(2021) 11 CESTAT CK 0057

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 75116 Of 2020

Principal Commissioner Of Customs (Port), Kolkata Vs M/s Kanha Electronics, Kolkata ?

Date of Decision : 23-11-2021

Acts Referred:

Customs Act, 1962 — Section 17, 17(4), 46, 54, 77, 111, 111(d), 111(m), 112, 112(a)(ii), 125
Bureau of Indian Standards Act, 1986 — Section 10, 10(p), 10(1)(p)
Bureau of Indian Standards Rules, 1987 — Rule 13, 13(fa)
Customs Tariff Rule, 1975 — Rule 2(a)

Citation : (2021) 11 CESTAT CK 0057

Hon'ble Judges : P. K. Choudhary, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

1. This appeal has been filed by the Revenue assailing Order in Appeal dated 22.01.2020, Impugned order whereby the learned Commissioner (Appeals) allowed the appeal filed by the importer and set aside the order in original dated 13.06.2019 passed by the Additional Commissioner of Customs (Port), Kolkata.

2. The facts of the case, after filtering out unnecessary details, are that the Respondent herein filed two Bills of Entry No. 8104330 dated 18.09.2018 and 8341648 dated 5.10.2018 declaring the imported goods as 12 mm Pixel LED and classified the goods under 85411000 and claimed the benefit of exemption notification no. 24/2005 (S.No. 23). Receiving information that the goods have been mis-declared, the officers opened and examined the goods and found them to be LED strands of 50 each but without connectors and adapters. It was felt that import of the goods is prohibited as per the Electronics and Information technology goods (Requirements of Compulsory Registration) Order, 2012, CRO issued by the Ministry of Electronics and Information Technology, Meity issued vide S.O. 2375 (E) dated 7th September 2012 as amended S.O. 2742(E). dated 17 August 2017 as the imported goods did not meet the requirement of compulsory registration as per the CRO. Therefore, it was also felt that the

imported goods were liable for confiscation under section 111(d) and (m) of the Customs Act and the respondent was liable to penalty under section 112. Accordingly an SCN was issued to the respondent and after following due process, the learned adjudicating authority passed the order in original dated 13 June 2019 as follows:

"(i) I reject the claimed classification 85411000 of imported goods i.e. LED LIGHTING CHAINS covered under bills of entry no. 8341684 dated 05.10.2018 and 8104330 dated 18.09.2018 and order to classify same under 94053000 under Section 17(4) of the Customs Act, 1962.

(ii) I reject the duty exemption for the imported items claimed by the importer under sl. 23 of Notification No. 24/2005-(Cus) dated 01.03.2005. I determine the duty liability at Rs. 4,33,436/- under Section 17(4) of the Customs Act, 1962.

(iii) I confiscate all the items imported vide Bills of Entry No. 8341684 dated 05.10.2018 and 8104330 dated 18.09.2018 having combined assessable value of Rs. 16,69,630/- under Section 111(d) and 111(m) of the Customs Act, 1962. However, I give the importer to redeem the goods for re-export only on payment of redemption fine of Rs. 3,00,000/- (Rupees Three Lakhs Only) under Section 125 of the Customs Act, 1962 within 15 days from the date of receipt of this order and in such case no duty will be chargeable.

(iv) I impose a penalty of Rs. 70,000/- (Rupees Seventy Thousand only) under the provisions of Section 112(a)(ii) of the Customs Act, 1962 on the importer M/s Kanha Electronics for his acts of commission and omission rendering the goods liable for confiscation."

3. Aggrieved, the importer appealed to the Commissioner (Appeals) who passed the impugned order setting aside the order of the original authority. Hence, this appeal by the Revenue. The issues which fall for consideration in this appeal are:

a) Are the imported goods classifiable under 85411000 as claimed by the Respondent importer and held by the Commissioner (Appeals) in the impugned order or under 9453000 as held by the original authority?

b) Consequently, is the benefit of Notification no. 24/2005-Cus dated 1.3.2005 available to the Respondent importer?

c) Are the goods liable for confiscation under section 111(d) and (m) and if so, whether the option of redemption of the goods only for export given by the original authority under section 125 correct?

d) Is the imposition of penalty under section 112 upon the respondent correct?

