CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. C/94/2011

(Arising out of Order-in-Original F. No. CC/MJ/24/2010 Adj. ACC dated 24.11.2010 passed by Commissioner of Customs (Imports), Mumbai-I)

Efkon India Pvt. Ltd. **Appellant**
701, Tower B, HCC 247 Park,
Hincon House,
LBS Marg, Vidhroli (W),
Mumbai 400 083.

Vs.

Commissioner of Customs (ACC & Imp) Mumbai **Respondent**
Air Cargo Complex, Sahar,
Andheri (E),
Mumbai 400 099.

WITH

Appeal No. C/129/2011

(Arising out of Order-in-Original F. No. CC/MJ/24/2010 Adj. ACC dated 24.11.2010 passed by Commissioner of Customs (Imports), Mumbai-I)

Commissioner of Customs (ACC & Imp) Mumbai **Appellant**
Air Cargo Complex, Sahar,
Andheri (E),
Mumbai 400 099.

Vs.

Efkon India Pvt. Ltd. **Respondent**
701, Tower B, HCC 247 Park,
Hincon House,
LBS Marg, Vidhroli (W),
Mumbai 400 083.

Appearance:

Shri P. Patankar, Consultant for the Appellant-Assessee
Ms. Trupti Chavan, Authorised Representative for the Respondent-Revenue

CORAM:

Hon’ble Dr. D.M. Misra, Member (Judicial)
Hon’ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/85786-85787/2019

Date of Hearing: 22.01.2019
Date of Decision: 22.01.2019

PER: SANJIV SRIVASTAVA

These two appeals under consideration have been filed by the revenue and the importer against the order in original No CC/MJ/24/2010 ADJ ACC dated 24.11.2010 of Commissioner Custom (Import) Air Cargo Complex Mumbai. By the said order Commissioner held as follows:

"(a) The classification of the goods is decided as 85176290 under Customs Tariff and Excise Tariff and duties payable without benefit of Notification 6/2006-CE (S No 28). The protest lodged by the importer at the time of clearance of the goods is decided accordingly.

(b) I order for the confiscation of goods under section 111(m) of the Customs Act, 1962. However, I give an option to redeem the goods on payment Redemption fine of Rs 15,00,000/- (Rupees Fifteen Lakhs only) under section 125 (1) of the Customs Act, 1962. The importer shall, in addition be liable to pay the applicable duty.

(c) I impose a penalty of Rs 5,00,000/- (Rupees Five Lakhs Only) on the importer under section 112(a) of the Customs Act, 1962."

2.1 Importer had filed Bill of Entry No 768445 dated 12.10. 2010 for clearance of goods declared as "Mobile Phone" and claimed classification under CTH No 85171290, and claimed the benefit of Notification No 06/2006-CE (Sr No 28). The declared value of consignment was Rs 1,35,69,442/-.

2.2 On examination it was found that the goods were not mobile phones as there was no voice communication through these devices. Importer had vide letter dated 21.10.2010 given technical specifications of the imported goods, wherein it was specifically mentioned that "Features like telephony, VIOP were not available with this device. In view of description of the said goods as "Wireless Data Device" in the manual, the said goods merited classification under CTH 85176290 with effective rate of duty @ 0% (BCD) +10% (CVD) +4% (SAD) leviable. This classification is further supported by the fact these devices is purely used for industrial usage like ticketing, billing collection etc and only GPRS communication is possible using the customized software.

2.3 Thus the goods were wrongly declared as "Mobile Phone" instead of "Data Transfer Device" as described in the user manual.

2.4 Importer vide his letter dated 22.10.2010 admitted the classification of goods under CTH 85176290. However they paid the duty under protest.

2.5 Importer vide their letter dated 22.10.2010 waived the requirement of Show Cause Notice and asked for personal hearing and requested for release of goods taking a lenient view.

2.6 After affording personal hearing on 30.10.2010, Commissioner adjudicated the matter as per his order referred in para 1, supra. By the said order Commissioner also disposed of the protest made at time of payment of duty.

2.7 Aggrieved by the order of Commissioner both revenue and importer have filed appeal before tribunal

3.1 Revenue has in the appeal filed challenged the order of Commissioner stating that *"The imported product is "wireless data device" used for ticketing, billing collection etc and only GPRS communication is possible as mentioned in the manual. From the description of the goods it appears that the goods require a licence from the "Wireless Planning & Co-ordination" (WPC) wing of the*

Ministry of Communication and Information Technology in view of this requirement under Section 3 of the Indian Wireless Telegraphy Act, 1933 read with section 11 of The Customs Act, 1962, for its import and clearance. The Adjudicating Authority has not examined the issue regarding applicability of WPC license. Since the importer did not furnish the WPC License, the importer had not fulfilled the requirement under Section 3 of the Indian Wireless Telegraphy Act, 1933 read with Section 11 of the Customs Act, 1962. Therefore the imported goods are liable for confiscation under Section 111(d) of the Customs Act, 1962 and consequently the importer is liable for penalty in terms of Section 112(a) of the Customs Act, 1962 on this count as well".

