CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Custom Appeal No. 799 of 2010

&

Customs CO No. 91001 of 2013

(Arising out of Order-in-Original No. 24/Cus/2010 dated 29.07.2010 passed by the Commissioner of Customs, Central Excise & Service tax, Aurangabad)

M/s. Force Appliances P. Ltd …..**Appellant**
S. No. 273, Nagar-Burhanagar Road,
Madhavnagar,
Ahmednagar

Vs.

Commissioner of Customs, Central Excise & Service tax, Aurangabad …..**Respondent**
Aurangabad Commissionerate, N-5 Town Centre,
CIDCO, Aurangabad

APPEARANCE:

Shri T. Viswanathan, Advocate for the appellant
Ms. P.V. Sekhar, Addl. Commissioner (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/86837 / 2019

DATE OF HEARING : 12.03.2019
DATE OF DECISION : 13.09.2019

PER: C J MATHEW

The appellant herein, M/s Force Appliances Private Limited, is aggrieved by the fastening of duty liability of ₹99,12,009/- being the duty foregone on ‘parts of CD Deck mechanism’ imported between February 2008 and February 2009 for not being in compliance with the conditions in notification no. 25/99-Cus dated 28th February 1999 (at serial no. 115).

2. The said notification allows ‘parts of CD/VCD/DVD mechanisms, *viz.*, ‘optical pickup assembly and parts thereof, DC Micro motors, Loader parts of plastic (parts of CD loader), cable connector, springs, screws, washer’ to be imported at concessional rate of duty for use in manufacture of finished goods. This is akin to similar benefit available to manufacturers of intermediate goods cleared with payment of duty to manufacturers of finished goods. Consequently, the condition of concessional rate of duty is subject to compliance with the procedure set out in Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excise Goods) Rules, 1996. The proceedings against the appellant arose from the allegation that the parts so imported had been utilised in the manufacture of ‘DVD players,’ falling under heading no. 8521 9020 of First Schedule to Central Excise Tariff Act, 1985 instead of ‘CD Deck Mechanism’, falling under heading no. 8522 9000 of First Schedule to Central Excise Tariff Act, 1985, as specified in the said notification.

3. Appellant admits that the goods being cleared by them are ‘DVD players’ but contends that the operation of such players is possible only with assembling of ‘CD Deck mechanism’ within such

players; according to him, it is by this mechanism that redundancy of the recorded media paired with fading technology is avoided and trends in the technology are marketable without adding costs to the customers. Learned Counsel places on record the end-use certificates corresponding to each bill of entry as evidence of utilisation of the imported goods in the assembly of 'CD Deck mechanism' which was ultimately used in the assembly of DVD players. It is also contended that the 'loader assembly' referred to in the ER-1 returns were CD Deck mechanisms cleared in that form to other assemblers. This, according to him, should suffice as being compliant with conditions specified in the notification. Reliance has been placed on the decision of the Tribunal in *Commissioner of Customs v. Overseas Business Corporation [2009 (263) ELT 673 (T)]* and in that of *Commissioner of Customs v. Overseas Business Corporation [TIOL-2432-CESTAT-DEL]*. It is also contended that all the requirements in the said Rules have been observed in entirety.

4. Relying upon the decision of the Constitution Bench of the Hon'ble Supreme Court in *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) ELT 577 (SC)]*, Learned Authorised Representative argued that exemption notifications are to be construed rigidly and that any ambiguity therein cannot be widened to deprive Revenue of the dues authorised to be collected by the sovereign legislature. It was also pointed out that, while the burden of liability to tax vests in the tax administration, it is

for the assessee to establish its claim for any exemption notification. Attention was also drawn to the decision of the Tribunal in *Gigabyte Technology (I) Ltd v. Commissioner of Customs, Mumbai [2018 (359) ELT 230 (Tri-Mumbai)]* on the need for conformity with specific description in any exemption notification.

5. It has been brought to our notice that the demand for duty has been raised in show cause notice issued by Commissioner of Central Excise, Aurangabad, within whose jurisdiction the appellant has established its factory for manufacture of goods using the imported parts on which the concessional duty of customs has been accorded by the assessing officer under section 17 of Customs Act, 1962 and before whom the appellant has undertaken to comply with the condition of the notification availed. There is no doubt that the post-clearance utilisation is to be administered in accordance with Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 for which closure is to be accorded by jurisdictional Deputy Commissioner of Central Excise, or Assistant Commissioner of Central Excise, as the case may be.

