IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75600 of 2015

(Arising out of Order-in-Appeal No.13/CUS(A)/GHY/15 dated 12.02.2015 passed by Commissioner, Customs & Central Excise (Appeals), Guwahati.)

M/s. G.M. Exports International
(Prop. G.M. Mostafa Kamal, College Nagar, P.O. Mankachar, Dist. Dhubri, Assam, Pin-783131.)

...Appellant

VERSUS

Commissioner of Customs (Preventive), North Eastern Regon, Shillong

.....Respondent

('Custom House', 110, Mahatma Gandhi Road, Shillong, Meghalaya, Pin-793001.)

APPEARANCE

Ms. Chandreyee Alam, Advocate for the Appellant (s)
Shri S.Debnath, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 75307/2024

DATE OF HEARING : 15 February 2024
DATE OF DECISION : 15 February 2024

Per : RAJEEV TANDON :

The appellant has imported six consignments of Dried Garlic falling under CTH 07129040 from Bangladesh during the period November 2011. The appellant is aggrieved by the order of the lower authority holding that the imported Garlic were not dried Garlic and that the goods were mis-declared as Dried Garlic. The Order-in-Original passed by the adjudicating authority confirms a demand of Rs.11,50,776/- besides imposing equivalent amount of penalty under Section 114A of the Customs Act apart from other penalties invoked on the importer under Section 112A and Section 114AA of the Customs Act, 1962.

2. It is submitted by the appellant in the present appeal that at the time of importation, the authorities had physically verified the consignments as Dried Garlic and due endorsement thereto was made on the Bills of Entry. They submit that at the time of imports as the impugned goods had originated in Bangladesh, a SAFTA country, they had sought benefit of Customs Notification No.99/2011 dated 09.11.2011 (duty exemption for import from SAFTA countries) and that they had declared the impugned goods as Dried Garlic and free from quarantine pests. It is not disputed that the test reports, sent by the Department, drawn from one of the Bills of Entry (No.105 MGH/1112 dated 17.12.2011) and sent to Plant Quarantine Station, Guwahati had confirmed that "received Garlic (small size Bulbs - sample under Bill of Entry No. 105 MGH/1112 dated 17.12.2011 and imported from Bangladesh), was examined and found to be in good condition and free from all pathogens. The goods were subsequently also sent by the department to the Referral Food Laboratory, Kolkata and were described as "Dried Garlic". The said report pointed out that the samples were received on 30.04.2012 and analyzed on 02.05.2012 and completed analysis on 05.05.2012. The said test report certified absence of (i) off odour, mustiness, fermentation and rancidity; (ii) mould, living/dead insect, insect fragments and rodent contamination; (c) stalks, peels, stems and extraneous matter.

3. The department disputed the contention of the appellant about the nature of imported goods as Dried Garlic essentially on the basis of pointing out in para 1.2 of the Show Cause Notice that the Assistant Plant Quarantine, Guwahati, who collected samples of similar garlic imported under Bill of Entry No. 105 MGH/1112 dated 17.12.2011 through Mahendraganj LCS stated that he had collected sample of fresh vegetable garlic and as per report dated 26.12.2011 of the Regional Plant Quarantine Station, Kolkata they have tested "Garlic Bulb". It was therefore the contention of the department that Garlic Bulbs – fresh or

chilled is classifiable under CTH 07032000 and attracting BCD @ 100%, Education Cess @ 2% and Secondary and Higher Education Cess @ 1%. The appellants were therefore alleged to having contravened the various provisions of the Customs statute as well as the provisions of Destructive Insects and Pests Act, 1914, PFS Order, 1989 and Plant Quarantine (Regulation of Import Into India) Order 2003.

4. We have heard the appellant as well as the learned Authorized Representative Shri S. Debnath in the matter. While the appellants have specifically contemplated that as per the requirement 10% of the gunny bags containing imported goods were physically checked by the Customs officers of the LCS, as per norms, and that they had found the goods to be Garlic (dried) and confirmed to the specification as per the commercial invoices. The goods were also got examined by the authorities under Destructive Insects and Pests Act, 1914 and no wrongdoing on the part of the importer was pointed out i.e. to say the goods confirmed with the Plant Quarantine (Regulation of Import into India) Order, 2003. The mere fact of the said report by the Plant Quarantine authorities indicating the examination of the goods as Garlic Bulb or an hearsay evidence of collection of samples of a third import at Maharajganj LCS, said to be of fresh Garlic, led the department to the conclusion that the imported goods were mis-declared and appropriate duty was not paid thereon. They submit that contrary to the department's allegations, the word "Garlic Bulbs" in combination does not occur anywhere in sub-heading 07032000. They emphatically assert that the said sub-heading is for "Garlic" while the declared sub-heading 07129040 is for "Dried Garlic". They also submit that as the term "Dry Garlic" is not explained in the Customs Tariff Act, 1975, mention was made of EU Quality Standards for Fresh Fruits and Vegetables. Definition of produce have been mentioned under the "Common Quality Standard for Garlic Regulation" 228897 vide which certain definitions have been mentioned regarding dried garlic, semi dried garlic and green garlic. The same is reproduced below:-

"This standard applies to garlic of varieties (cultivars) grown from Allium Sativum L. to be supplied fresh (1), semi-dry (2) or dry (3) to the consumer, green garlic with full leaves and undeveloped cloves and garlic for industrial processing being excluded.

(1) 'Fresh garlic' means produce with a 'green' stem and with the outer skin of the bulb still fresh.

(2) 'Semi-dry-garlic' means produce with the stem and the outer skin of the bulb not completely dry.

