CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO. 2

CUSTOMS APPEAL NO: 87730 OF 2017

[Arising out of Order-in-Original No: 16/2017-18/CAC/CC(E)/PS/Adjn dated 27th September 2017 passed by the Commissioner of Customs (Export-II), Mumbai – I.]

Hareesh Menon
1103 Ratnashri Tower-II, Hariom Nagar
Mulund (E), Mumbai - 400082 … ***Appellant***

versus

Commissioner of Customs (Export-II)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

(i) Customs Appeal No. 88067 of 2017 (Skytrain Freight Forwarders Pvt Ltd), (ii) Customs Appeal No. 85514 of 2018 (Nexo Industries Pvt Ltd), (iii) Customs Appeal No. 85515 of 2018 (Amarik Singh Sond), (iv) Customs Appeal No. 85516 of 2018 (Rajinder Singh Sond), and (v) Customs Appeal No. 85517 of 2018

[Arising out of Order-in-Original No: 16/2017-18/CAC/CC(E)/PS/Adjn dated 27th September 2017 passed by the Commissioner of Customs (Export-II), Mumbai – I.]

APPEARANCE:

Ms Krishna Sarkate, Advocate for the appellant

Shri D S Mann, Deputy Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85384/2024

DATE OF HEARING: 10/10/2023
DATE OF DECISION: 08/04/2024

PER: C J MATHEW

The core of the dispute in this appeal of M/s Nexo Industries Ltd, in which several individuals and entities have been penalised under section 112 and section 114AA of Customs Act, 1962 also, is the classification of goods imported in July 2009 against licence no. 3010061661/18.06.2009 under 'duty exemption entitlement certificate (DEEC)' scheme of the Foreign Trade Policy (FTP) and corresponding notification no. 93/2004-Cus dated 10th September 2004 enabling procurement of '"cold heading quality (CHQ)" non-alloy steel rod/wire rod' for manufacture and export of 'bolts and nuts made of "cold heading quality (CHQ)" steel' in fulfillment of obligation thereof.

2. In the bills of entry, the goods were declared as liable, but for the exemption afforded by said notification, to duties of customs at the rate corresponding to tariff item 7213 9120 of First Schedule to Customs Tariff Act, 1975 for

> *'cold heading quality'*

within

> *'BARS AND RODS, HOT-ROLLED, IN IRREGULARLY WOUND COILS, OF IRON OR NON-ALLOY STEEL'*

which is the description corresponding to heading 7213 of First

Schedule to Customs Tariff Act, 1975. In the tariff enumeration of chapter 72, heading 7206 to 7217 are concerned with articles of 'non-alloy steel', heading 7218 to 7223 with articles of 'stainless steel' and heading 7224 to 7229 with articles of 'other alloy steel' and it is on the distinction between the first and the last that the dispute over classification, and its consequential fallout in the perception of the adjudicating authority, turns. Re-classification, manifesting merely as additional liability to duties of customs, should not stand in the way of entitlement to 'value based' exemption if supported by 'authorization' issued under the relevant scheme in the Foreign Trade Policy (FTP) and qualifying under corresponding exemption notification issued under section 25 of Customs Act, 1962. We are constrained to note the stretch of the dispute because the impugned order[1] of Commissioner of Customs (Export-II), Mumbai Zone – 1 has not only determined that description corresponding to heading 7227 of First Schedule to Customs Tariff Act, 1975 is more apt but also proceeded to fasten detriments which may, at best and even only indirectly, be consequences of implied breach of provisions of Customs Act, 1962 and, we dare say, with less than deserving application of mind.

