CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 349 of 2010

[Arising out of Order-in-Original No: CC-(RT) 6/2010 ACC dated 23rd February 2010 passed by the Commissioner of Customs (Export), Air Cargo Complex, Mumbai.]

Microqual Techno Pvt Ltd … ***Appellant***
3rd Floor, Techwep Centre, Oshiwara-Behrambagh,
Jogeshwari (W), Mumbai 400 102

versus

Commissioner of Customs (Exports) …***Respondent***
ACC, Sahar, Andheri (E), Mumbai – 400 099

APPEARANCE:

None for the appellant

Ms Trupti Chavan, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86737 / 2019

DATE OF HEARING: 20/03/2019
DATE OF DECISION: 19/09/2019

PER: C J MATHEW

We proceed to dispose off this appeal of M/s Microqual Techno Pvt Ltd against order-in-original no. CC-(RT) 6/2010 ACC dated 23rd February 2010 of Commissioner of Customs (Export), Air Cargo Complex, Mumbai, notwithstanding the absence of representation on behalf of the appellant, as none has chosen to appear despite notices and repeated adjournments. Learned Authorised Representative apprised us of the facts and the grounds on which the impugned order decided to deny the benefit of notification no. 64/2008-Cus dated 9th May 2008, ordered recovery of ₹ 6,62,843, along with interest, on unpaid portion of assessed duty liability at ₹ 7,43,009 on declared goods valued at ₹ 25,94,376, affirmed the duty of ₹ 9,33,282 on undeclared goods valued at of ₹ 32,58,755 that was assessed at the time of import besides confiscating both consignments with release subject to payment of fine of ₹ 5,00,000 and imposing penalty of ₹14,95,430 under section 112 of Customs Act, 1962.

2. Appellant had filed bill of entry no. 637842/09.07.08, claiming the benefits of notification no. 64/2008-Cus dated 9th May 2008 against license permitting duty saved of ₹ 6,68,93,756.44 on import of machinery in accordance with Export Promotion Capital Goods scheme in the Foreign Trade Policy, for clearance of 'spares' valued at ₹ 25,94,376 (€ 38253) which, on 21st August 2008, was provisionally assessed on payment of duty of ₹ 80,166 as per the notification *supra*. The consignment, said to comprise 44 items, was, on suspicion aroused by reference to various other invoices of the same supplier in the documents accompanying the consignment,

subjected to examination and found to include 179 items in addition. The appellant claimed that these were remnants of the consignments valued at ₹ 26,09,06,250/- (€4125000) procured earlier against the very same license and cleared on payment of duty assessed in bill of entry no. 869982/13.06.82, no. 867429/11.06.08 and no. 865976/ 13.6.08 by debit of ₹ 7,25,95,068 as ‘duty saved’ in the said license. Owing to insufficiency of the licence to cover the last bill of entry, the discretionary enhancement, offered under Foreign Trade Policy, was also utilized and the balance remaining thereafter, as on date of the impugned import, was ₹ 9,88,063 for which ‘transfer release advice’ was issued to Air Cargo Complex by Jawaharlal Nehru Custom House.

3. The undeclared ‘spares’ were seized and provisionally released on discharging duty of ₹ 9,33,282 without the benefit of notification no. 64/2008-Cus dated 9th May 2008 on assessable value of ₹32,58,755 (€48049). In the impugned proceedings, the benefit of notification on the declared ‘spares’ was also denied for demanding duty thereon. This denial, the independent assessment of the undeclared goods and the detriments are in challenge.

4. The appellant insists that the non-declaration of goods on which duty had been paid along with the capital goods cleared earlier occurred owing to their ignorance of the shipment in the impugned

consignment. The reliefs claimed in the appeal are that the benefit of notification should be extended to the goods declared in the bill of entry by restricting the confirmation of demand to the assessed, and paid, duty of ₹ 80,166 and that the balance remaining in the permissible duty saving should be applied to the duty leviability on the undeclared goods besides setting aside the other detriments.

5. As pointed out by Learned authorised Representative, the claim of being ignorant of the shipment of goods that had already been subject to duty and, therefore, not included in the bill of entry for 'standard spares and parts', is not easily acceptable. The contract with the supplier for procurement of the machinery includes supply of parts and spares over a ten-year period. It surely cannot be the claim of the appellant that any future import of spares is also eligible for exemption when the tenure of the license itself is for a lesser period. It is evident from the impugned order that communication dated 26th March 2008 of the supplier clearly informed that the shipment included two sets of 'spares' and that the justification for non-dutiability of spares whose value had been included in assessable value of earlier imports as proof of absence of motive is not credible or such explanation, though within their knowledge, was made only after the consignment was stopped. The adjudicating authority has, therefore, concluded that a claim at this stage lacks credibility in the light of existing correspondence. Drawing attention to the contract,

Learned Author Representative discounts the claim of procurement of 'spares' at no additional cost as it is clear that even the 'spares' to be supplied with the equipment was optional. From the correspondence pertaining to procurement of 'spares', the adjudicating authority concluded that the selection of spares, being left to the appellant, was not included in the contracted value and that reference to 'free supply' is demonstrated only in the letters emanating from the appellant. The failure to notify 'short shipment' in the earlier consignments and failure to claim refund of duty paid on 'spares' that were not shipped appear to reinforce the conclusion of the adjudicating authority. No evidence to counter these inferences and conclusions in the impugned order are found in the grounds of appeal. Mere protestation of ignorance of the additional shipment would not sustain in the face of evidence of correspondence that demonstrates otherwise. In the circumstances, we are unable to accept the claim of the appellant that the undeclared goods were, in fact, remnants of earlier 'duty paid' consignments. These are, therefore, liable to separate assessment. We also cannot find any flaw in the confiscation of the undeclared goods with the attendant detriments. The eligibility for clearance under the scheme in the Foreign Trade Policy, except for non-availability of 'duty saved' in the license has not been disputed in the show cause notice.

6. There is no allegation of any misdemeanour in the import of the

declared goods. Neither is there any reason for denial of the benefit of the notification issued for implementation of the scheme in the Foreign Trade Policy except the non-availability of ‘duty saved’ in the license.

7. We take note that the unutilised component of the ‘transfer release advice’ of ₹ 9,88,063 has not been made available to the appellant in consequence of the findings in the impugned order that ‘additional fee to cover excess imports effected’ against the discretionary enhancement, as laid down in paragraph 5.10 of Handbook of Procedures, has not been complied with. If that be so, the denial of the adjustment of ‘duty saved’ against the impugned goods-declared and undeclared-would be tenable. However, the appellant has placed on record that the maximum fee mandated in the Policy has already been deposited; accordingly, the provisions in paragraph 5.10 of Handbook of Procedures is rendered inoperable. The appellant is entitled to adjustment of ‘duty saved’ to the extent of the amount in the ‘transfer release advice’ and the recovery of duty, if any, is to be restricted to any excess due thereafter.

8. In the circumstances, only the undeclared goods valued at ₹32,58,755 are liable to confiscation under section 111 of Customs Act, 1962. We, therefore, reduce the fine for redemption to ₹3,00,000. We are also of the opinion that the interest of justice will be served by

limiting the penalty under section 112 of Customs Act, 1962 to ₹10,00,00. The direction in paragraph 44D of the impugned order shall be complied with by the competent authority in accordance with our modifications to the applicability of the 'transfer release advice.'

9. The appeal is, accordingly, disposed off.

(Order pronounced in the open court on 19/09/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*