CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO. 2

CUSTOMS APPEAL NO: 89388 OF 2013

[Arising out of Order-in-Original No: 01/2013-14 dated 19th August 2013 passed by the Commissioner of Customs (Export), Nhava Sheva.]

Commissioner of Customs (Export)
Mumbai – II, Jawaharlal Nehru Custom House,
Nhava Sheva, Tal: Uran, Dist: Raigad - 400707 … ***Appellant***

versus

Steel & Scrap
202 Yogeshwar, 2nd Floor, 135/137 Kazi Sayed Street
Mumbai - 400003 ***…Respondent***

APPEARANCE:

Shri Ram Kumar, Assistant Commissioner (AR) for the appellant

Shri Chirag Shetty, Advocate for the respondent

CORAM:

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

FINAL ORDER NO: 85475/2024

DATE OF HEARING: 21/11/2023
DATE OF DECISION: 08/05/2024

PER: C J MATHEW

The limited cavil in this appeal, at the behest of Committee of Chief Commissioners – aggrieved by the order of Commissioner of

Customs (Exports), Nhava Sheva for having stopped at re-determining the assessable value as ₹ 2,30,32,755 and reclassifying of the impugned goods as chargeable to duty at the rate prescribed for tariff item 7205 2100 of First Schedule to Customs Tariff Act, 1975 to levy differential duty of ₹ 49,01,331– under the authority of section 129D(1) of Customs Act, 1962, is the failure in the impugned order[1] to confiscate the goods under section 111(m) of Customs Act, 1962 and to impose appropriate penalty under section 112 of Customs Act, 1962.

2. The respondent, M/s Steel & Scrap, had imported 69.610 metric tons of 'waste and scrap of high speed steel dry grindings' for which bill of entry no. 5817366/24.01.2012 had been filed declaring the goods, valued at ₹ 25,55,494, chargeable to duty of ₹ 3,62,344 at rate applicable to tariff item 7204 4900 of First Schedule to Customs Tariff Act, 1975 on availing exemption of 'basic customs duty (BCD)' extended by notification no. 21/2002-Cus dated 1st March 2002 (at serial no. 200). Consequent upon 'first check' sought by the importer, 'positive metal inspection (PMI)', 'sieve test' which resulted in 100% passage through mesh with aperture of one millimetre and report of Maharashtra Pollution Control Board, it was determined that the goods were not 'waste and scrap' but 'alloy steel powder' meriting re-classification thereon and consequent re-valuation. The correctness

[1] [NHS-CUSTM-SXP-COM-01-13-14 dated 19th August 2013]

of the determination of differential duty, as well as denial of eligibility for the exemption from duties as claimed, is not in issue here with the importer having accepted that liability.

3. The impugned order has not resorted to section 28 of Customs Act, 1962 and, impliedly, is not about duty not levied, not paid or short-paid which would be in consequence of clearance of imported goods, despite such deficiency, for home consumption under section 47 of Customs Act, 1962. Indeed, this limb of qualification for clearance could not have been invoked as, by then, the duty liability, as re-worked, had been discharged during the term that the goods were, in accordance with section 49 of Customs Act, 1962, deposited in warehouse. The other limb of qualification for clearance, *viz*., that the goods are not prohibited, could not have been brought into play as that is not an allegation in the entire proceedings leading to the impugned order. It would, therefore, be appropriate to turn to the submissions made on behalf of the appellant-Commissioner for ascertaining source of grievance.

4. According to Learned Authorized Representative, the goods were found to be not conforming to the declaration, both insofar as description and tariff item was concerned, and the respondent had, though ineligible therefrom, claimed the benefit of exemption from ‘basic customs duty (BCD)’ which warranted confiscation under

section 111(m) of Customs Act, 1962. It was contended by him that fine in lieu of confiscation should have been a part of the impugned order as also penalty under section 112 of Customs Act, 1962. On the other hand, Learned Counsel for respondent submitted that there was no misdeclaration on the part of the importer who had himself sought ‘first check’ and the goods were indeed ‘waste and scrap’ to be deployed in manufacture of recycled steel ingots. He also contended that the fine, if any, could not exceed the differential duty liability which was below the threshold for recourse to appellate jurisdiction by Revenue as set out in instruction dated 2nd November 2023 issued from file[2] of Ministry of Finance in Central Board of Indirect Taxes & Customs (CBIC).

5. The goods were re-assessed to duty while stored, under section 49 of Customs Act, 1962, in warehouse pending clearance for home consumption. Re-determination of duty liability was effected without issue of show cause notice on express waiver by the importer at that stage. From the records, we are unable to ascertain any communication of the intention to confiscate goods and impose penalty; all that is seen in the impugned order is

> *‘11…………..The importer requested for waiver of SCN, however, they requested for Personal Hearing in the matter, vide their letter dated 26.07.2013.’*

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[2] [F no. 390/Misc/30/2023-JC]

6. On perusal of

> *'Section 124. Issue of show cause notice before confiscation of goods, etc.*
>
> **-** *No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person –*
>
> *(a) is given a notice in 36[writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;*
>
> *(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and*
>
> *(c) is given a reasonable opportunity of being heard in the matter : ……….'*

of Customs Act, 1962, it is seen that notice is mandatory pre-requisite for confiscation of goods and imposition of penalty. There is no option to have this pre-requisite waived under any circumstances and the only latitude under law is

> *'…….. Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral. …..'*

in section 124 of Customs Act, 1962 which requires the owner of the goods to have been informed of intent, in relation to the goods, at least orally.

7. It has not been held out in the appeal that such intent was communicated to the respondent herein and that the waiver contained in the letter of 26th July 2013 expressed satisfaction that such pre-requisite had been complied with. Therefore, it would appear that the adjudicating authority did not intend to venture in that direction. This is evident from the finding that

> *'13.6 I also find that though the importer had declared the items to be 'waste and scrap of High Speed Steel Dry grindings', yet, the importer had themselves asked for first check appraisement of the goods. There does not appear to be any deliberate attempt to evade duty. In view of this, I find no reason to confiscate the goods or to penalize the importer. I also take into consideration the fact that the goods have been pending for clearance for more than eighteen months and importer has suffered heavy detention and demurrage charges towards the same.'*

in the impugned order. The demand for imposition of fine in lieu of confiscation and of penalty without issue of notice, or waiver of notice in the full knowledge of such intent on the part of customs authorities, is in excess of law and not admissible in the context set out in the grounds of appeal.

8. The grounds of appeal have not established that respondent had

been placed on oral notice and, at his request, for that to suffice as proposal to confiscate the goods and impose penalty. The grounds of appeal have not essayed upon incorrectness of exercise of mind by the adjudicating authority and in the stated circumstances, on the declaration before him, that no offence under section 111(m) of Customs Act, 1962 was evident. It is not their case in the grounds of appeal that every revision of classification and valuation is statutorily to be followed by invoking of section 111(m) of Customs Act, 1962 and section 112 of Customs Act, 1962.

9. For the above reasons, there is no merit in the appeal which is dismissed.

(Order pronounced in the open court on 08/05/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*