CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85898 OF 2024

[Arising out of Order-in-Original No: 234/2023-24/Commr./NS-III/CAC/JNCH dated 20th February 2024 passed by the Commissioner of Customs (NS-III), Nhava Sheva.]

MSS India Pvt Ltd
B-14, MIDC Area, Ambad, Nashik – 422010 … ***Appellant***

versus

Commissioner of Customs (NS-III)
Jawaharlal Nehru Customs House, Nhava Sheva,
Tal: Uran, Dist: Raigad – 400707 ***…Respondent***

APPEARANCE:

Shri Ashwini Kumar, Advocate for the appellant

Shri Ranjan Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85825/2025

DATE OF HEARING:	21/10/2024
DATE OF DECISION:	17/04/2025

PER: C J MATHEW

M/s MSS India Pvt Ltd is in appeal before us challenging the fastening of duty liability of ₹ 1,42,30,300, on imports effected against bill of entry no. 2250349/06.01.2021, and of penalty of ₹ 50,00,000 under section 112 of Customs Act, 1962, attendant upon confiscation under section 111(m) and section 111(o) of Customs Act, 1962 subject to redemption on payment of fine of ₹ 15,00,000 under section 125 of Customs Act, 1962, as well as the differential duty of ₹ 7,25,16,863 under section 28 of Customs Act, 1962 in 149 bills of entry for similar import of goods between July 2018 and May 2020 valued at ₹ 26,14,63,362 that carried imposition of penalty of like amount under section 114A of Customs Act, 1962 as well as penalty of ₹ 5,00,00,000 under section 114AA of Customs Act, 1962 besides fine of ₹ 2,50,00,000 in lieu of confiscation under the authority of Customs Act, 1962.

2. The appellant, purported holder of 'letter of permission (LoP)[1]' from the Development Commissioner, SEEPZ SEZ to operate under the 'export oriented unit (EOU)' scheme in the Foreign Trade Policy (FTP), had undertaken, *vide* intimation[2] of 27th November 2020 and purportedly in compliance with Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017[3] prescribed as condition for availing the benefit of notification[4], that the imported goods would be used for manufacture of several specified end products. It was alleged that imported goods were not in conformity with the said intimation and, consequently, ineligible for exemption afforded by the notification[5] which had to be recovered and, thereby liable to be subjected to re-assessment. According to jurisdictional customs authorities, the description of the goods, together with definitions, in notes to section XV, and exclusion stipulated in note 1(f) in section XVI

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[1] [no. PR:241(1998) EOB/2015/98 dated 17th November 1998]]
[2] [2020-21]
[3] [notification no. 68/2017-Cus (NT) dated 30th June 2017]
[4] [no. 52/2003-Cus dated 31st March 2003]
[5] *ibid*

of First Schedule to Customs Tariff Act, 1975, warranted assessment to duty at the rate prescribed for tariff item 8538 9000 of First Schedule to Customs Tariff Act, 1975. The substance of the case is that the imported goods were not 'bars' but parts required for manufacture of 'switch gears' and, hence, covered within chapter 85 of First Schedule to Customs Tariff Act, 1975 and not against tariff item 7407 1030 of First Schedule to Customs Tariff Act, 1975 as claimed.

3. We take note that the jurisdictional customs authorities have taken recourse to

> *'Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537'*

corresponding to sub-heading 8538 of First Schedule to Customs Tariff Act, 1975 and that too among, other than

> *'Boards, panels, consoles, desks, cabinets and other bases for the goods of heading 8537, not equipped with their apparatus.'*

corresponding to sub-heading 8538 10 of First Schedule to Customs Tariff Act, 1975 to determine rate of duty to be applied for clearance should the imports be excluded from the purview of the notification[6]. It is common ground that the goods had been classified for the purpose of self-assessment on the declaration of coverage of goods as

> *'copper bars excluding hollow bars'*

corresponding to tariff item 7407 1030 of First Schedule to Customs Tariff

[6] [no.52/2003 dated 31st March 2003.]

Act, 1975 and that, while entitlement to the exemption in notification[7] was sought to be denied for non-compliance with Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017, which obliges

> *'importer who intends to avail the benefit of an exemption notification issued under section 25 of Customs Act, 1962 and whether the benefit of such exemption is dependent on the use of imported goods covered by notification for the manufacture of any commodity on provision of output service as set out in rule 2 thereof.'*

to give information upon receipt of imported goods and to maintain records, the liability to consequential duty was computed after re-assessment of the imported goods.

