CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 86993 of 2013

(Arising out of Order-in-Original CAO No. 39/2013/CAC/CC(E)/YG/GR.VII dated 28.02.2013 passed by the Commissioner of Customs (Export), New Custom House, Mumbai)

M/s R.K. Mining Pvt. Ltd. **.... Appellant**
1-2-49/15, Nizampet Road, Hydernagar,
Kukatpally, Hyderabad - 500072

Versus

Commissioner of Customs (Imp.), Mumbai **.... Respondent**
New Custom House, Ballard Estate, Mumbai-400001.

WITH

Customs Appeal No. 86994 of 2013

(Arising out of Order-in-Original CAO No. 39/2013/CAC/CC(E)/YG/GR.VII dated 28.02.2013 passed by the Commissioner of Customs (Export), New Custom House, Mumbai)

B. Sasikiran Reddy **.... Appellant**
1-2-49/15, Nizampet Road, Hydernagar,
Kukatpally, Hyderabad - 500072

Versus

Commissioner of Customs (Imp.), Mumbai **.... Respondent**
New Custom House, Ballard Estate, Mumbai-400001.

AND

Customs Appeal No. 86995 of 2013

(Arising out of Order-in-Original CAO No. 39/2013/CAC/CC(E)/YG/GR.VII dated 28.02.2013 passed by the Commissioner of Customs (Export), New Custom House, Mumbai)

B. Ravikalyan Reddy **.... Appellant**
1-2-49/15, Nizampet Road, Hydernagar,
Kukatpally, Hyderabad - 500072

Versus

Commissioner of Customs (Imp.), Mumbai **.... Respondent**
New Custom House, Ballard Estate, Mumbai-400001.

Appearance:

Shri T. Viswanathan a/w Akhilesh Kangasia, Advocates for the Appellants

Shri Ashwin Kumar, Auth. Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86793-86795/2023

Date of Hearing: 08.05.2023
Date of Decision: 08.05.2023

PER : M.M. PARTHIBAN

This appeal has been filed by M/s R.K. Mining Private Limited (herein after, referred to as 'the appellants') with address at 1-2-49/15, Nizampet Road, Hyder Nagar, Kukatpally, Hyderabad-500072, against Order-in-Original CAO No. 39/2013/CAC/CC(E)/YG/GR.VII dated 28.02.2013 (referred to as 'the impugned order') passed by Commissioner of Customs (Export), New Custom House, Ballard Estate, Mumbai.

2. Briefly stated, the facts of the case are that the appellants herein are engaged in removing earth, digging, excavation of iron ore and transportation of the same from top of the hill to its base as a mine raising contractor for Obulapuram Mining Co. P. Ltd. They had obtained an EPCG license No.0930004388/3/11/00 dated 12.09.2008 for import of two numbers of Nordberg Trak mounted (cone type) Crushing Plant described in detail as (i) Nordberg make Primary Lokotrack Mobile Crushing Plant model LT 105 consisting of Nordberg Primary Jaw Crushed model C 105 and (ii) Nordberg Secondary Lokotrack Mobile Crushing plant model LT 1100 consisting of Nordberg Secondary Cone crushed model GP 11F. The said EPCG license was issued to the appellants for 3% concessional duty as 'service provider' involving export obligation for a FOB value of exports of US$2,731,313.37 or Rs.11,94,94,960/- with export obligation period of 8 years. The amount of duty saved was also given as Rs.1,49,36,870/-. On the basis of intelligence received and developed by the Marine & Preventive (M&P) Wing of Customs (Preventive) Commissionerate, Mumbai, that the appellants have fraudulently shifted the crushing plants to the project site of their sister concern without taking any permission and without making

any exports, in violation of EPCG scheme, an investigation was initiated. On completion of the investigation, show cause proceedings were initiated against the appellants for confiscation of the imported goods, demand of duty payable but for the EPCG license concession availed and for imposition of penalties. Learned Commissioner of Customs upon adjudication of the case passed an Order-in-Original dated 28.02.2013 confirming the adjudged demands, confiscation of the impugned goods and imposed redemption fine and penalties. Feeling aggrieved of the impugned order, the appellants have filed these appeals before the Tribunal.

