CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 728 of 2011

(Arising out of Order-in-Appeal No. 361(CRC-I)/2011(JNCH)/IMP-304 dated 29.07.2011 passed by Commissioner of Customs (Appeals), Mumbai-II)

M/s Anchor Electricals Pvt. Ltd. **.....Appellant**
Plot No.24, Mahal Industrial Estate,
Mahakali Caves Road,
Near Paper Box, Andheri (E),
Mumbai-400093

VERSUS

Commissioner of Customs (Import), Nhava Sheva **.....Respondent**
Jawaharlal Nehru Custom House,
Post Uran, District – Raigad,
Nhava Sheva - 400707

Appearance:

Shri Brijesh Pathak, Advocate for the Appellant
Shri Ramesh Kumar, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87480 / 2019

Date of Hearing: 19.06.2019
Date of Decision: 19.06.2019

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein, had filed the Bill of Entry No. 787268 dated 02.12.2009 for import of 3 sets of Press Machine on Delivery Duty Unpaid (DDU) basis from Japan and cleared the same for home consumption, after payment on customs duty on 08.12.2009. En route, two of the vehicles met with an accident and part of the consignment were damaged before reaching the factory. The damaged goods were re-exported back to the Japanese supplier vide Shipping Bill No. 7998033 dated 29.12.2009 upon establishing the identity of the goods imported by it. The appellant had filed the refund application under Section 26A of the Customs Act, 1962 on 07.01.2010 for refund of Rs.44,26,759/- proportionate to the value of re-exported defected goods. The refund application was rejected by the original authority on the ground that the goods had been damaged after the out of customs charge was given by the department. On appeal against the adjudication order, the learned Commissioner of Customs (Appeals), Mumbai-II vide Order-in-Appeal dated 29.07.2011 (for short, referred to as “the impugned order”) has upheld the adjudication order and rejected the appeal filed by the appellant. In support of rejection of appeal, the impugned order has *inter alia*, held that the goods imported by the appellant were not defective and were damaged en route after clearance from the customs in sound condition; that there was no lack of conformity with the specification of the goods at the time of dispatch from the Country of Export or at the time of clearance from the customs. With the said observations, the impugned order has held that the case of the appellant does not fall either under Section 22 *ibid* or Section 26A *ibid* for grant of refund of the duty amount in question. Feeling aggrieved with the impugned order dated 29.07.2011, the appellant has preferred this appeal before the Tribunal.

2. Heard both sides and perused the records.

3. It is an admitted fact on record that part consignment of the imported goods (4 out of 8 cases consisted of 2 sets of press machine) was damaged en route during the course of movement from the port of import to the factory premises of the appellant and that such damaged goods were re-exported by establishing the identity of the goods actually imported by it on payment of appropriate duties of customs. The International Chamber of

Commerce has designed the INCOTERMS, prescribing the obligations of seller and buyer under various types of contracts namely, FOB, CIF, DDU etc. The appellant in this case had imported the subject goods under DDU contract basis entered with the Japanese supplier. The obligations cast on both the seller and buyer in the DDU type of contracts provided in the INCOTERMS are set out herein below:

The seller's obligations	*The Buyer's obligations*
A4 Delivery	***B4 Taking delivery***
The seller must place the goods at the disposal of the buyer, or at that of another person named by the buyer, on any arriving means of transport not unloaded, at the names place of destination on the date or within the period agree for delivery.	*The buyer must take delivery of the goods when they have been delivered in accordance with A4.*
A5 Transfer of risks	***B5 Transfer of risks***
The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.	*The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A4.*

4. From the above table, it is apparent that the overseas supplier is under the contractual obligation to deliver the goods in the condition as per the agreed terms at the buyer's premises. In this case, since the goods were damaged en route and did not reach the factory of the appellant, such defective goods were exported by it and also accepted by the overseas supplier. The documents annexed to the Shipping Bill also established the fact that the duty paid imported goods was in fact re-exported by the appellant. Since, the goods imported by the appellant were not subjected to any process of repair, re-conditioning etc. and the department was satisfied that the defective imported goods were actually re-exported by the appellant and that the appellant did not claim any duty drawback, the requirement of Section 26A *ibid* has been duly complied with by the appellant for grant of import duty paid at the time of assessment of the Bill of Entry.

Thus, the observation of the learned Commissioner (Appeals) that Section 26A *ibid* does not deal with the situation of goods damaged during transportation is not proper and justified. Section 22 *ibid* provides for abatement of duty on damaged or deteriorated goods at any time before clearance for home consumption. It is not the case of Revenue that the appellant had claimed any abatement of duty on the damaged goods. Section 22 *ibid* and Section 26 *ibid* are independent of each other and repeated reference to Section 22 in the impugned order is unwarranted and has no relevance to the case in hand.

5. In view of the foregoing discussions, we are in agreement with the submissions of the appellant that it should be entitled for refund of import duty in terms of Section 26A *ibid.* Therefore, the impugned order is set aside and the appeal is allowed in favour of the appellant.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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