If this option is chosen, all the goods imported under the project are classified under a common Customs Tariff Heading 98.01 and are assessed to a common rate of duty regardless of where each of the individual goods merit classification. The Commissioner has also not classified the imported goods under 98.01. Further, the submission of the Revenue is that the parts imported under each Bill of Entry must be classified wherever they merit classification and the parts cannot be seen as a part of the system and classified especially when they are imported under different Bills of Entry. According to the Revenue, all imported parts are articles of iron and steel and they are of general use and not parts of any machinery. The first ground of this assertion is that the parts described in the invoice do not show that they are parts of a

machine. This was the allegation in the SCN. The Commissioner, had, as required during the relevant period, sent a Consultative letter asking the assessee to clarify who submitted detailed literature and drawings and designs to demonstrate that all parts were designed specifically to be parts of the system. The Commissioner asked the Deputy Commissioner for a report. He replied stating that the goods were no longer in the Customs area and hence no verification was possible. Thereafter, she sent a team of officers from the Special Intelligence and Investigation (SIIB) of the Custom House who visited the importer's premises and confirmed that all parts were installed in the plant. The importer also submitted a clarification from its overseas supplier that the invoice, packing list, etc. were prepared and the certificate of origin sought by them classifying the products as per their general practice under HSN 7308. However, what were supplied were parts meant specifically for the plant. Relevant paragraphs of this clarificatory letter were reproduced in paragraph 16 of the impugned order. We find that the Revenue has not given any reasons as to why:

- a) The original documents by the supplier should be considered as sacrosanct but the clarification given by the same supplier in their letter should be ignored;
- b) The drawings and designs submitted by the assessee and considered by the Commissioner in concluding that the parts were specifically designed for the plant should be ignored;

c) Alternatively, the Commissioner's understanding or interpretation of the drawings and designs was incorrect and what is the correct way to interpret them;

39. The appellant has also not produced any alternative drawings or designs or any evidence to show that the parts in question were only parts of general use and not ones designed for the plant. In the absence of any evidence in the appeal, it is not possible to fault the Commissioner for considering the reply to the consultative letter, the drawings and designs and the clarifications provided by the supplier to conclude that the parts in question were parts designed for the plant and were not ordinary articles of iron and steel.

40. It has been submitted (sub-paragraph xxx) that the goods were not described as parts of vapour turbines and were not imported as Project imports to claim single classification. It has again been repeated (sub-paragraph xxxi) that the imported goods fall under 7308 90 as per HSN notes. It was submitted (sub-paragraph xxxii) that in **LML Ltd.**²⁷ Supreme Court held that the Explanatory Notes to HSN are a dependable guide to interpret Customs Tariff. Reliance was also placed on **Jagson International Ltd.**²⁸, (sub-paragraph xxxiii) to assert that HSN can be referred to while classifying the goods.

41. We have considered these submissions. We do not find either that the assessee claimed classification under the Project Imports or has the Commissioner classified the goods under 98.01 and so Project import is irrelevant to decide this appeal. It is

²⁷ **2010 (258) ELT 321 (SC)**

²⁸ **2006 (199) ELT 553 (Tri- Del)**

undisputed that HSN can be referred to while deciding the classification of the goods under the Customs Tariff because it is based on the HSN. But the HSN mentioned in the documents by the overseas supplier does not bind the adjudicating authority.

42. It is submitted (sub-paragraph xxxiv), relying on **Sony India Ltd.**²⁹, that Rule 2(a) of Rules of Interpretation of the Tariff (which states that components in disassembled condition is to be classified along with the finished good) applies only when all the components are presented at the same time for customs clearance and they can be put together by means of simple processes and not requiring complicated processes. It has also been submitted (sub-paragraph xxxv) that as per CBEC Circular no. 17/2013-Cus dated 11.4.2013, the steel columns for lamp posts are classifiable under 7308 as Steel Structures and not as parts of lamps or lamp fittings under 9405. Thus, the end use is irrelevant for classification of the goods. It was submitted (sub-paragraph xxxvi) that the goods that were imported were declared as Pre-Engineered Power House Building Structures and hence they should have been classified under 9406 0099 and not under 84068200 and that the Tribunal is competent to classify the goods under a heading not mentioned in the SCN. Reliance was placed on **Voltas India Ltd**³⁰. It was ultimately prayed that the impugned order may be set aside and the classification, demand of duty and interest and imposition of penalties as proposed in the SCN may be upheld.

²⁹ 2008(231) ELT 385 (SC)

³⁰ 1991) ELT 1997 (261) (SC)

43. We have considered these submissions. We find that the Commissioner has given her findings relying on Rule 1 (NOT RULE 2) of the General Rules of Interpretation, which states that classification shall be based on terms of the Tariff Headings and Section Notes and Chapter Notes and the titles of Sections and Chapters are for ease of reference only. She also referred to Section Note 1(f) to Section XV (under which Chapter 73 falls) which states that articles of Section XVI (machinery, mechanical appliances and electrical goods) are excluded from Section XV. She further relied on Section Note 2 of Section XVI, especially Note 2(b) which states that parts suitable for use solely or principally with a machine must be classified in the heading of the machine. General Rule of Interpretation 2(b), regarding which a submission is made, appears irrelevant to this case. The argument that end use of the articles is irrelevant for classification is correct for articles of general use but if the articles are designed for a particular end use, they should be classified accordingly. If nails are to be classified, what use they are put to after import is irrelevant. However, if one imports engines of automobiles (which are mainly made of iron and steel) and declares them as articles of iron and steel, they are not put to use as engines before clearance from the customs, but they will be so used in due course after clearance. They should be classified as parts of automobiles although they will be used as such parts much after the clearance and not as articles of iron and steel. What is important is to examine what are the imported goods intended to be. If they are articles of general use, they should be classified as such. If they are intended to be used in a particular way, they

should be classified as such. If one imports a pillow and uses it to smother someone to death, it will be a murder weapon in the case under the Indian Penal Code but can still not be classified as a weapon under the Customs Tariff. It continues to be an article of bedding because it is intended to be used as an article of bedding and not as a weapon. What is relevant to classification whether the goods are goods of general use or they are designed for a particular use.