3. Before adumbrating on the flawed outcome, on which the competent reviewing authority too was remiss in discharging its statutory obligation, it may be useful to dwell, briefly though, on the facts and circumstances

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[1] [order-in-original no.16/2017-18/CAC/CC(E)/PS/Adjn dated 27th September 2017]

leading to the appeal. M/s Nexo Industries Ltd, as holder of the said 'authorisation', cleared 1107.29 metric tons of 'CHQ wire rod, grade SAE10B21' imported from Korea against bill of entry no. 903273/17.07.2009 and 1089.11 metric tons of 'prime steel CHQ wire rod hot rolled, grade SAE10B10A' from China against bill of entry no. 901933/08.07.2009 availing duty exemption of ₹ 58,11,461 and ₹ 52,14,824 respectively on declared values aggregating ₹ 5,92,04,642. The appellant claims that goods, stipulated to be produced using the imported material and to the extent of US $ 2,513,487 committed under the scheme in the Foreign Trade Policy (FTP), were exported against 98 shipping bills between 30th July 2009 and 28th June 2010. Thereafter, on the basis of intelligence received and investigations carried out, the appellants were issued with show cause notice, resorting to recovery of duty foregone for the extended period of limitation in section 28(4) of Customs Act, 1962, on 23rd April 2014, alleging misuse of the scheme by importation of articles of 'alloy steel' that, backed by allegedly tampered 'mill test certificates', were misdeclared in the bills of entry to avail duty exemption intended only for articles of 'non-alloy steel' as specified in the authorisation. It may be noted here that there is no allegation that the export of goods had not taken place or had been manufactured by using other material and that the demand was raised just a few months short of the outer limit of extended period permissible in section 28 of Customs Act, 1962.

4. In the impugned order, it was held that 'boron content' in the

imported articles of steel exceeded the threshold of 0.0008%, prescribed in note 1(f) to chapter 72 of First Schedule to Customs Tariff Act, 1975 assigned for distinguishment of ‘other alloy steel’ therein, warranting re-classification in heading 7227 of First Schedule to Customs Tariff Act, 1975 to deny the eligibility of ‘authorization’ issued for goods that are composed of ‘non-alloy steel’ with consequential recovery of duty foregone as above and differential duty of ₹ 15,44,100 and ₹ 22,49,311 respectively by revaluing the goods to ₹ 3,28,45,482 and ₹ 3,33,93,757, aggregating ₹ 6,62,39,240, upon rejection of the declared value of US$ 520 per metric ton and US$ 570 per metric ton respectively and substitution with US$ 610 per metric ton under the authority of rule 4 and rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. It would appear that revaluation was erected on the contention that the ‘transaction value’ reflected in the invoices were for articles that did not conform to the goods and, therefore, sufficing for resort to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, permitting adoption of value, as declared by the same importer for articles of ‘alloy steel’ in bills of entry filed between September 2009 and November 2009, in the alternative. The extended period of limitation was invoked by comparison of photocopies of ‘mill test certificate’, absent remarks, filed at the time of import with originals obtained much later specifying ‘boron content’ in the goods.

5. We are unable to appreciate the re-classification adopted in the

impugned order inasmuch as the adjudicating authority has failed to determine the tariff item, and the associated 'rate of duty', which is the express intent of section 12 of Customs Act, 1962. Moreover, in the light of the declaration in the impugned bills of entry, it was of essence that the finding of the goods to be 'alloy steel', which has not been assigned a meaning in the notes to chapter 72 of First Schedule to Customs Tariff Act, 1975, could have been validated only with reference to meaning of 'steel' and its variants; the lack thereof discountenances the approach to classification in the impugned order. Further, while rejection of value may not require rigour of justification, and indeed could be triggered even by lack of response from importer, it may be gainsaid that simultaneous recourse to two successive options in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 runs counter to the sequential application that is prescribed in the very Rules as consequence of rejection; it is also demonstrative of lack of certainty of the degree of similitude of the impugned goods with those referred to for comparison. It should also have been borne in mind that the Rules framed, in accord with section 14 of Customs Act, 1962, are, contextually, not exclusive to proceedings for recovery of duties under section 28 of Customs Act, 1962 but also intended for assessment of 'imported' goods under section 17, and section 18, of Customs Act, 1962 and to, impliedly, brook distinction among these several streams for collection of tax under the authority of law as to flex the sequence in the Customs Valuation (Determination of Value of Imported

Goods) Rules, 2007 to suit recourse thereof is to strain the credibility of the valuation scheme. We are compelled to dwell on the implied distinction as the adjudicating authority appears to have fallen back on value of subsequent imports as benchmark which would surely not have been available for resort at the time of import of impugned goods which were to be subjected to the same Rules and in the same manner as a post-importation proceedings under section 28 of Customs Act, 1962 for recovery of duty not paid or collected at the time of import. The conceptual foundation of valuation under customs law is unvaryingly unalterable at any stage of duty collection and is not to be perceived as algorithm of convenience.