4. The unorthodox resort to re-assessment was sought to be justified thus

> *'29. After having identified and framed the main issues to be decided, I now proceed to deal with each of the issues individually for analysis considering facts, circumstances of the case, legal provisions of the Customs Act, 1962and nuances of various judicial pronouncements*
>
> *A. Whether the imported goods classified under CTH 74030000 are liable for re-assessment and classifiable under CTH 85389000:*
>
> *(i) Classification of goods in the nomenclature are governed by the following principles:*
>
> > *"7.1 GRI-1 provides that "The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or*

[7] [no. 52/2003-Cus dated 31st March 2003]

Notes do not otherwise require."

The explanatory notes regarding the same explain that: -

(1) the nomenclature sets put in systematic form the goods handled in international trade. It groups these goods in Sections, Chapters and sub-Chapters which have been given titles indicating as concisely as possible the categories or types of goods they cover.

(III) the second part of this Rule provides that classification shall be determined (a) according to the terms of the headings and any relative Section or Chapter Notes, and (b) where appropriate, provided the headings or Notes do not otherwise require. .

(V) As per provision III(b): (a) The expression "provided such headings or Notes do not otherwise require" is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification.

(ii) In terms of GRI-I, when "Copper Busbar" which is part used principally for production of switchgears, bus bars etc are provided in Tariff i.e., CTH 8535,8536& 8537, the terms of the headings and any relative Section or Chapter Notes are paramount i.e. they are the first consideration in determining classification. Accordingly, Copper Busbar (the product) merit classification under the CTH 8538- 'parts suitable for use solely or principally with the apparatus of headings 8535, 8536 or 8537'.

(iii) I further find that for use principally with a particular kind of electrical machine merits classification under CTH 8538. Accordingly, impugned goods which are used as parts suitable for use principally for production of switchgejyotars and other electrical applications maerit classification under CTH 8538

xxxxx

which are used as parts suitable for use principally for production of switchgejyotars and other electrical applications maerit classification under CTH 8538 *xxxxx*

> *(iv) I further find that the noticee has submitted explanation received from their supplier M/s Copalcor (Pty) Ltd, wherein, the supplier has specifically mentioned that Copper Bar and Copper Busbar are two different items and the impugned goods, Copper Busbar are liable for classification under heading 8538......'*

in the impugned order with discard of the explanation, in several letters issued by the supplier, M/s Copalcor (Pty) Ltd, South Africa, between 11th December 2023 and 8th January 2024, that reference to 'busbar' in their invoices was from oversight, as afterthought.

5. The said Rules were notified to enable continuation of procedural safeguards, by monitoring of 'end use' stipulated as condition in some exemption notifications through central excise jurisdiction, in place prior to 1st July 2017. Such facilitation enabled, in general, manufacture of finished goods without having to subject imported goods required for such production to duties of customs and, normally, in notifications specifying both raw materials and finished goods emerging therefrom. Rule 4 of the said Rules required furnishing of certain particulars to trigger oversight by central excise authorities. In the 'post-excise tax regime' after 31st June 2017, Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 was substituted to enable appropriate oversight and to be in force even in hitherto excluded schemes, such as 'export-oriented unit (EOU)' scheme, owing to 'manufacture' being no longer, for tax purpose, distinguishable economic activity. The present dispute arises from the legacy of sanctity accorded to the 'triggering intimation' under the erstwhile Rules designed for input-output 'marriage', as it were and its unalloyed application

to a scheme designed to keep such regulated correlation out. The limited question is the primacy of the substantive notification that, over time, has shed all such restrictions over the Rules, embodying procedure, made applicable from lack of alternative and, that too, by investing jurisdiction on the vestige of ‘integrated tax’ befalling such imports.

6. According to Learned Counsel for the appellant, the jurisdiction, in terms of the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017, for recovery of duty from non-eligibility for any reason did not vest with ‘proper officer’ under Customs Act, 1962. It was also contended that there is neither allegation in the show cause notice, nor any finding in the impugned order, that the impugned goods were not raw materials or components for use in goods manufactured in ‘export oriented unit (EOU)’ approved under the Foreign Trade Policy (FTP). It was further contended that the classification adopted in the impugned order was the ‘residual’ intended for parts, and, that too, qualified by ‘use solely or principally with the apparatus enumerated therein’ whereas some activities were required to performed on the imported goods before being actually put to use and, hence, recourse to the revised classification was incorrect. It was also submitted that note 9 in section XV, with reference to bars and rods at clause (a), conforms to the product that were imported by them. Learned Counsel also took us through the provisions of notification[8] and Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017. He placed reliance on the decision of the Hon'ble High Court of Madras in

[8] [no. 52/2003-Cus dated 31st March 2003]

Commissioner of Customs (Sea), Chennai v. CESTAT, Chennai [2023 (383) ELT 5434 (Mad.)] and on the decision of the Hon'ble Supreme Court holding that exemption available to 'export-oriented units (EOU)' was to be interpreted liberally in application.