3. Learned Advocate appearing for the appellants had submitted that there is no violation of the conditions of Customs notification No.64/2008-Cus. dated 09.05.2008, inasmuch as there is no restriction in shifting the capital goods from importer's factory to another factory of the license holder or to the factory of supporting manufacturer. He further stated that though initially at the time of shifting they did not have the permission of DGFT, subsequently they had obtained necessary permission from DGFT and had also applied for discharge of export obligation, as they had also fulfilled the export obligation. They claimed that there is no violation of the Customs notification or other provisions of the Customs Act, 1962 by citing the following case laws:

(i) Thiagarajar Mills Ltd Vs. Commissioner of Customs, Trichy 1999 (111) E.L.T. 288 (Tribunal)
(ii) India Seamless Metal Tubes Ltd Vs. Commissioner of C. Ex & Customs, Goa 2017 (348) E.L.T. 577 (Tribunal- Mumbai)
(iii) Regency Ceramics Ltd. Vs. Commissioner of Customs (Export), Chennai 2018 (363) E.L.T. 293 (Tribunal- Chennai)
(iv) Suncity Synthetics Ltd. Vs. Commissioner of Customs, Nhava Sheva 2001 (132) ELT 684 (Tribunal- Mumbai)
(v) Reliance Infrastructure Ltd. Vs. Commissioner of Customs, Chennai-IV 2017 (357) E.L.T. 865 (Tribunal- Chennai)

4. Learned Authorized Representative (AR) representing the department had reiterated the findings made in the impugned order and stated that inasmuch as the appellants did not fulfil the conditions of the customs notification, the impugned order is legally sustainable.

5. Heard both sides and perused the records of the case as well as the submissions made in the form of paper book by both the parties.

6. The short issue for consideration before us that whether the appellants have violated the provisions of notification No.64/2008-Customs dated 09.05.2008, in terms of the show cause proceedings or not, for deciding on the issue of legality of the impugned order. In order to examine these in detail, the allegations raised in the Show Cause Notice (SCN) dated 11.06.2012 are extracted and given below:

"22. Now, whereas, from the foregoing, it appears that:

i. RKMPL had violated the

(a) Condition No. 9 of the EPCG licences by not installing the crushing plants at the declared place;

(b) Conditions of Para 5.15 of the Hand Book of Procedures 2004-09 by not maintaining any records as discussed in the foregoing paras;

(c) Condition No. 6 of the condition sheet attached to EPCG Licence No. 0930004388/3/11/00 dated 12.09.2008 and para 5.3 of the Exim policy 2004, 2009 by not actually using the subject crushing plants imported against the said licence for mining and excavating the iron ore;

(d) Condition No. 14 of the condition sheet attached to the said EPCG License, by not submitting the installation certificates to the Licensing authority within six months from the date of import;

(e) provisions of Notification No. 64/2008 dated 09.05.2008 by shifting the said crushing plants to the project site of their sister concern, without completing the export obligation;

ii. By virtue of the above mentioned contraventions, RKMPL have rendered the subject crushing plants having total assessable value amounting to Rs. 6,11,25,200/-, liable to confiscation under Section 111 (o) of the Customs Act, 1962.

iii. The total Customs duty amounting to Rs. 1,27.17,014/- in respect of the subject crushing plant as detailed in the foregoing paras, evaded by RKMPL is required to be recovered from them with interest accrued thereon under the proviso to Section 28 (1) read with 28AB of the Customs Act, 1962. They have also made themselves liable to penalty under Section 112 (a) and/or (b) and/or 114A of the Customs Act, 1962.

iv. S/Shri B. Ravikalyan Reddy and B. Sasikiran Reddy have by their acts of omission and commission, as discussed in the foregoing paras of this show cause notice, rendered the subject crushing plants liable to confiscation under Section 111 (o) of the Customs Act, 1962. They have also rendered themselves liable to penalty under Section 112(a) and/or (b) and/or 114AA of the Customs Act, 1962.

23. RKMPL are hereby called upon to show cause in writing to the Commissioner of Customs (Export), having his office at 2nd Floor, New Customs House, Ballard Estate, Mumbai - 400 001, within 30 days from the receipt of this show cause notice as to why :-

a. the said Nordberg mobile crushing plants comprising LT-1100 and LT-105 valued at Rs. 6,11,25,200/-, imported and cleared under EPCG scheme by fraudulently availing concessional duty exemption under Notification No. 64/2008-Cus. dated 09.05.2008 should not be confiscated under Section 111(0) of the Customs Act, 1962;

b. the total Customs duty amounting to Rs. 1,27,17,014/- actually payable but saved in terms of the aforesaid exemptions in respect of the aforesaid crushing plant, should not be recovered in terms of the proviso to Section 28(1) of the Customs Act, 1962, along with interest in terms of Section 28AB of the Customs Act, 1962.

c. penalty should not be imposed on them under Section 112 (a) & (b) and/ or 114A of the Customs Act, 1962.

d. the voluntary deposit amounting to Rs. 1,28,00,000/- by RKMPL during the course of investigation should not be appropriated and adjusted against their duty liability in respect of the aforesaid crushing plants.