44. To sum up,

- a) Goods should be classified as they are imported and not based on the use they are put to after import.
- b) If the imported goods were parts of machinery, they should be classified as such and if they are general articles of iron and steel, they should be classified as such.
- c) Revenue's case in this appeal is on the same evidence as was relied upon in the SCN. It does not take into account any of the submissions by the assessee before the Commissioner, the drawings and designs, the expert opinion and the Chartered Engineer's certificate.
- d) Revenue, has, in its appeal, not argued that the drawings and designs submitted by the assessee before the Commissioner were not correct or that they were not correctly understood and interpreted by the Commissioner and if so, how.
- e) Revenue's appeal has not provided any alternative drawings or designs or documents to counter what was submitted by the assessee.

- f) Revenue has not disputed the expert opinion or the Chartered Engineer's certificate both of which confirm that the imported goods were parts of the power plant specifically designed for the purpose and not articles of general use nor has the Revenue produced any contrary evidence or expert opinion.
- g) Revenue has not explained why the subsequent clarification by the supplier that the goods supplied were parts specifically designed for the power plant and not parts of general use and that it had committed an error in mentioning the wrong HSN in its documents such as invoice and packing list and also while applying for a certificate of origin should not be considered and only the supplier's original documents should be considered.
- h) Revenue's case is on the ground that the original documents of the suppliers mention the HSN corresponding to articles of general use and therefore, they cannot be called parts of machinery before Indian Customs in the Bills of Entry. It is also the case of Revenue that the goods should be classified as they are imported and not based on what use they were put to after their import. If the assessee wanted all the goods to be classified as a single unit, then they could have opted for Project Import Regulations and all the goods could have been classified under 98.01. We find the submission regarding project import is irrelevant because neither has the assessee claimed it nor has the Commissioner classified the goods under project imports.

- i) Revenue was correct in its submission that the imported goods should be classified as they are imported and not based on what use they were put to after import. If the imported goods were parts of machinery, they should be classified as such and if they are parts of general use, they should be classified likewise.
- j) After examining all the evidence on both sides, the Commissioner has found that structural steel items were items of general use and other goods were specifically designed for the power plant and classified them accordingly and confirmed part of the demand. Revenue has not produced any evidence to prove the contrary. Hence, the Commissioner was correct in her classification of the goods.
- k) Classification of imported goods is a part of assessment which power and responsibility is with importer, the proper officer or the adjudicating authority and not with the overseas supplier.
- l) The fact that a particular HSN was mentioned by the overseas supplier in the import documents is certainly a relevant factor in examining the case but the HSN mentioned by such supplier does not estop either the importer or the proper officer or the adjudicating authority from classifying the goods under any other heading. Otherwise, anyone can ask the supplier to indicate an incorrect but convenient HSN in the invoice and packing list and reduce the duty liability; different imports of identical goods may be sent by suppliers indicating different HSNs resulting in different classifications of identical goods. Thus,

if it is held that HSN in the supplier's documents binds the importer or the assessing officer or the adjudicating authority in classification of goods, as the Revenue seems to suggest, it can lead to absurd results with disastrous consequences for the Revenue itself.

m) Revenue's submission is also that General Rule of Interpretation 2(a) which states that an article in CKD/ SKD condition and an incomplete article should be classified as complete article is inapplicable to this case because the goods were not imported under the same Bill of Entry or consignment. Goods imported under various consignments cannot be grouped together to hold that they were together a machinery. There can be no dispute about this submission. In fact, the Commissioner has not classified based on this Rule of Interpretation at all. Her findings were based on the fact that expert opinions and the drawings and designs show that the imported goods were parts of the power plant and were specifically designed for that purpose and they deserve to be classified as such. There is no inconsistency in parts of a power plant being classified as such parts instead of parts of general use.

n) We are unable to accept the Revenue's contention that all the goods imported under the six Bills of Entry should be held to be parts of general use and classified as such and that the HSN indicated in the supplier's documents should determine the classification of the goods under the Customs Tariff as this contention is based on ignoring the defence submissions by the assessee before the Commissioner, the

expert opinion and the Chartered Engineer's certificate that they were parts specifically designed for the purpose, the clarificatory letter by the supplier also confirming that they were parts specifically designed for the purpose, the drawings and designs demonstrating how and where each of the imported parts fits into the design.

45. In view of the above, we answer the questions framed by us in paragraph 25 as follows:

- a) The imported goods, except the structural items on which the Commissioner confirmed the demand, were not general articles of iron and steel but were parts of the OT crane system and HRSGS specifically designed for the purpose.
- b) They were correctly classified by the Commissioner as parts of the power plant in the impugned order.
- c) Consequently, the Commissioner was correct in dropping part of the demand, interest and penalty.

41. The impugned order is, therefore, correct and proper and calls for no interference. The appeal filed by the Revenue is rejected.

(Order Pronounced on **31.01.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)