7. Learned Authorized Representative, while reiterating the findings in the impugned order, submitted that the intimation, in terms of Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017, mandated use of the goods in manufacture of final products whereas the goods impugned were not actually products in the list of goods that could be permitted for import. According to Learned Authorized Representative, there was no bar on recovery by the jurisdictional customs authorities inasmuch as the claim for exemption itself being defective, the assessment and clearance were void *ab initio* and argued that such 'bus bars' were permitted for import only as samples and prototypes which the imported goods were not.

8. The appellant is a 'export-oriented unit (EOU)' governed by the provisions of Foreign Trade Policy (FTP) entitling procurement – from both abroad and domestically – of capital goods, raw materials components and samples subject to such restriction as are specified either in the Foreign Trade Policy (FTP) or in the corresponding exemption afforded under section 25 of Customs Act, 1962. The said scheme has been in operation for over three decades and, during this time, has evolved from supervised manufacture, prevailing before the comprehensive Central Excise Tariff Act, 1975 was brought into existence and in the regime of high rates of duty, to autonomous operation subject only to compliance with conditions

including obligation to be ‘net foreign exchange earnings (NFE)’ positive and features inter-departmental annual reviews and submission of quarterly statements. From the days of approval to be granted on each occasion of import with double lock of bonded store, the scheme has travelled a long way to the regime of general exemption binding the unit to export goods in terms of said ‘letter of permission (LoP)’ or to clear them domestically on payment of appropriate rate of duty in accordance with section 3 of Central Excise Act, 1944. A paradigm shift was the erasure of Central Excise Act, 1944 with effect from 1st July 2017 and the elimination of ‘manufacture’ as a charge for taxation. Consequently, the scheme of supervision was bound to undergo a change and governing notification[9] to reflect necessary changes. We find from the impugned order that reference has been made to notification[10] which amended the governing notification[11] and also the operationalizing of Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 *vide* notification[12].

9. In terms of prevailing notification[13] empowering of clearance of goods without payment of duty as well as recovery in the event of non-compliance with conditions thereof, there was no requirement to obtain prior permission for import of any goods; eligibility stemmed to the extent that the goods, whether raw materials, samples, components or capital goods that were warehoused/installed at the premises of manufacturer, were for use in the manufacture of goods permitted to be exported that were also

[9] [no. 52/2003-Cus dated 31st March 2003]
[10] [no. 78/2017-Cus dated 13th October 2017]
[11] ibid
[12] [no. 68/2017-Cus (NT) dated 30th June 2017]
[13] ibid

permissible to be cleared on payment of appropriate duties of central excise and, except for the duty liability arising on domestic clearance in the new 'goods and service tax regime', no other change was brought into force insofar as the governing notification[14] is concerned. *Vide* notification[15], these changes were brought about thus

> *'2. In the said notification, for the words, brackets and figures "from the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under sub-sections (1), (3) and (5) of section 3 of the said Customs Tariff Act, subject to the following conditions, namely:-",*
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> *the following shall be substituted, namely:-*
>
> *"from -*
>
> *(A) the whole of the duty of customs leviable thereon under the First-Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under sub-sections (1), (3) and (5) of section 3 of the said Customs Tariff Act; and*
>
> *(B) the integrated tax and compensation cess leviable thereon under sub-sections (7) and (9), respectively of section 3 of the said Customs Tariff Act:*
>
> *Provided that nothing contained in clause (B) above shall apply on or after the 1st day of April, 2018, subject to the following conditions, namely:-"'*

10. It is also noticed that an earlier notification[16] had caused change, *viz.*,

> *2. In the said notification, -*
>
> *(a) in the opening paragraph, -*

[14] [no. 52/2003-Cus dated 31st March 2003]
[15] [no. 78/2017-Cus dated 13th October 2017]
[16] [no. 59/2017-Customs dated 30th June 2017]

> *(i)* *for the words "and the additional duty, if any, leviable thereon under section 3 of the said Customs Tariff Act", the words " and the additional duty, if any, leviable thereon under sub-sections (1), (3) and (5) of section 3 of the said Customs Tariff Act" shall be substituted;*
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> *(ii)* *after condition (2), the following shall be inserted, namely:-*
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> *"2A. The unit shall follow the procedure prescribed under rule 5 of the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017, for import of goods.";'*

11. It would, therefore, appear that the appellant herein was required to be compliant with Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 for the purpose of any imports effected after 1st July 2017 in order to be eligible for the exemption from payment of duties in accordance with which they had purportedly intimated that 'bus bars' had been cleared by them. It is seen that the importer had intimated the goods required, as set out in Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017, and that, in terms of the Rules, they were, in effect, required to maintain records of usage in production as was prevalent during the governance of manufacturing activities under Central Excise Act, 1944. The present controversy relates to the classification of goods which, according to jurisdictional authorities, were 'end products' of themselves and hence not capable of being used in manufacture as raw materials and, therefore, ineligible for the benefit of exemption in notification[17]. The