24. S/Shri B. Ravikiran Reddy and B. Sasikiran Reddy are also called upon to show cause in writing to the Commissioner of Customs (Export), having his office at 2nd Floor, New Customs House, Ballard Estate, Mumbai - 400 001, within 30 days from the receipt of this show cause notice as to why penalty should not be imposed upon them in terms of Section 112 (a) and/or 112 (b) of the Customs Act, 1962."

In the impugned order learned Commissioner of Customs (Export) after consideration of the reply of the appellants and after offering them a personal hearing had decided the case against the appellants by passing the following order:

"21. In view of the above, I order as under:

(i) I deny the benefit of exemption under Notification 64/2008 Cus. Dated 09.05.2008 on account of violation of condition 2(7) of the said notification and confirm customs duty demand of Rs. 1,27,17,014/- (Rupees One Crore Twenty Seven Lakh Seventeen Thousand and Fourteen Only) in terms of proviso to Section 28(1) of the Customs Act, 1962 as in force at the relevant time. I appropriate the said amount of Rs. 1,27,17,014/- from the voluntary deposit of Rs. 1,28,00,000/- (One Crore Twenty Eight Lakhs Only) made by the importers on 03.01.2012 during the course of investigations.

(ii) As the differential duty confirmed stands recovered by way of appropriation, I direct the importers to pay the interest @15% from the date of clearance in terms of conditions of the Notification read with Section 28AB of the Customs Act, 1962. I appropriate the balance of Rs. 82,986/- (Rupees Eighty Two Thousand Nine Hundred Eighty Six Only) from the voluntary deposit towards the said liability and direct them to pay the balance forthwith.

(iii) I confiscate the said Nordberg mobile crushing plants LT 1100 and LT 105 valued at Rs. 6,11,25,200/- in terms of provisions of section 111(o) of the Act for violation of conditions of Notification 64/2008-Cus. dated 09.05.2008. The said goods were seized on 15.12.2011 and are freely importable. The said goods were allowed provisional release on 30.07.2012 on execution of Bond of Rs. 6,11,25,200/- being the full value of seized goods along with Bank Guarantee No. 0416812BG0000336 dated 3.7.2012 issued by State Bank of India, Commercial Branch, Hyderabad for Rs. 19,08,000/-.In terms of provisions of Section 125 of the Act, I give an option to the importers to redeem the said confiscated goods on payment of redemption fine of Rs. 1,00,00,000/- (Rupees One Crore Only).

(iv) I impose a penalty of Rs. 1,27,17,014/- (Rupees One Crore Twenty Seven Lakh Seventeen Thousand and Fourteen Only) on M/s. R.K. Mining Pvt. Limited (importer) in terms of provisions of Section 114A of the Customs Act, 1962.

(v) I also impose a penalty of Rs. 25,00,000 (Rupees Twenty Five Lakh Only) each on Shri B. Ravikalyan Reddy and Shri B. Sasikiran Reddy Chairman & Managing Director of M/s. R.K. Mining Pvt. Limited (importer) in terms of provisions of Section 112(a) of the Customs Act, 1962."

7. From the perusal of the records of the case and the specific allegations raised in the SCN and decided in the impugned order as above, it transpires that the learned Commissioner of Customs (Export) had confirmed the adjudged demand of customs duty, interest thereon besides confiscation of the goods and imposition of redemption fine and penalties on the appellants based on certain findings as discussed by him in paragraphs 18 to 20 of the impugned order. On the other hand, learned Advocate for the appellants have submitted certain facts and evidences in the form of documents in the appeal papers clearly negating such conclusions arrived at in the impugned order. Thus, we consider it necessary that we should firstly examine these points, one by one, before coming to a considered view on the impugned order.

