(2023) 09 CESTAT CK 0016

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Stay Application No. 60020 Of 2023 In Customs Appeal No. 60108 Of 2023

Commissioner Of Customs, ICD Patparganj APPELLANT

Vs

Jindal Stainless Ltd RESPONDENT

Date of Decision : 13-09-2023

Acts Referred:

Customs, Excise And Service Tax Appellate Tribunal (Procedure) Rules, 1982 — Rule 6(A)

Citation : (2023) 09 CESTAT CK 0016

Hon'ble Judges : S. S. Garg, Member (J);P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Pawan Kumar, B. L. Narsimhan, Krati Singh, Aman Singh

Final Decision : Dismissed

Judgement

S. S. Garg, Member (J)

1. Revenue has filed the present appeal assailing the impugned order dated 29.07.2022 passed by the Commissioner (Appeals) of Customs, Delhi whereby the Commissioner (Appeals) has upheld the order-in-original. Alongwith this appeal, Revenue has also filed stay petition seeking stay of the impugned order.

2. Brief facts of the case are that the Respondent is engaged in the manufacture of stainless steel coils, slabs and steel sheets. For the purposes of manufacturing of these final products, the Respondent inter alia imports nickel, ferro nickel, ferro chrome, molybdenum and other ferro alloys ('goods') from various sellers, which are utilized for manufacturing of the final products.

(i) The Respondent filed various bills of entries ('BOEs') seeking clearance with respect to goods imported by it. The BOES were accompanied by the invoices based on certificate of quality analysis conducted by them through the laboratory. The declared assessable value was based on such invoice, which was calculated as per following formula: Value = (Total weight) X (% of Metal content) X (Rate of metal)

(ii) The BOE was assessed provisionally by the customs officer against submission of test bond under Section 18 of the Act and cleared the goods. Subsequently, the Customs officer deemed it necessary to subject the goods to testing to ascertain the true percentage of metal content in the goods imported

(iii) Representative sample of the goods was drawn and forwarded to Central Revenue Control Laboratory New Delhi (hereinafter CRCL) for testing

(iv) Based upon the report submitted by CRCL, assessing officer proceeded to finalise assessment of BOES and raised the demand on the Respondent vide Assessment Orders.

(v) Aggrieved by the Assessment orders (AOs), the Respondent filed 68 appeals before Commissioner (Appeals), Customs. Wherein, the Ld. Commissioner (Appeals) allowed all appeals and set aside the AOs vide a common Order-In-Appeal dt. 19.07.2022.

(vi) Aggrieved by the Impugned order, the Department has approached this Tribunal in respect of 44 AOs and sought stay of the operations of the Impugned order passed by Ld. Commissioner (Appeals).

3. Heard both the parties and perused the records.

4. Ld. DR submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the evidence on record. He further submitted that the department has raised various grounds in their appeal on the basis of which the impugned order is liable to be set-aside. He also submitted that in the present case under valuation of the goods is proved on the basis of the report of CRCL, Delhi and the Ld. Commissioner (Appeals) has wrongly set-aside the order of assessing officer without any cogent evidence on record.

5. On the other hand, the Ld. Counsel appearing for the Respondent submitted that the Respondent have filed one common appeal against the impugned order-in-appeal which has been passed with reference to all 44 assessing orders which are disputed by the department. He further submits that as per the explanation to Rule 6(A) of CESTAT Procedure Rules, 1982 which provides that where the impugned order-in-appeal has been passed with reference to more than one orders-in-original, the memoranda of appeal filed shall be as many as the number of the orders-in-original. For this submission, he relied upon the decision of the Tribunal in the case of Richemont India Pvt. Ltd. vs. C.C. (Import & General), New Delhi 2016 (42) STR 26 (Tri.-Del.).

6. Ld. Counsel also submits that the request made by the respondent for re-testing was not entertained by the assessing officer which is in violation of the decision of the Tribunal in the case of Garg Industries Ltd. vs. Commissioner of Central Excise, Mumbai 2007 (208) ELT 535 (Tri.-Mumbai).

7. Ld. Counsel further submits that the samples drawn for test report were only representative of small portion and adverse inference cannot be drawn for entire consignment. He also submits that only a small percentage of variation of metal content in the samples drawn is negligible and cannot be considered for entire consignment. He further supported the impugned order by submitting that there is nothing on record brought by the department to establish that the respondent paid an amount over and above the invoice price and there is no cogent evidence to establish any flow back of consideration to the foreign seller. For this submission, he relied upon the following decisions:-

• Hanil Automotive India Pvt. Ltd. vs. Commissioner of Cus.-III, Chennai 2021 (376) E.L.T. 522 (Tri. - Chennai)

• Commissioner Of Customs (Export), Goa vs. VGM Exports 2013 (291) E.L.T. 572 (Tri. - Mumbai)

• Ebro Armaturen India Pvt. Ltd. vs. Commr. of C. Ex., Bangalore-l 2021(375) E.L.T. 259 (Tri. - Bang.)

• Central Excise and Service Tax, Noida v. Sanjivini Non-Ferrous Trading Pvt. Ltd. 2019 (365) E.L.T. 3 (SC)

8. After considering the submissions of both the parties and perusal of material on record and the various decisions relied upon by the appellant as well as respondent, we find that in order to stay the operation of the impugned order, the revenue is required to establish three ingredients, namely, prima facie case, balance of convenience and irreparable loss whereas in the present case, we find that revenue has not been able to establish any of the three ingredients. We have gone through the impugned order and we find that in the impugned order, the Commissioner (Appeals) has relied upon the decision of the Tribunal in the case of Binani Cements ltd. Vs. Commissioner of Customs, Ahmedabad 2004 (165) ELT 533 (Tri.-Del) and other decisions cited (supra).

9. Further, we find that the prima facie case and balance of convenience are also in favour of the respondent because the goods have already been cleared and thirdly we find that the appellant is not going to suffer irreparable loss if the impugned order is not stayed.

10. In view of our discussion above, we find that at this stage, there is no justification for staying the impugned order and therefore, the application seeking stay of the impugned order is hereby rejected.