IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NOS: C/86431 & 86432/2018

[Arising out of Order-in-Original No: 212/2017-18 dated 25th January 2018 passed by the Principal Commissioner of Customs (General), Mumbai.]

Vishnu Agarwal
Technical Associates Ltd … ***Appellants***

versus

Commissioner of Customs (General)
Mumbai – I ***…Respondent***

Appearance:

Shri BR Tripathi, Advocate for appellants

Shri Ahibaran, Additional Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 06/06/2018
Date of decision: 24/08/2018

ORDER NO: A/87134-87135/2018

Per: C J Mathew

The dispute in this challenge to order-in-original no. 212/2017-18 dated 25th January 2018 of Principal Commissioner of Customs (G), New Customs House, Mumbai is the differential duty of

₹27,98,452 ordered to be recovered on two consignments imported by appellant, M/s Technical Associates Ltd and other consequential detriments imposed under Customs Act, 1962. The matter had been carried to the Tribunal on an earlier occasion and had been remanded to enable the noticees to be heard afresh after setting aside the order issued *ex parte*.

2. The differential duty arose from the finding in the impugned order that the appellant had attempted to pass off 'secondary/defective cold rolled grain oriented steel sheet coils' as 'prime cold rolled grain oriented steel sheet coils' and thus claimed ineligible concessional rate of import duty prescribed in notification no. 21/2002-Cus dated 1st March 2002. Appellant is a manufacturer of 'electrical transformers' and the 'cold rolled grain oriented steel sheet coils' are cut into laminates which are bound together with copper wire before being placed in the metal casing. Sheets in coils are imported from various suppliers and the two consignments were allegedly those of M/s AK Steels USA procured through M/s Bralco (Asia) Ltd, Malaysia.

3. One consignment of 95.249 metric tons, valued at US$ 314,321.70 against bill of entry no. 306497/9.8.2005, was subjected to examination at the time of import and seized, but subsequently released provisionally and upon provisional assessment. Another 16

nos. 'cold rolled grain oriented steel sheet coils' weighing 43.139 metric tons, valued at ₹ 61,26,674 and admittedly imported against bill of entry no. 899253/23.6.2005 for a total of 24 nos. coils, was found without primary packing at the factory of the appellant at Lucknow and was also seized; the remaining 8 nos. were consumed in the manufacturing process and was not available.

4. The thrust of the contention of Learned Counsel for appellant, while reiterating the grounds of appeal, was that they had always been particular about declaration of secondary material in the past without any need to misrepresent the present consignments, that chemical composition and electrical properties determine the character of the goods as prime or otherwise, that the value of prime goods is substantially higher than secondary and such overvaluation did not make for concomitant gain for the importer, that inexpert visual inspection has been relied upon to conclude that these goods are secondary, that the statements recorded during the investigations had been misconstrued as admission of misrepresentation by the adjudicating authority and that request of importer for drawal of samples and testing had not been acceded to.

5. Learned Authorised Representative urged upholding of the impugned order in view of the admissions made by various persons, including the customs house agent, in statements recorded during the

course of investigations. This, according to him, was sufficient in view of the decision of the Hon'ble Supreme Court in *Surjeet Singh Chhabra v. Union of India [1997 (89) ELT 646 (SC)]* and of the Hon'ble High Court of Bombay in *Vinod Solanki v. Union of India [2008 (228) ELT 17 (Bom)]*. It was also pointed out that the Hon'ble Supreme Court has held in *Commissioner of Central Excise, Madras v. Systems & Components Pvt Ltd [2004 (165) ELT 136 (SC)]* that an admitted position of an assessee does not have to be proved by Revenue thereafter. To counter the ground that goods should not have been confiscated, he placed reliance on the decision of the Hon'ble Supreme Court in *Weston Components Ltd v. Commissioner of Customs, New Delhi [2000 (115) ELT 278 (SC)]* and of the Hon'ble High Court of Madras in *Dadha Pharma Private Ltd v. Secretary to Govt of India [2000 (126) ELT 535 (Mad)]*.