4. We proceed to decide the above issues.

Classification of the impugned goods

5. The competing tariff entries are 85411000 and 9453000 of the Customs Tariff. These entries are as follows:

8541: DIODES, TRANSISTORS AND SIMILAR SEMI CONDUCTOR DEVICES; PHOTOSENSITIVE SEMI-CONDUCTOR DEVICES; INCLUDING PHOTO VOLTAIC CELLS, WHETHER OR NOT ASSEMBLED IN MODULES OR MADE UP INTO PANELS; LIGHT EMITTING DIODES; (LED); MOUNTED PIEZO-ELECTRIC CRYSTALS

8541 10 00 - Diodes, other than photosensitive or light emitting diodes (LED),

- Transistors, other than photo sensitive transistors:

8541 21 00 -- With a dissipation rate of less than 1 W

85412900--Other

854130 - Thyristors, diacs and triacs, other than photosensitive devices

8541 30 10 --- Thyristors

8541 30 90 --- Other

8541 40 - Photosensitive semi-conductor devices, including photo voltaic cells whether or not

assembled in modules or made up into panels; light-emitting diodes (LED)

--- Photocells :

8541 40 11 ---- Solar cells whether or not assembled in - modules or panels

8541 40 19 ---- Other

8541 40 20 --- Light emitting diodes (electro-luminescent)

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8541 40 90 --- Other

8541 50 00 - Other semi-conductors devices

8541 00 - Mounted piezo-electric crystals

85419000 - Parts

LAMPS AND LIGHTING FITTINGS INCLUDING SEARCHLIGHTS AND SPOTLIGHTS AND PARTS

9405 THEREOF, NOT ELSEWHERE SPECIFIED OR INCLUDED; ILLUMINATED SIGNS, ILLUMINATED NAME-PLATES AND THE LIKE, HAVING A PERMANENTLY FIXED LIGHT SOURCE, AND PARTS THEREOF NOT ELSEWHERE SPECIFIED OR INCLUDED

9405 10 - Chandeliers and other electric ceiling or wall lighting fittings, excluding those of a kind used for lighting public open spaces or thorough fares :

9405 10 10 - Hanging lamps, complete fittings

9405 10 20 - Wall lamps

9405 10 90 - Other

9405 20 - Electric table, desk, bedside or floor-standing lamps :

9405 20 10 - Table lamps, complete fittings

9405 20 90 - Other

9405 30 00 - Lighting sets of a kind used for Christmas trees

9405 40 - Other electric lamps and lighting fittings :

9405 40 10 - Searchlights and spotlights

9405 40 90 - Other

9405 - Non-electrical lamps and lighting fittings :

6. The case of the Revenue is that the customs tariff heading 85411000 covers "diodes other than photosensitive and light emitting diodes (LED)". Therefore, the imported goods can never be classified under this head when the heading specifically excludes LEDs. It is also the case of the Revenue that what were imported were not merely LEDs but they were strands of 50 LEDs each and were effectively lighting sets of the kind used for Christmas trees although they were without connector and adapter. In other words, they are incomplete lighting sets. As per Rule 2(a) of the Rules of Interpretation, incomplete and unfinished articles must be classified as complete and finished articles. Rule 2(a) of the Rules of Interpretation reads as follows:

Rule 2(a): Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this Rules), presented unassembled or disassembled.

7. It is also the case of the Revenue that on a query on Sevottam, the respondent importer submitted a letter dated 25.4.2019 accepting the classification of the goods under Customs Tariff Heading 94053000.

8. In the impugned order, the learned Commissioner (Appeals) has found that the original authority has wrongly applied Rule 2(a) of the Rules of Interpretation because Rule 1 itself answers the question. According to Rule 1, goods should be classified according to the Chapter headings and Chapter notes and Section Notes. He held that Chapter note 1(f) to Chapter 94 clearly excludes lamps or light fittings of Chapter 85 from Chapter 94 and Customs Tariff Heading 94.05 covers only lamps and light fittings not elsewhere specified or included. He observed "Though there is a specific heading for different types of lamps in Chapter 85 ((85.39), there is no specific heading for lighting fittings in Chapter 85. This factual aspect conclusively suggests that lighting fittings of Chapter 85 as specified in the excluding note 1(f) of Chapter 94 including the lighting fittings

of LED."