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[17] [no. 52/2003-Cus dated 31st March 2003]

fulcrum of the case of the jurisdictional customs authorities is the revision of classification from that declared in the tariff item 7407 1030 of First Schedule to Customs Tariff Act, 1975 to tariff item 8538 9000 of First Schedule to Customs Tariff Act, 1975, by means of exclusions and definitions set out in note to section XV of First Schedule to Customs Tariff Act, 1975 within which lies ‘copper and articles of thereof’ of chapter 74 therein. In effect, the impugned order has moved impugned goods from a primary or near primary stage to finishing state and held to be ineligible for having attained shape as finished goods. The instrument deployed thereof was the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 owing to which two provisions, one enabling and the other machinery to weaponize recovery of duty beyond that was foregone and for non-compliance with the conditions thereof in notification[18] issued under section 25 of Customs Act, 1962, were coalesced in a single proceedings.

12. We take note from the contents of the notification that the amendments are entirely procedural and, necessitated by having to graft ‘manufacture’ on to a tax regime, that did not control manufacture, for ensuring proper consequence to exemption from ‘integrated tax’ granted by notification[19], the governing mechanism remained unchanged. Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 is a framework that enables some level of supervisory control over ‘goods and service tax (GST)’ assessees otherwise commencing only ‘post-manufacturing’ with the procedural stipulations thereof are to be treated as

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[18] [no. 52/2003-Cus dated 31st March 2003]
[19] [no. 78/2017-Cus dated 13th October 2017]

merely procedural and nothing else. The customs authorities were required to examine eligibility, in terms of enumerated conditions, for exemption and the classification of the goods, which, from the intent of notification[20], being assessment neutral and of no consequence, warranted interference only upon proven diversion instead of actual use in manufacture. Assessment to duty, whether at the rate prescribed for tariff item 7407 1030 or tariff item 8538 9000 of First Schedule to Customs Tariff Act, 1975, was immaterial to exempting 'export oriented units (EOU)' from payment of duty as the goods manufactured were, in any case, to be exported and, to the extent permitted by the scheme in the Foreign Trade Policy (FTP), cleared domestically in form that it was not at the time of import.

13. As far as the 169 bills entry for the period from July 2018 are concerned, there is no allegation that the goods imported had been used other than as intended in the exemption notification[21]. In the absence of breach of such condition, there was no scope for recovery of any duties foregone at the time of import. There is no allegation of the goods having been cleared, as such, into the domestic market nor that the impugned goods were not utilized in the manufacture of goods exported by the appellant. The classification accepted at the time of import was interred for all time to come with deployment of goods for production.

14. As far as the live consignment is concerned, the provision in the exemption notification enables consequence for failure to meet post-

[20] [no. 52/2003-Cus dated 31st March 2003]
[21] ibid

importation conditions leaving scope neither for levy of duty nor for confiscation thereof at the threshold of Indian territory. Presumption of eventual violation of the conditions specified in notification[22] is not acknowledged in law and hinges on personal perception which is anathema. Neither is there any allegation that the impugned goods are not permitted for import in terms of the 'letter of permission (LoP)' issued by the jurisdictional Development Commissioner and which is the touchstone for denial of exemption with consequent relevance to assessment to duty at the threshold. The incorporation of supervision through Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017, and consequent only to erasure of jurisdiction over manufacture, had not altered the rubric and formula of the scheme in which appellant operated. Except for goods, specifically excluded in the governing notification or unconnected with goods specified in the 'letter of permission (LoP)' – and accompanying exclusion from the notification, the nature or classification of goods imported under the scheme has no consequence except in situation of not having been deployed in manufacture. The impugned Rules are merely facilitative as are the procedures therein for claiming exemption and to be deployed, if at all, for detriment within the scope and extent of the Rules. The authority adjudicating the impugned notice had no jurisdiction in proceedings to revisit assessment in relation to alleged procedural disputation over Rules for operationalizing a scheme of manufacture and export by which an assessee was permitted, subject to requirement for manufacture of permitted goods,

[22] [no. 52/2003-Cus dated 31st March 2003]

to import without any restriction on quantity or description.

15. In the light of the factual matrix *supra*, the charging of differential duty as well as the other detriments amounts to excess of jurisdiction and based on premises and suppositions which have neither authority of law to support nor judicial pronouncements to prop up. This is clearly a case of excess of jurisdiction by authorities vested with the empowerment to charge duties on goods imported into the country in accordance with law, namely, section 12 and section 14 of Customs Act, 1962 and, on non-conformity with threshold conditions imposed in any notification issued under section 25 of Customs Act, 1962.

16. For the above reason, the impugned order is set aside to allow the appeal.

(Order pronounced in the open court on 17/04/2025

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*