8.1. The findings arising out of the discussion by the learned Commissioner of Customs (Export) in the impugned order and the relevant counter argument or evidences produced by the Advocate for the appellants and the factual position on such issues/findings are as follows:

Sl. No.	**Findings in the impugned order and reference to paragraph No.**	**Counter argument or document submitted by appellants**	**Factual position/ Status**
1.	Imported machines under EPCG license found installed at RK	Installation certificate as per 5.3.2 of Handbook of Procedures (HBP) and	Legal requirement for production of Installation certificate on transfer of

Sl. No.	Findings in the impugned order and reference to paragraph No.	Counter argument or document submitted by appellants	Factual position/ Status
	Infra & Engineering (India) Pvt. Ltd. Meja Road, Allahabad (UP) and said fact admitted by statements. (Para 18.1.1)	Exim Policy 2004-2009 has been issued on 07.05.2012.	machines by EPCG license holder fulfilled.
2.	As the mining activity was stopped at the original site, EPCG license holder applied to DGFT for shifting the machines to Meja thermal power plant project of NTPC near Allahabad. (Para 19.1.3)	The appellants who are the EPCG license holder had applied to DGFT on 15.02.2012 and got their permission for shifting of the imported machinery on 10th April, 2012.	Permission as per para 5.3.1 of HBP 2009.2014 was given by DGFT vide its letter dated 10.04.2012 for shifting the imported material to the premises of supporting manufacturer M/s. Meja Urja Nigam (P) Ltd. at Allahabad.
3.	No installation certificate submitted by appellants within prescribed time of 30 days and no such certificate is available on record. (Para 19.1.4)	Installation certificate from Chartered Engineer (registered with Indian Institute of Chartered Engineers) certifying installation of the imported machinery, its commissioning and that is has been put to regular use by M/s R.K. Mining Pvt. Ltd. at Meja Urja Nigam Pvt. Ltd. (NTPC), Kohdhar Ghat, Tehseel Meja, Allahabad (UP) was issued on 07.05.2012 (within 30 days of permission by DGFT) and has been submitted by appellants.	The copy of the installation certificate has been submitted by the appellants as part of the documents filed in appeal. The finding at para 19.1.4 is contradictory to findings recorded at para 18.1.1. Factual position is that there is a installation certificate as per requirement of HBP.
4	Condition (7) of para 2 of Notification No.64/2008-Cus. dated 09.05.2008 not fulfilled inasmuch as the installation certificate as ever been submitted by appellants. No intimation regarding relocation of the imported machinery given. (Paragraph 19.1.5)	Installation certificate dated 05.04.2009 in respect of two imported machines of appellants for installation at their quarry, commissioning on 29.03.2009 at R.K. Mining Pvt. Ltd. Sy. No.1/P, Obulapuram village, D.Hirelal Mandal, Anantapur Dist. (AP)	Condition No.7 of Notification No.64/2008-Cus. dated 09.05.2008 has been fulfilled inasmuch as there exists a certificate for installation at the premises of the appellants. However, the impugned order dated 28.02.2013 has not taken cognizance of the existence of such certificate dated 05.04.2009. No discussion on the said fact.
5.	Imported machinery	Imported machinery	The factual position of