3.2 Importer has challenged the order of Commissioner stating that imported goods are very similar to mobile phone in appearance. There are many features common in the "Data Transfer Devices" imported by them and the mobile phone. So their staff classified the goods under Tariff Heading 85171290 and claimed the benefit under Notification No 6/2006-CE and 24/2005-Cus. As such there was no misdeclaration at all but they claimed the classification as per their understanding of the imported equipment. The classification claimed by them was based on their understanding of the imported equipment. Commissioner has not appreciated their bonafides but has viewed it with a predetermined mind that they have deliberately claimed the classification of goods under CTH 8517 in order to evade custom duty. They rely on the following decisions in their support wherein it has been held that claim of wrong classification does not constitute mis declaration so as invite penal action against the importer.

i. R G Sales P Ltd [2002 (148) ELT 1076 (T-Kol)]

ii. Kuresh Laila [2009 (189) ELT 45 (T-Chennai)]

iii. Steel authority of India Limited [2005 (184) ELT 308 (T-Bang)]

iv. Lietronics Vijay India Pvt Ltd [2009 (234) ELT 535 (T-Chennai)]

Since they had no intention to evade payment of duty by claiming the wrong classification the action as per the impugned order of Commissioner is not justified.

4.1 We have heard Shri P. Patankar, Consultant for the importer and Ms Trupti Chavan, Assistant Commissioner, Authorized Representative for the revenue.

4.2 Learned Consultant reiterated the submissions made in the appeal. He submitted that the they had accepted the Classification as determined by the revenue and paid the duty according. They had by claiming the wrong classification on the Bill Of Entry not misdeclared the goods nor they had any intention to evade payment of duty. In his view the error was a bonafide one and should have been condoned. He lied upon the decisions referred in para 3.1, supra and argued that claiming wrong classification cannot be equated to mis-declaration for holding that goods are liable for confiscation under Section 111(m) and for imposition of redemption fine and penalty.

4.3 Arguing for the revenue learned authorized representative reiterated the grounds taken in the appeal filed by the revenue. She further submitted that the case against the importer is not of mis-classification simplicitor, but a case of misdeclaration. Importer had mis-declared the goods “Mobile Phone” instead of “Data Transfer Device” and on the basis of the said misdeclaration claimed classification as Mobile Phones. Since importer had mis declared the goods by describing them as something which they were not the charge of mis-declaration against them is well founded and order of Commissioner confiscating the goods cannot be faulted with. Since the goods have been confiscated, Commissioner has allowed them to be redeemed against redemption fine. For the various acts leading to confiscation of goods, penalty under Section 112(a) too is justified.

5.1 We have considered the submissions made in the appeals and during the course of arguments along with the impugned order.

5.2 In their appeal revenue has raised the issue which was never there before the adjudicating authority. In the present case no show cause notice has been issued and matter adjudicated by the Commissioner on the basis of waiver to show cause given by the importer. The impugned order does not refer even remotely to the issue sought to be raised by the revenue in appeal. In our view such approach cannot be justified. However on the merits of issue raised by revenue in their appeal we find that issue is squarely covered against the revenue by the tribunal order in case of Reliance Communication Limited [2014 (301) ELT 571 (T)], wherein following has been held:

"6. *In the impugned order it is a clear cut finding by the adjudicating authority as follows :*

"In the Import-Export Policy 2004-09 against Tariff items 8525 50 10, 8525 60 12, 8525 60 92, etc. the entry "Restricted" is seen along with the note "Not permitted to be imported except against a licence to be issued by the WPC. Wing of the Ministry of Communication and Information Technology." No such entry is seen against tariff Item 8517 70 90 where the impugned goods will be appropriately classifiable. There is suggestion in para 6 and in para 16(b) of the SCN that every equipment which functions using wireless transmission or reception requires such a licence at the time of import in view of the provisions of Section 3 of the Indian Wireless Telegraphy Act, 1933 read with Section 11 of the Customs Act. Section 3 of the Indian Wireless Telegraphy Act reads as under :

"3. Prohibition of possession of wireless telegraphy apparatus without licence. - *Save as provided by Section 4, no person shall possess wireless telegraphy apparatus except under and in accordance with a licence issued under this Act."*

It may be seen that this section deals with prohibition on possession. It is not a section dealing with prohibition on imports. For the customs to take any action for enforcement there should be prohibition on import. No such prohibition is seen in the Indian Wireless Telegraphy Act, 1933. However, the department is calling for WPC licence or no objection certificates in the case of import of all wireless equipments as a matter of practice on the ground import itself amount to possession. In the case before me, the goods were originally classified under CTI 8525 20 17, 8525 20 19 and 8517 12 20. Against this heading the import policy is that it is allowed "free". Now classification is suggested under CTI 8517 70 90. Against this item also import policy is noted as "free". So the proposed change in classification cannot bring in a new restriction. Further, the goods are already cleared and therefore goods cannot be confiscated under Section 111(d) of the Customs Act. If there is any violation of the Indian Wireless Telegraphy Act, 1933 for the use of the equipment it is for the Telegraph department to enforce it."