9. We have considered the arguments on both sides. We find it strange that having concluded that there is no heading for light fittings of LED under Chapter 85, the learned Commissioner (Appeals) concludes that they are excluded from Chapter 94 by virtue of Chapter note 1(f) which states that lighting fittings covered by Chapter 85 are excluded from Chapter 94. If the lighting fittings in question are not covered by Chapter 85, evidently, they are not excluded by virtue of Chapter note 1(f) of Chapter 94. Having come to this contradictory conclusion, the learned Commissioner (Appeals) held that the lower authority should not have applied Rule 2(a) because Rule 1 provides an answer. As is evident from the learned Commissioner (Appeals) findings itself Rule 1 does not answer the question because Chapter note 1(f) to Chapter 94 which the learned Commissioner relied upon only excludes lighting fittings falling under Chapter 85 and the learned commissioner finds that there is no heading for lighting fittings of LEDs in Chapter 85.

10. We also find it unsustainable that the learned Commissioner (Appeals) holds that the imported goods are classifiable under 85411000 in paragraph 18 of the impugned order after reproducing this heading in paragraph 8 as follows:

85411000 - Diodes, other than photosensitive or light emitting diodes (LED)

Clearly photosensitive diodes and LEDs are excluded from this heading and therefore, learned Commissioner (Appeals) committed an error in classifying them under this heading.

11. Coming to the nature of the goods that are imported, although they were declared as LEDs, on examination, they were found to be not individual LEDs but strands of 50 LEDs each. Such strands of LEDs are used for decoration, etc. but one needs to attach the adapters and connectors to the strings of LEDs. There were no adapters in the consignment and therefore, they were incomplete. Learned adjudicating authority has correctly applied Rule 2(a) to conclude that they were classifiable as Lighting sets of a kind used for Christmas trees 94053000. The classification of the goods by the Commissioner (Appeals) needs to be set aside and the classification by the original authority needs to be restored and we do so.

Exemption notification no. 24/2005-Cus (S.No. 23)

12. This unconditional exemption notification exempts goods covered by it from the whole of duty of Customs. S.No. 23 of it reads as follows:

S.No.

Heading, sub-heading or tariff item

Description

23

8541

All goods

Evidently, goods falling under heading 8541 are exempted and not goods falling under 94053000. Since we have held that the goods in question are classifiable under 94053000, the benefit of this exemption notification does not apply.

Confiscation of goods and imposition of penalty

13. The next question is whether the impugned goods are liable for confiscation under Section 111(d) and Section 111(m) of the Customs Act, 1962 as held in the order of the original authority or not as held by the learned Commissioner (Appeals) in the impugned order. We have held the classification in favour of the Revenue and against the assessee. However, relevant confiscation provisions have to be examined. Section 111 reads as follows:

SECTION 111. Confiscation of improperly imported goods, etc. - The following goods brought from a place outside India shall be liable to confiscation: -

(a) ....

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

....

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;........

14. The original authority held that the goods are liable for confiscation [under section 111(d)] because they have been imported in violation of the CRO published by S.O. 2375 (E) dated 7th September 2012 which reads as follows:

In exercise of the powers conferred under Section 10(1)(p) of the Bureau of Indian Standards Act, 1986 (63 of 1986) and in pursuance of clause (fa) of Rule 13 of the Bureau of Indian Standards Rules, 1987, the Central Government, after consulting the Bureau of Indian Standards, makes the following order, namely:-

......

3. Prohibition regarding manufacture, storage, sale and distribution, etc. of goods-

(1) No person shall, by himself or by any other person on his behalf, manufacture or store for sale, import, sell or distribute goods which do not

conform to the specified standards and do not bear the words Self declaration-conforming to IS (Relevant Indian Standard mentioned in the column (3) of the Schedule) on such goods after obtaining registration from the Bureau.

Provided that nothing in this order shall apply to manufacture of goods meant for export.

(2) The substandard or defective goods that do not conform to the specified standard mentioned in column (3) of the Schedule shall be deformed beyond use by the manufacturer and disposed off as scrap.

The schedule to the above order was expanded by S.O. 2742(E). dated 17 August 2017 including, inter alia, at S.No. 36 as follows:

36

LED Lighting Chains

IS 10322 (Part 5/Section 7): 2013

Luminaires - Part 5: Particular Requirements Section 7 Lighting Chains

15. Both the original CRO of 2012 and its amendment on 17 August 2017 were issued under Section 10(p) of the BIS Act, 1986 and clause (fa) of the BIS Rules, 1987. These read as follows:

Section 10 of the Bureau of Indian Standards Act, 1986

10. Functions of the Bureau.-(1) The Bureau may exercise such powers and perform such duties as may be assigned to it by or under this Act and, in particular, such powers include the power to-

(a) establish, publish and promote in such manner as may be prescribed the Indian Standard, in relation to any article or process;

(b) recognise as an Indian Standard, in such manner as may be prescribed, any standard established by any other Institution in India or elsewhere, in relation to any article or process;

(c) specify a Standard Mark to be called the Bureau of Indian Standards Certification Mark which shall be of such design and contain such particulars as may be prescribed to represent a particular Indian Standard;

(d) grant, renew, suspend or cancel a licence for the use of the Standard Mark;

(e) levy fees for the grant or renewal of any licence;

f) make such inspection and take such samples of any material or substance as may be necessary to see whether any article or process in relation to which the Standard Mark has been used conforms to the Indian Standard or whether the Standard Mark has been improperly used in relation to any article or process with or without a licence;

g) seek recognition of the Bureau and of the Indian Standards outside India on such terms and conditions as may be mutually agreed upon by the Bureau with any corresponding institution or organisation in any country;

(h) establish, maintain and recognise laboratories for the purposes of standardisation and quality control and for such other purposes as may be prescribed;

(i) undertake research for the formulation of Indian Standards in the interests of consumers and manufacturers;

(j) recognise any institution in India or outside which is engaged in the standardisation of any article or process or the improvement of the quality of any article or process;

(k) provide services to manufacturers and consumers of articles or processes on such terms and conditions as may be mutually agreed upon;

(l) appoint agents in India or outside India for the inspection, testing and such other purposes as may be prescribed;

(m) establish branches, offices or agencies in India or outside;

(n) inspect any article or process, at such times and at such places as may be prescribed in relation to which the Standard Mark is used or which is required to conform to the Indian Standard by this Act or under any other law irrespective of whether such article or process is in India or is brought or intended to be brought into India from a place outside India;

(o) co-ordinate activities of any manufacturer or association of manufacturers or consumers engaged in standardisation and in the improvement of the quality of any article or process or in the implementation of any quality control activities;

(p) perform such other functions as may be prescribed.

(2) The Bureau shall perform its functions under this section in accordance with, and subject to, such rules as may be made by the Central Government.

Rule 13 of the Bureau of Indian Standards Rules 1987

13. Other Functions of the Bureau - The Bureau under clause (p) of sub-section (1) of section 10 may also -

a. formulate, implement and coordinate activities relating to quality maintenance and improvement in products and processes;

b. promote harmonious development in standardization, quality systems and certification, and matters connected therewith both within the country and at international level;

c. provide information, documentation and other services to consumers and recognized consumer organizations on such terms and conditions as may be mutually agreed upon;

d. give recognition to quality assurance systems in manufacturing or processing units on such terms and conditions as may be mutually agreed upon;

e. bring out handbooks, guides and other special publications;

f. carry out inspections and testing or testing of an article or process for conformity to any other standard if so authorized on such terms and conditions as may be mutually agreed upon;

(fa) formulate, implement and coordinate activities relating to registration for self declaration of conformity to the relevant Indian Standard on voluntary or compulsory basis, of articles as may be considered expedient in public interest and so notified through an order by the Central Government after consulting the Bureau.

g. perform such other functions as may be conducive to the interests of the Bureau.

16. From the above, it is evident that Section 10 deals with the functions of the Bureau of Indian Standards and clause (p) mandates it to perform any other functions as may be prescribed. Similarly, Rule 13 deals with the functions of the bureau. Neither Section 10 nor Rule 13 authorise the imposition of any controls over imports as has been done in the CRO 2012. In fact, neither the Bureau of Indian Standards Act, 1986 itself nor the Bureau of Indian Standard Rules, 1987 have any provision to regulate imports or to impose restrictions on imports. Therefore, it is doubtful whether any restrictions on imports imposed under the CRO issued under the BIS Act, 1986 can be considered as "restriction on imports under any other law for the time being in force." Section 111(d) must be read with the CRO read with Section 10 (1) (p) of the BIS Act and Rule 13 (fa) of the BIS Rules and neither the section nor the Rule nor the parent Act provide for restricting imports or laying down standards for imports. The CRO imposed restrictions not under the law but beyond it. Be that as it may, since neither side argued this point, we are not deciding this case based on this legal position.

17. We find that S.No. 36 of the schedule to the CRO order dated 2012 as amended in 2017 places restrictions on strands of LED lights. What were imported in the present case are incomplete strands inasmuch as they do not have any adapters. Incomplete articles are to be classified as complete articles as per Rule 2(a) of the Rules of Interpretation for the Customs Tariff. However, these Rules of interpretation apply to the tariff and not to the restrictions on imports imposed supposedly under the BIS Act. In the absence of any explicit provision prohibiting the import of the impugned goods (which are incomplete LED light strands), we find that the import of the impugned goods is not prohibited and they cannot be confiscated under Section 111(d) of the Customs Act.

18. As far as Section 111(m) is concerned, "any goods which do not correspond

in respect of value or in any other particular with the entry made under this Act" are liable for confiscation. The "entry" in question is the Bill of Entry filed under Section 46 of the Act. In addition to making an entry under Section 46, the importer is also required to self assess the duty under Section 17 of the Act. There is no separate process by which duty is to be self-assessed under section 17. The Bill of Entry contains columns to describe the nature of the goods, their value as well as classification, exemption notifications claimed, etc. Once the Bill of Entry is successfully filed, both making an entry under Section 46 and self assessment under Section 17 are completed. While entry under section 46 is entirely the responsibility of the importer, assessment under section 17 by the importer is subject to re-assessment by the officer. Often, the importer may claim classification under one heading and the officer may decide that it correctly falls under another. Similarly, the importer may declare the value and the officer may decide the assessable value to be different. An exemption notification claimed by the importer may be found to be not available in that case by the officer. The re-assessment by the officer, itself is also further appealable to the Commissioner (Appeals) both by the importer and by the Revenue.

19. In other words, the Bill of Entry filed under Section 46 contains certain factual information such as the details of importer, IEC, exporter, Country of origin, Rotation number, line number, nature of the goods imported, quantity, etc. which have to be correctly declared by the importer. The officer cannot change the declaration by the importer but he may find that the declaration was wrong (say, 1000 pieces were imported and not 800 as declared) and reassess duty accordingly and also take action for mis-declaration. The Bill of Entry also contains certain information such as Customs tariff heading and exemption notifications, which reflect the importer s self-assessment which, unlike declarations, can be changed by the officer. Wrong self-assessment is not the same as wrong declarations. Under Section 111(m), goods which do not correspond to the entry made under section 46 are liable for confiscation and not goods which are wrongly self-assessed to duty although self-assessment under section 17 is also done through the process of filing the Bill of Entry. Any column in the Bill of Entry which can be modified by the officer through re-assessment under section 17 is self-assessment by the importer. Whatever cannot be modified by the officer is a declaration by the importer under Section 46. The self-assessment is the importer s opinion which is subject to re-assessment by the officer and further subject to appeals. The declaration by the importer in the Bill of Entry are factual aspects which must be correctly declared and failure to do so entails action under the Act and the officer cannot modify the importer s declaration. Wrong self-assessment is not mis-declaration by the importer. Similarly the officer is not liable if his re-assessment gets overturned on appeal nor is the appellate authority liable if his order gets overturned on further appeal.

20. In the present case, the importer declared the imported goods as LEDs and on examination they were found to be LEDs in strands of 50 each. The importer claimed a classification and consequentially the benefit of an exemption

notification in its self-assessment while the officer re-assessing the goods classified them under a different heading and consequently found that the exemption notification was not available. The learned Commissioner (Appeals) agreed with the importer and we have, in this order, found that the decision of the Commissioner (Appeals) was not correct. Therefore, the impugned goods cannot be confiscated under section 111(m) on the ground of classifying the goods wrongly or claiming the benefit of an exemption notification. Insofar as the declaration of the goods in this case is concerned, we find that the description in the Bill of Entry can, at best, be termed incomplete or vague and cannot be called wrong. What were imported were the LEDs though they were in strands.

21. In this factual matrix, we find that the impugned goods are not liable for confiscation under section 111(d) or 111(m). The provisions related to redemption become, consequently, irrelevant. Further, no penalty can be imposed under section 112.

22. In view of the above, the appeal filed by the Revenue is partly allowed as follows:

a) The impugned goods are correctly classifiable under 94053000 chargeable to appropriate rate of duty.

b) The benefit of exemption notification 24/2005-Cus (S.No. 23) being confined to goods falling under 8541, is not available to the respondent.

c) Setting aside of the confiscation of the goods under section 111(d) and 111(m) the impugned order is upheld.

d) Setting aside of penalty imposed upon the appellant under section 112(a) (ii) in the impugned order is upheld.

(Pronounced in open Court on 23.11.2021)