Sl. No.	Findings in the impugned order and reference to paragraph No.	Counter argument or document submitted by appellants	Factual position/ Status
	during its transportation by vehicle from Mumbai to Obulapuram was met with an accident and owing to that the crusher machinery got damaged. The same was transported to Obulapuram after repairs and installation certificate was submitted. (Para 19.1.6)	vide Bill of Entry No. 880420 dt. 29.01.2009 was transported by Spurgex Transport Pvt. Ltd. through 3 trailers on 30.01.2009; one of the trailer met with accident within limit of Pune Municipal Corpn. While other trailers reached the site at Obulapuram on 06.02.2009, the trailer that met with accident arrived the site on 14.02.2009. Thus, installation certificate dated 29.03.2009 was submitted.	trailer carrying imported machinery met with an accident was corroborated by the transport company. The mention of installation certificate submitted by appellants in the impugned order in para 19.1.6 contradicts its finding in earlier para 19.1.5.
6.	Shifting of the imported machinery was carried out in April, 2011 itself due to mining activity being banned by the Government of India at Obulapuram, but appellants applied to DGFT for their permission to shift such machinery only in February, 2012. (Para 19.1.6)	Since the Government of India imposed ban on mining at Obulapuram the imported machinery was kept idle over two years. On obtaining a contract at NTPC thermal power plant, the machines were shifted in Feb./March 2012. Due to their ignorance they did not intimate Customs authorities but applied for permission before DGFT on 17.02.2012 which they could get on 10.04.2012.	Since competent authority for giving permission to shift the imported machinery to premises of other person/supporting manufacturer is DGFT who had acceded to the request of appellants for installing the machines at premises of supporting manufacturer vide their letter dated 10.04.2012, the condition of notification has not been violated by appellants.
7.	The imported machinery was never installed at the declared premises of the appellants at Obulapuram; instead these were installed at Allahabad to be used for a purpose other than the activity of crushing or iron ore declared in their application to DGFT for issue of EPCG license. There is contradiction in the statements	Imported machinery under EPCG license after customs clearance transported to Obulapuram in three trailers; while two trailers reached site on 06.02.2009, the trailer that met with an accident arrived the site on 14.02.2009. Since the Government of India imposed ban on mining activity at Obulapuram, and the ban was sub-judice being pending before the Hon'ble Supreme Court, these machines were put to	The factual position of imported machinery having been transported to the Obulapuram site is corroborated by the transporter. The EPCG license No. 0930004388/3/11/00 dated 12.09.2008 issued to the appellants under the category of "Service Provider" for export of "Miscellaneous Products". The appellant's request made to DGFT authorities for shifting imported machinery to other premises have been duly taken note of and the

Sl. No.	Findings in the impugned order and reference to paragraph No.	Counter argument or document submitted by appellants	Factual position/ Status
	given by B.Sasikiran Reddy, Managing Director and B.Ravikalyan Reddy, Chairman of the appellant company on installation and use. Thus, there is mis-statement of facts and violation of the provisions of notification. (Paras 19.1.7, 19.1.8)	use for mining work at Bellary and Hospet during July to October, 2009. On receiving a contract for using the imported machines at NTPC Meja thermal power project, they applied to DGFT and obtaining permission. The machines were kept idle for two years at site, owing to the ban imposed by Govt.	request has been acceded to by the DGFT in its permission letter dated 10.04.2012. Thus, to that extent there is no mis-statement of facts. The statements given by different persons holding the position of Chairman and Managing Director of the appellants' company has to be examined in the context of the investigation findings.

8.2 From the factual position in each of the above issues listed above, we find that the conditions of the notification has been fulfilled in respect of Sl. No.1 and 4; as regards the issue at Sl. No.2, 6 necessary permission from the competent authorities have been obtained by the appellants and thus there is no violation of any condition of the notification; in respect of Sl. No. 3, the installation imported machines found to have been accepted by original authority at one paragraph at 18.1.1, but the installation certificate for the same has not been taken into account in the other paragraph at 19.1.4 of the findings, leading to apparent contradiction in the impugned order; similar is the case in respect of Sl. No. 5 where there is also an apparent contradiction in the findings of original authority. Further, in respect of the issues at Sl. No.4, the factual position has not been taken into account with respect to document/installation certificate, which is available on record. Thus, it is clear that the issues arising out of the case and allegations raised in the show cause notice have not been discussed with respect to available documents and case records, various submissions made by the appellants before the original authority, by the learned Commissioner of Customs (Export) in the impugned order, to arrive at the conclusion whether the conditions of the Notification No.64/2008-Customs dated 09.05.2008 have been fulfilled or these have been violated by the appellants.

9. In view of the above discussion, we are of the considered view that the impugned order lacks appreciation of facts on record and the documents submitted by the appellants which are relevant to the issues of the case, for

arriving at a proper decision. There is no discussion or not even a mention of the document produced by the appellants in respect of installation certificate dated 05.04.2009. Thus, we find that the impugned order has not considered all relevant aspects of the case and ignored crucial documents.

10. In view of the discussion and analysis in paragraphs 8 and 9 above, we are of the considered view that the matter needs to be looked into afresh by the original authority for determining the correct position of law in this case. Accordingly, we set aside the impugned order and remand the case for fresh *de novo* adjudication of the case. Needless to say that adequate opportunity for personal hearing should be given to the appellants and submissions, if any, made by them during the proceedings should also be taken into consideration of the case.

11. In the result, the impugned order passed by the Commissioner of Customs (Export), New Custom House, Mumbai is set aside by allowing the appeals filed by the appellants for *de novo* adjudication, by remanding the case back to the original authority.

(Operative portion of the order pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha