IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
ESTERN ZONAL BENCH: KOLKATA
REGIONAL BENCH – COURT NO.2

Customs Appeal No. 76332 of 2017

(Arising out of Order-in-Appeal No. Kol/Cus(A/P)/AA/395/2017 dated 18.04.2017 passed by Commissioner of Customs (Appeals), Kolkata.

Commissioner of Customs (Airport & Admn.), Kolkata.
Customs House, 15/1, Srand Road, Kolkata-700001.

..Appellant

VERSUS

M/s Bagree Enterprises,
City Kotwali Chhotapara, Raipur, Chhatisgarh-492001.

…**Respondent**

APPERANCE :
Shri M. P. Toppo, Authorized Representative for the Appellant
Shri Tarun Chatterjee, Advocate for the Respondent

CORAM:
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER No…75471/2022

DATE OF HEARING : 28.07.2022
DATE OF DECISION : 28.07.2022

Per Shri Sanjiv Srivastava :

This appeal is listed before us for re-consideration of the issue on remand by the Hon'ble High Court at Calcutta in Customs Appeal No. 59 of 2018 while remanding the matter, the Hon'ble High Court as follows:-………

"There is no doubt in our mind that the Commissioner of Customs (Appeals) has given very cogent reasons in his decision dated 18th April 2017 reversing the order in original and holding that the subject goods were accessories.

The goods in question are linear accelerator with IMRT for radiological use in the detection of cancerous turnovers. According to the Commissioner (Appeals), the imported goods with the descriptions Lot-1 upgrade to IGRT and Lot-2 upgrade to Rapid ARC were accessories which enhanced the efficiency of the linear accelerator. Hence, they were exibilble to a concessional rate of duty as opposed to the claim of the revenue tht they were "parts" of the linear accelerator with such benefit.

Aggrieved the revenue preferred an appeal before the tribunal. Before the tribunal the question of facts were not closed and it was expected that the impugned order of the Commissioner (Appeal) would be properly tested there, on facts also.

We observe that the tribunal in its impugned order dated 28th November 2017 has merely affirmed the order of the Commissioner of (Appeals) without any analysis whatsoever of facts. This was absolutely mandatory for consideration of the case of the parties.

In those circumstances, we admit the appeal by condoning the delay holding that there was sufficient cause for it and allow the application for condonation of delay (GA No. 2087 of 2018). The department is directed to register the appeal immediately.

We remand the matter back to the tribunal by setting aside its order dated 28th November 2017 and directing it to make a fresh pronouncement with reasons upon hearing the parties within three months from the date of communication of this order.

2. While disposing of the appeal filed by the revenue, the Tribunal vide order No. Mo/75439/SO/75440/FO/78313/2017 dated 28.11.2017 has as follows:

> "4. After hearing both sides and on perusal of record, it appears that the respondent has imported accessories. The Department was of the view that the value of the imported items has not been declared correctly. Accordingly, they demanded the duty. But the Commissioner (Appeals) observed that the imported items were fully and correctly declared in the bills of entry as pher the description of the items given in the commercial invoice. The name of imported items as "accessory" was mentioned. The same was covered as "Parts and Accessories of Medical Radiotherpy Equipment".
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> 5. From the above, it appears that the imported items were fully and correctly declared in the bills of entry and the Adjudicating Authority/ Department has not contradicted the description, value or any other material particular declared on the goods in the bill of entry. When it is so, then we find no reason to interfere with the impugned order. Accordingly, the impugned order is hereby upheld for the reasons mentioned therein."

3. On the basis of intelligence an investigation was under-taken by DRI, and a Show Cause Notice, was issued to wherein respondent was called to show cause as to why:-

> "(i) The concessional rate of BCD claimed under S. No. 474 (ii) of Notification No. 12/2012 Cus dated 17.03.2012 and 'Nil' rate of SAD claimed under S. No. 93 of Notification No. 21/2012-Cus dated 17.03.2012 for these good imported under the Bill of Entry mentioned in Annexure-A, should not be denied:
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> (ii) Basic duty of Customs (BCD) should not be changed @ 7.5% adv. Alongwith Education Cess, Secondary & Higher Secondary Education Cess and SAD at the applicable rates for the goods imported under the Bill of Entry, as detailed in Annexure-A.
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> (iii) Customs duties (BCD+ Education Cess + SAD as applicable) totally amounting to Rs.30,28,866/- (Rupees thirty lakh twenty eight thousand eight handred sixty six only), as detailed in Annexure-A, which has not been paid due to willful mis-statement, should not be demanded and recovered under the provisions of Section 28 of the Customs Act, 1962 alongwith interst as applicable on the aforesaid Customs duties, under the provisions of Section 28AA of the Customs Act, 1962, as prevalent during the material time.
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> (iv) The amount of Rs.26,00,000/- (Rupees twenty six lakh only), voluntarily paid by M/s Bagree Enterprise, during investigation, should not be appropriated towards the aforesaid Customs duties, interest and any other dues payable by them on their imports.
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> (v) goods of the declared CIF value of Rs.4,35,63,000/- (Rupees four crore thirty five lakh sixty three thousand only), as detailed in Annexure-A, should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.
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> (vi) Penalty under Section 112(a) or Section 114A of the Customs Act, 1062, should not be imposed on them for their willful acts and omissions, as discussed above."

4. This Show Cause Notice was adjudicated by the Assistant Commissioner of Customs confirming the demands in the Show Cause Notice by imposing of penalties on the appellant. On appeal, Ld. Commissioner (Appeals) vide the impugned order, set aside the order the Assistant Commissioner. Revenue filed the appeal before the Tribunal which was earlier decided as per the Final order indicated in para 2.

5. Revenue challenged this order before the Hon'ble High Court. As per order in para 1 remanded the matter for passing an speaking order Hon'ble

High Court have in its order stated that Commissioner (Appeals) has decided the appeal before him by:-

6. The matter has been remanded to us only for substanting the order passed by this Tribunal dismissing the appeal filed by the Revenue against the impugned order. The only issue for consideration is whether the goods imported are parts of the machinery or accessories to the machineries earlier imported.

7. Since the year 2010 a varian make Linear Accelerator with IMRT technology, (Linac). In 2012, it was decided, to upgrade the "LINAC" by installing additional two (2) other technologies, viz., IGRT [Image Guided Radiation Therapy] technology and Rapid ARC technology [also known as volumetric modulated Arc Therapy or VMAT, for short]. The Respondent, imported from M/s Varian Medical Systems International AG Switzerland various items in two (2) separate identifiable lots described in the commercial invoice no. 320585725-A dated 07.08.2012 as Lot I Upgrade to IGRT and Lot 2 Upgrade to Rapid Arc. The import goods were declared in Bill of Entry No. 7665281 dated 14.08.2012 with benefit of concessional duty under then prevalent Notification No. 12/2012-Cus dated 17.03.2012 [S. No. 474 (ii) and Notification No. 21/2012-Cus dated 17.03.2012 [S. No. 93] as "accessories" of 'medical linear accelerator, classifiable under Heading 9022.90 of CTA75 and allowed clearance for home consumption after physical examination and on satisfaction of the proper officer of customs about proper and correct declaration of import items made on the bill of entry and payment of correct and appropriate duty assessed thereon.

8. The fact no disputed is that the Linac was already operational with the above referred Dr. Bhimrao Ambedkar Memorial Hospital since the 2010 and the goods imported in 2012 wherein only to enhance the capabilities of the said machine already operational. Contention of Revenue is that the goods imported are nothing parts of the machine imported 2010 whereas contention of respondent is that these are accessories.

9. We find that Hon'ble Supreme Court has in case Mehra Bros. – Vs. Joint Commercial Tax Officer, 1991(51) E.L.T. 173 (S.C.) has held "accessories" to be adjuncts, accompaniments for enhancing functional capability, efficiency of the machine/equipment.

10. In the case of Commissioner of Central Excise, Delhi Vs. Insulation Electrical (P) Ltd., 2008(224)E.L.T. 512 (S.C.), Hon'ble Apex Court held a

"part" of machine/equipment to be the item/component that is indispensible for functioning of the machine/equipment, i.e., in absence of which the machine/equipment is non-operational. ..

11. From ratio of judgment as mentioned above, clear distinetion has been made between the parts and accessories. Applying the ratio, we find that as the Linac was already operational since 2010, the goods imported is 2012 were nothing other than accessories for that machinery as they enhanced the functional capabilities.

12. Having held that these goods were accessories to enhance the capabilities of functional machine, we find no merits in the appeal filed by the Revenue. Accordingly, the appeal is dismissed.

(Dictated and pronounced in the open court)

Sd/-
(Sanjiv Srivastava)
Member (Technical)

Sd/-
(P. Dinesha)
Member (Judicial)

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