6. It would appear from the impugned order that the adjudicating authority has ventured to convince himself that there was a misdeclaration on the part of the importer; we are unable to assign a fitter description to the findings. The claim of the importer for testing to validate the visual examination by amateurs appears to have been studiously avoided. Instead, the provisions of Customs Act, 1962 pertaining to relevancy of statements and presumptions in relation to documents in section 138B and section 139 of Customs Act, 1962 have been overly relied upon. The reference to various decisions,

reiterated in the arguments of Learned Counsel, appropriate to the specific circumstances of those disputes would also draw attention to the inept handling of facts that should have been the foundation for denial of the concessional rate of duty.

7. That the imported goods are classifiable under heading 72251100 of the First Schedule to Customs Tariff Act, 1975 is not in dispute; it is merely the appropriateness of the assertion that these are 'secondary/defective' that is and that dispute revolves around the denial of the benefit of notification no. 21/2002-Cus dated 1st March 2002. The distinction between the prime and secondary is not defined in the notification. In such situations, it should be the common trade parlance that should enable distinguishment and we note that neither the show cause notice nor the adjudication order have even glanced in that direction. It is evident from standing order no. 62/2009 dated 21st December 2009 of Commissioner of Customs (Import), JNCH, Nhava Sheva, cited by Learned Counsel, that the determination as prime and secondary is not amenable to an easy resolution; on the contrary, the necessity of expert analysis is the pith of that instruction. Moreover, the standing order is premised on the advantage to be derived by an importer from such misdescription.

8. The appellant has laid particular emphasis on the lack of a test report; we are also deprived of the expert opinion that, admittedly, has

been acknowledged in the cited standing order. We are, consequently, compelled to refer to facts and circumstances of the import to arrive at our conclusions.

9. It is apparent from the history of imports made by the appellant, and from the contents of the standing instruction, that there is a substantial variation in the prices of prime and secondary/defective coils. Transformers are undeniably critical to the power transmission and distribution sector and the laminates manufactured from the coiled steel sheets are at the core of the transformer; its physical and chemical properties are crucial to its efficiency and therefore, to its price. Visual examination and photographic display will not suffice as acceptable substitutes.

10. It is axiomatic that recovery of, or assessment to, duty are predicated upon the rate of duty and value or quantity, as the case may be; in the present instance, it is value that matters. The distinction between prime, stock lot and secondary/defective is also reflected in the prices. A presumption of upgraded misdeclaration also carries with it the appropriateness of the declared value. No case has been made out by Revenue that the goods were underinvoiced against the benchmark of prices of prime steel sheet coils as to warrant a suspicion of such upgraded declaration. Empirically, and from the contents of the notice, it would appear that the declared value is

appropriate to prime goods. For a legally valid assessment of duty, there can be no escapement from a downward revision in the assessable value of the imported goods. That is the inevitable consequence of misdeclaration and consequent rejection of declared value. Revenue cannot have its cake and eat it too. If the goods are secondary, the constitutional provision mandating the collection of tax chartered by law, cannot be ignored to maximise revenue. To do so is illegal. To affirm so is to abet disregard of the rule of law. The adjudication order is tainted by this lack of validity.

11. The appellant has, time and again, drawn attention to the absence of gain in such misdeclaration. The gap between the rates of duty is far outweighed by the gap in prices between prime and secondary. Reason would have us reject the contention of Revenue that the appellant was motivated by venality to indulge in the alleged contravention. As the authors of novels set in the wild west of America would have their character say ‘there ain’t no percentage’, we too are, unable to see any percentage in the alleged misdescription on the part of the importer and the impugned order fails to provide any enlightenment.

12. The facts are not established and the machinery provisions of law cannot subordinate the charging provisions of the statute. There is no material evidence to sustain the allegation of misdescription and

statements, in the absence of facts and circumstances, fail the test of law.

13. Accordingly, we find that impugned order is not sustainable in law. Setting it aside, we allow the appeals.

(Pronounced in Court on 24/08/2018)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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