IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. C/125/2010

(Arising out of Order-in-Original No. 158/2009 CC(I) JNCH dated 22.10.2009 passed by Commissioner of Customs (I), JNCH, Sheva)

Trimurthy Enterprises **Appellant**

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**

Appearance:

None for appellant
Ms. Trupti Chavan, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 9.4.2018
Date of Decision: 8.6.2018

ORDER No. **A/86740/2018**

Per: Raju

This appeal has been filed by M/s. Trimurthy Enterprises.

2. No one appeared for the appellant. Revenue was heard and order was reserved. However, on 12th April 2018, written submission was filed by the appellant. In the written submission, it has been argued that the matter was earlier remanded by the Tribunal vide order

dated 1.7.2005 for grant of personal hearing and for observing principles of natural justice as the earlier order was passed without grant of personal hearing and without any written representation from the appellant.

2.1 It has been argued in the written submission that the impugned order has been passed without giving them a copy of the test report of the samples drawn from the imported goods and without granting them cross examination. It has been argued that on numerous occasions (six times from 27.9.2005 to 16.8.2007), the appellant represented to the adjudicating authority for test report, relied upon documents and cross examination. However, the same was not granted.

3. The case of the Revenue is that the appellant sought clearance of 50 MT of secondary/defective CRCA sheets declaring a price of US$ 275/MT. It was alleged that the goods imported were secondary/defective CRGO electrical sheets, the value of which is much higher. The representative sample of the goods was drawn. The premises of the appellant were searched and certain documents and correspondence were recovered. The said correspondence included correspondence with the foreign supplier wherein the appellant had asked the overseas supplier to describe

from the containers of CRGO corrugated sheets as defective/secondary CRCA sheets at US$ 275/MT CIF with further request/direction that the overseas supplier should try to amend their old Bill of Lading and manifest as per new description of the material. In his statement dated 26.6.1997 and 27.6.1997, Shri Ashwini Kumar Mishra, partner of the appellant firm, admitted that this was shown with a view to undervalue the goods and that the value of defective/secondary CRGO sheets was in the range of US$ 485 to 580/MT whereas that of secondary/defective CRCA sheets was US$ 275/MT. He also admitted that in November/December 1995, he had handed over US$ 7,500/- in cash to Shri Balbinder Kaur Greval, a resident of UK, to facilitate payment to M/s. Gold Arrow Business Services, the foreign supplier, to adjust the differences between the declared price and the actual value of the goods. He also admitted to have remitted a sum of US$ 20,000/- and UK Pounds 3,000/- to M/s. Gold Arrow Business Services for making adjustment in the difference. Shri Ashwini Kumar Mishra was arrested and released on furnishing surety of Rs.3,000/- and to furnish bail till 11.7.1997. Further statement of Shri Ashwini Mishra was also recorded on 4.7.1997 and 28.7.1997. Shri Mishra filed a retraction affidavit on 5.7.1997 wherein he denied the statements dated 26.6.1997 and 4.7.1997 on the grounds that the same were recorded forcibly. He also denied any payment through illegal channels in India or out of India in any currency. The said retraction was rebutted by Revenue as an afterthought as the statements were recorded in his own handwriting and were voluntary. Shri Ashwini Mishra vide letter dated 30.7.1997 addressed to Commissioner of Customs, withdrew his earlier letter with regrets and pleaded finalization of the case by adjudication. It was further found that the goods for which the appellant had filed Bill of Entry No.859 dated 10.4.1997 seeking clearance by declaring them as defective/secondary CRCA sheets were originally consigned to M/s. Ayan Industries, Thane and were described as “seconds/defective CRGO electrical (silicon) steel sheets”. The importer’s name and description were amended subsequently on 11.4.1997 by the request made by the steamer agent. Statement of Shri Mohammed Ali, partner of M/s. Ayan Industries was recorded wherein he admitted that he had negotiated with the suppliers of M/s. Gold Arrow Business Services Ltd. for supply of secondary/defective CRGO electrical sheets at US$ 715/MT, but they did not retire the import documents from the bank because of unfavourable market condition and therefore did not file any Bill of Entry. The enquiries were made from

Bombay Mercantile Co-op. Bank Ltd. who were the bankers handling the import documents produced vide letter dated 1.12.1997 copies of the import documents viz. commercial invoice, Bill of Lading, certificate of origin, certificate of insurance, analysis certificate etc. The Bank confirmed that the said documents were returned unpaid as per drawer's banks instructions on 14.2.1997. Moreover, enquiries from the bankers of the appellant i.e. Punjab and Sind Bank, confirmed regarding issuance of travellers' cheque to Shri Ashwini Mishra amounting to US$ 9,200/- in October 1995 and US$ 10,000/- in May 1997. The demand was confirmed by the Commissioner and penalty was imposed. When the matter was agitated in Tribunal, the said order was set aside and the matter was remanded on the ground of failure of natural justice inasmuch as the relied upon documents were not given.