6. We also take note that the registration prescribed under the said Rules has been certified by the jurisdictional authority in which the description of imported goods as well as the description of the goods manufactured out of these are entered. Before we proceed to evaluate the claim of Learned Counsel, the show cause notice must necessarily

be perused. It is seen that the notice presumes that the goods have been procured at concessional rate of duty in terms of Customs (Import of Goods Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 read with notification no. 25/1999-Cus dated 28 February 1999. There can be no more patent irregularity of assumption that this. A notification for exemption from duties of customs is issued under the authority of section 25 of Customs Act, 1962 and it is such a notification that grants the privilege of concession disputed in the present proceedings. The cited Rules does not afford the authority to confer such privilege. Perhaps, as suggested by Learned Counsel, the misappropriation of jurisdiction may be a consequence of this erroneous presumption of primacy of the said Rules instead of according it a secondary status as the framework for procedural regulation of imported goods after clearance. It is also alleged that the appellant was in breach of rule 7 of the said Rules by failing to intimate, within two days, due receipt of imported goods in the factory and by failing to maintain the prescribed records. These allegations are based upon statements recorded from the authorised signatory of the appellant and the letter of admission by the appellant. Consequent upon these alleged breaches and the alleged misuse of imported goods for use in manufacture of goods that were not covered by the bond executed in pursuance of the said Rules, the provision of rule 8 of the said Rules has been invoked by the authority issuing the show cause notice to demand the duty foregone, along with applicable interest, and to propose imposition of penalty under section 114A of Customs Act.

7. The impugned order takes note of the exemption notification availed by the importer which limits the duty liability to 5% subject to compliance with the conditions specified therein. Despite the submission of the appellant herein before the adjudicating authority that the enumeration of items eligible for the concessional rate had been expanded beyond the original description of 'parts of CD mechanism' to include 'parts of DVD mechanism etc.' *vide* notification no. 70/2004-Cus dated 9 July 2004, observing that the description of the finished product was not altered, it was opined that expansion of the permissible imports did not privilege the importer to use the goods for anything other than manufacture of 'CD Deck mechanism.' Furthermore, the adjudicating authority holds that though the notification is not specific on the subheadings, the latitude of coverage by the chapter heading cannot be extended to the appellant herein without compromising on the requirement for strict interpretation of the description itself. The expert opinion of the Department of Electronics on the use of 'loader assembly' as an alternative description of 'CD Deck mechanism' in common parlance has been discarded by the adjudicating authority with a sweeping assertion of unacceptability of such expertise in the absence of samples having been examined by that authority under the overall control of central excise authorities.

8. While the adjudicating authority has, in ample measure, demonstrated his superior knowledge of ‘compact discs’ and ‘digital versatile discs’ to distinguish a CD mechanism from the DVD mechanism, it appears that, in the process, he has omitted to give thought to the evolution of the technology of ‘players’ from ‘cassette’ through ‘compact disc’ to ‘digital versatile disc’ without which the media that he has referred to would not be able to serve the needs of consumers. Based on that trajectory of thinking, he has concluded that ‘CD Deck mechanism’, which is at the heart of ‘CD players’ is different from the deck mechanism of ‘DVD player.’ In the absence of any primary source as an authority for arriving at such a conclusion, we must confess to our ignorance, and therefore, our inability to evaluate the correctness of this conclusion. At the same time, our admitted ignorance cannot be subordinated to the technical assertions in the impugned order which are, admittedly, without acceptable provenance.

9. The non-intimation of arrival of the imported goods within the stipulated time and non-maintenance of simple records are procedural breaches and, in the admitted position of absence of any allegation of diversion or continued dereliction in maintenance of records, should not constitute irreparable breach for denial of the exemption notification.

10. It would appear that the adjudicating authority has proceeded with his own line of thinking on the scope of the exemption notification. There is no doubt that an exemption notification will need to be construed strictly but an exemption notification that permits import of parts which, according to the adjudicating authority, cannot find use in the intended finished goods is also an indictment of the Central Government for indulging in superfluity. We do not say so but can infer no other conclusion from the casual dismissal of the claim of the appellant that 'CD Deck mechanism' is utilised in 'DVD players' and that the amendment to the description of eligible goods include such hardware advancements. This is not an attempt to read down, or dilute, the objective of the exemption notification but to give effect to the promptness with which the Central Government has attended to evolution of the electronics industry without being bogged down by 'horse and buggy' propositions.

11. In the absence of such consideration by the adjudicating authority and casual discarding of the expert opinion of Department of Electronics, we are constrained to hold that the findings in the impugned order are not sustainable and must be set aside. As the response to the show cause notice, written as well as oral, have not been dealt with, there is no closure to the proceedings. We, therefore, remand the matter back to the original authority for consideration of the facts and evidences of proper utilisation of the imported goods in the manufacture of assemblies that conform to the description of the

finished goods in the exemption notification. We would also like to point out that the competence of the Commissioner of Central Excise to initiate proceedings for recovery of duties foregone by the assessing officer merely from the authority of Rules intended to govern procedure for utilisation of such imported goods having been raised by the appellant herein would also need to be defended while complying with our remand order.

12. The appeal and memorandum of cross objections are, accordingly, disposed off.

(Order pronounced in open court on 13.09.2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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