(3) 'Dry garlic' means produce in which the stem, the outer skin of the bulb and the skin surrounding each clove are complete dry".

5. The Ld.Authorized Representative for the department however supports the adjudication and the order appealed and submits that the goods were mis-declared and the appellants were rightly subjected to short levy and penal consequences.

6. Having heard the rival contentions and perused the documentary evidence on record, we note that there is no mis-declaration on the part of the appellant and if at all there was any breach it was a technical breach of importing the goods through LCS not listed in Schedule 1 of the Plant Quarantine (Regulation of Import into India) Order 2003. However, we find that the department has never objected on this score. The department of its own freewill and accord has not drawn any samples of the goods imported in these different consignments. However, it is a fact that all these imports were part of a single contract and a single letter of credit executed with the exporter of the country of origin. Be as it may, the department only at the time of last imports (out of six) chose to have the matter examined by the Plant Quarantine Authorities, which report undisputedly was not in contravention or violation of the statutory provisions. The terminology deployed by the Plant Quarantine authorities cannot be determinative test to impute any mis-declaration on the part of the appellants. Moreover, we note that the test report has emanated almost after a gap of five months and has therefore chosen to disregard the findings under the presumption *"I therefore hold that a Garlic Bulb can become*

dry during this period". The delay in such test reporting certainly cannot be attributed to any omission or commission of delinquency on the part of the appellant. We also note that the Ld.Appellate Authority has not elaborated as to the grounds on which the said authority was of the view that the Garlic under import was not dried and has perhaps blindly accepted the Adjudicating authority's logic that "Garlic Bulb" is synonymous with "Raw Garlic". Apart from the above we also note that the appellants had placed before the authorities the following:-

(1) Commercial invoices issued by the exporter.

(2) Physiosanitary Certificates issued by Quarantine Entomologist, Plant Protec Wing, Government of P.R. of Bangladesh, Dhaka and

(3) A Certificate subscribed by the Customs officer on the Bills of Entry as well.

7. All these evidences have been simply ignored without even a thought. Furthermore, a 'Bulb' is understood in local parlance as a short stem with fresh leaves or leaf bases that function as food storage organs during dormancy. It is very well known that Garlic, an agricultural produce, occurs as a bulb. Upon drying it loses moisture content to a large extent, but retains its shape as a bulb. Therefore, the mention of the term "Garlic Bulb" cannot be considered as determinative of the fact of it being dry or not. For which, if at all it was imperative for the department to get the water contents verified as they sought to dispute the classification declared and re-classified the product under heading 7032000. For this failure on the part of the department the assessee/importer/appellant cannot in any way be held responsible.

8. The DGFT VIDE Policy Circular No.32(RE-99)/2000 dated 17th September, 1999 have clarified that "Dried Garlic" classified under EXIM code No.071290.04 of ITC (HS) Classification, would be treated as Dried Garlic provided the moisture content thereof does not exceed 10% irrespective of the method of drying. Neither in the impugned SCN nor in the OIO, there was any mention that water content of the samples taken exceeded 10%. Therefore, view taken by both the

adjudicating authority (in the OIO) and the Commissioner(Appeals) regarding classification of the garlic is unfounded and without a basis.

9. The appellant in support of their contention as to the nature of the product has relied on the following decisions:-

(a) J.B. Impex Vs. Commissioner of Customs, Nhava Sheva – **2001 (134) ELT 0210 (Tri.-Mumbai) –** *"Thus if the subject vegetable is known and understood in commercial parlance as a dried vegetable, it would not be fresh vegetable classifiable under 0703.20. Even though garlic is specifically mentioned under 0703, by reading the heading notes of the HSN under 0703, and 0712, it would be apparent that when the item is not understood as green garlic or/and fresh garlic it is treated as dried garlic then it will not be classified under 0703 but would be classified under 0712."* [Upheld by the Supreme Court vide **2007 (217) ELT 163 (SC) =** Commissioner of Customs, Mumbai v. Ashish Bajpai – **2007-TIOL-194-SC-EXIM**]

(b) Raisoni Exports (India) Pvt.Ltd. vs. Commisioner of Customs, Nheva Sheva – **2011-TIL-351-CESTAT-MUM –** *"The garlic was imported from Pakistan and was declared to be dried garlic for the purpose of clearance under OGL. Fresh garlic was not freely importable unlike dried garlic. The department, however, did not choose to get any sample tested for its moisture content ………………………. The Commissioner's order does not disclose any reliable alternative examination of the goods. No copy of the Bill of Entry with any examination report is available on record. In these circumstances, we do not think that the adjudicating authority was right in rejecting the declared description of the goods. Where the determination of the moisture content was imperative in the context of ascertaining whether the garlic imported by the appellant was fresh or dried, it was open to the customs authorities to get a sample tested for its moisture content. Having not done so, they are not justified in rejecting the declared description of the goods."*

10. As for this eligibility to exemption Notification referred supra seeking concessional rate of duty for import of the impugned goods from the People's Republic of Bangladesh, we find that the dispute on this score is completely arbitrary and baseless. It has nowhere been disputed that the goods did not originate and have been imported from

Bangladesh. The importer has submitted necessary Government certification as referred above in support of his contention. The impugned goods are squarely covered in terms of Notification No.99/2011 dated 09.11.2011 and therefore exemption from payment of duty is admissible to the appellants in terms of the said Notification. Under the circumstances, no case can be made out for imposition of any of the penalties on the appellant as indicated above. The order of the lower authorities is therefore liable to be set aside and we dismiss the same allowing the appeal filed by the appellant with consequential relief, if any, as per law.

(Operative part of the order was pronounced in the open Court.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(RAJEEV TANDON)
MEMBER (TECHNICAL)

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