7. *Thereafter the adjudicating authority has arrived at the decision that goods are not liable for confiscation under Section 111(d) of the Customs Act. We do agree with the finding of the adjudicating authority as the goods are freely importable as per Import-Export Policy 2009. Therefore goods are not liable for confiscation under Section 111(d) of the Customs Act, 1962. Therefore, no penalty under Section 112 of the Customs Act is leviable. Accordingly, impugned order qua dropping of penalty* *under Section 112 of the Customs Act is upheld. Appeal filed by the Revenue is dismissed."*

5.3 In view of the aforesaid decision we do not find any merits in the appeal filed by the revenue.

5.4 In para 7 and 8 of the impugned order Commissioner has recorded his findings as follows:

"7 I have carefully gone through the case records and submissions made at the time of personal hearing. The goods were declared as "Mobile Phone: PDA STM 7100" and were classified under CTH 85171290 and duty exemption under Notfn 024/2005-Cus Sr No 13 was claimed. Exemption under Notfn 06/2006-CE (Sr No 28) was also claimed under CETH 85171290, wherein Telephone for cellular networks are covered. Going by the details mentioned in the product catalogue the goods under importation are not Mobile phone as there is no voice communication through this device. I have considered the submission that this was a case of bonafide error committed by lower level staff due to lack of knowledge. I do not consider this to be a case of bonafide error because the instrument is much larger (physical dimension 76.2 X 222 X 37 mm and weight 512 grams) than normal cell phone. It has card reading facility and also has "Thermal Printer". Further nowhere in the invoice or catalogue the item is described as "Cell Phone". Even a lower level staff can distinguish it from cell phone. So, I consider it as a case of intentional mis declaration.

8. Since there is a misdeclaration in the description of goods, the said goods are liable for confiscation under Section 111 (M) of the Customs Act, 1962 and the importer is liable for penal action under Section 112(a) ibid. In view of above, I pass the following order."

5.5 Through out importer has been projecting that the error in claiming the classification of the goods was bonafide error. However the same is not supported by the facts on record. Importer had misdeclared the goods as "Mobile Phone" on the Bill of Entry. Such description of goods was not available in the product catalogue or the invoice. The argument made with regards to the identical nature of imported goods and Mobile Phone also is bereft of merits. The goods are declared on the Bill of Entry on the basis of the documents relating to importation of the same and not on the basis of physical examination of the goods. When the product catalogue and other documents in relation to the imported goods do not describe the goods as mobile phone, then the act of describing the goods as "Mobile Phone" on the Bill Of Entry cannot be anything other act of deliberate misdeclaration as have been held by the Commissioner.

5.6 Importer has before the Commissioner and even before us projected the case as to be one of misclassification and has claimed relying on various case laws referred in para 3.1, supra that claim of wrong classification on bill of entry should not invite penal consequences. Since the present case is not of misclassification simplicitor but case of deliberate misdeclaration leading to misclassification we do not find any merits in such submissions of the importer. The case law relied upon would not be applicable in the present facts of case.

5.7 Importer has in the appeal raised lot of procedural safeguards built in the system of assessment and has claimed that, all these should be taken into account while adjudging the offence against them. In our view procedural relaxations and facilitation measures are for facilitating the speedy clearance of the imported goods and are not for the purpose of perpetuating fraud/ misdeclaration. In our view such an argument should be rejected at the very first stage.

5.8 While we do not find any infirmity in the order of Commissioner in confiscating the goods under Section 111(m) of the Customs Act, 1962, we are inclined to reduce the redemption fine imposed by Commissioner from Rs 15,00,000/- (Rupees Fifteen Lakhs Only) to Rs 10,00,000/- (Rupees Ten Lakhs Only).

5.9 For various acts of omission and commission leading to the confiscation of goods under Section 111(m) importer is liable for penalty under Section 112(a) of the Customs Act, 1962. We do not find any infirmity in order of Commissioner imposing penalty of Rs 5,00,000/- (Rupees Five Lakhs Only) which is just and reasonable.

6.1 The appeal filed by revenue is dismissed as held in para 5.3 above.

6.2 The appeal filed by the importer is allowed to the extent of reducing redemption fine imposed to Rs 10,00,000/- (as held in para 5.8). With the above modification the impugned order is upheld.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

tvu