6. Leaving these observations aside for the nonce, we turn to the submissions of the rival sides. Learned Counsel for appellants opined that, for the purpose of eligibility of imports under the scheme in the Foreign Trade Policy (FTP), the ‘authorisation’ from the licencing authority, and which has been clarified as far back as 23rd November 2010 by the Norms Committee for ‘boron’ content upto 0.003% to qualify as ‘non-alloy’ steel, should have been the sole determinant. It is now contended that the ‘authorisation’ was formally amended by the licencing authority in ‘sheet’ dated 14th October 2020. It was submitted that there is no dispute over the imported goods having been used in the manufacture of exported products and, with fulfilment of export obligation having been accepted by the licencing authority *vide*

communication from their files[2], it was not open to customs authorities to revisit eligibility.

7. Learned Counsel cited the decisions of the Tribunal in *Indian Seamless Metal Tubes Ltd v. Commissioner of Central Excise & Customs, Goa [2017 (348) ELT 577 (Tri.-Mumbai)]*, in *Jindal Drugs Pvt Ltd v. Commissioner of Central Excise & Service Tax, Ludhiana [2018 (362) ELT 281 (Tri.-Chan.)]*, in *Condor Footwear (I) Limited v. Commissioner of Customs, Ahmedabad [2019 (367) 653 (Tri.-Ahmd)]* and in *Joy's The Beach Resort Pvt Ltd v. Commissioner of Customs, Chennai [2020 (372) ELT 721 (Tri.-Chennai)]* in support of her contention the fulfillment of export obligation erases scope for recovery of duties and imposition of penalties. Submissions on inappropriateness of revisiting valuation and invoking the extended period of limitation as well as on the impropriety of penalizing the other appellants were also made.

8. Learned Authorized Representative was pointedly concerned with the deliberate alteration of 'mill test certificates' and the intentional misleading on the part of the importer to avail exemption for ineligible articles which deserved the outcome in the impugned order. Attention was drawn to the conclusion in the impugned order that the Norms Committee was not an authority empowered to disturb the

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[2] [F no. 30/21/40/24/AM 10 dated 19th August 2021]

parameters set out in notes of chapter 72 in First Schedule to Customs Tariff Act, 1975.

9. The adjudicating authority appeared not have given credence to the revision accorded by Norms Committee; moreover, the adjudicating authority appeared to have misconstrued the purpose of section 12 of Customs Act, 1962, which has the sole reference to the First Schedule to Customs Tariff Act, 1975, and ‘scope for determining eligibility for exemption in a notification issued under section 25 of Customs Act, 1962 intended to operationalise a scheme in the Foreign Trade Policy (FTP) with objectives of its own by visiting the declared classification intended for ascertaining rate of duty. Supplanting of the one by recourse to unconnected jurisdiction of the other deprives the impugned order of legal validity. Compounding this glaring *lacunae* in an adjudication exercise, already compromised in the manner set out by us *supra*, are the developments since its culmination. The amending of the licence by the competent authority and the issuing of ‘export obligation discharge certificate (EODC)’ by the licencing authority may have given the adjudicating authority cause for pause had these been available then.

10. In view of these several foundational *lacunae*, the adjudicatory process, found wanting as model of legality and propriety, warrants appropriate rectification. To enable that, we set aside the impugned order and direct that the matter be heard afresh for disposal after affording

opportunity to the notices to make oral and written submissions. Appeals are allowed by way of remand.

(Order pronounced in the open court on 08/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*