4. In remand proceedings, the matter was adjudicated. The relied upon documents were given on 27.11.2005. Non relied upon documents were not given. Similarly, test report and surveyor report were not given. Request to conduct test/inspection by the appellant was also not granted.

5. It has been argued by the appellant that the direction of the Tribunal has not been followed as the

test reports were not given and cross examination was not allowed. It has been argued that the statement of Shri Ashwini Mishra cannot be relied upon as the same was retracted immediately.

5.1 It has been argued that M/s. Ayan Industries had placed order on M/s. Gold Arrow Services Ltd., UK, for import of CRGO silicon steel sheet at US$ 715/MT. However, the supplier had wrongly sent defective/secondary CRCA sheets and therefore M/s. Ayan Industries refused to accept the said consignment. Consequently, the supplier corrected the export documents with actual description of the goods and the price. It has been argued that in these circumstances, the value and description declared was correct.

5.2 It has been further argued that the adjudicating authority has discarded the direction of CESTAT in its remand order dated 28.6.2005 by not allowing cross examination, test reports of samples drawn.

6. Learned AR relies on the impugned order.

7. We have gone through the rival submissions. A perusal of the show cause notice shows that no reliance has been placed on the test report. While it is mentioned that samples were drawn, but there is no mention of any testing done and test report obtained.

Revenue has essentially relied on the documents recovered from the appellant's premises and the Bank. Revenue has also relied on the statement of the importer and Shri Mohammed Ali of M/s. Ayan Industries who had stated that the goods originally ordered by them were secondary/defective CRGO sheets. Shri Mohammed Ali had also admitted that the goods were not cleared on account of market conditions. The case of the appellant is that the test report has not been supplied to them. However, when test report not a relied upon document if supplied or not supplied becomes immaterial. Revenue has not relied on the test report for establishing its case.

8. The documents recovered from Bombay Mercantile Bank show that the goods originally consigned were secondary/defective CRGO (silicon) steel sheets at US$ 715/MT CIF. The same goods were diverted to the importer. From the importer's premises, correspondence was obtained wherein the appellant had asked the foreign supplier to amend the description in the Bill of Lading and other documents to secondary/defective CRCA sheets at US$ 275/MT. The appellant has sought to explain this by stating that the foreign supplier had committed a mistake while supplying the goods to M/s. Ayan Industries and that is

the reason why M/s. Ayan Industries refused to take the goods. It has been argued that the goods originally ordered were secondary/defective CRGO electrical silicon sheets, but by mistake, the foreign supplier had supplied secondary/defective CRCA sheets and consequently M/s. Ayan Industries had refused to take the consignment. We do not find any evidence to support this contention. Shri Mohammed Ali had clearly stated that he refused to take the consignment on account of market conditions and not on account of mistake on the part of the supplier. We also find that the appellant had admitted in the statement that they had deliberately done this to undervalue the goods. The appellant has claimed that the statement of Shri Ashwini Mishra was retracted, but the impugned order clearly records that the said retraction was also retracted later on. Moreover, Shri Ashwini Kumar Mishra was arrested and produced before the Magistrate on 28.6.1997. By that time the statement dated 26.6.1997 and 27.6.1997 were already recorded. If he wanted to retract, he could have retracted before the Magistrate. In these circumstances, the retraction affidavit dated 5.7.1997 is clearly an afterthought. In any case the said retraction was retracted by Shri A.K. Mishra vide letter dated 30.7.1997. In these circumstances, we find that sufficient evidence has been produced by Revenue to establish that the goods were indeed misdeclared by the appellant with intention to evade customs duty. Consequently the appellant is liable to pay duty, interest and also liable for imposition of penalty. The appeal is therefore dismissed.

(Pronounced in court on 8.6.2018)

(Ramesh Nair) **Member (Judicial)**	**(Raju)** **Member (Technical)**

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