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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Aug-25-2006

Reported in : (2006)(111)ECC727

Judge : S T Chittaranjan, T Anjaneyulu

Appellant : Ambuja Cement Eastern Ltd.

Respondent : Commissioner of Customs (Air

Judgement :

1. The appellants being aggrieved by an order of Commissioner of Customs (Appeals), Airport, Mumbai filed the present appeal. M/s Ambuja Cement Eastern Limited (Appellants) have imported part of shipment of 'diesel generating set' of capacity 10.4 KWE and claimed assessment under heading 8502.13 @ 25% + 10% + 16% + and special additional duty 4% on the ground that the item imported were a part shipment of the complete D.G. set. On scrutiny of the bill of entry and catalogue etc., it was noticed that the goods are only a 'Control Panel which prima facie appeared to be classifiable under heading 85.37. They also produced a zerox copy of bill of entry No. 334931 dated 05.03.2000 under which the assessment of the identical item was done under Chapter Heading 8502.13 by the Jawahar Customs, Nhava Sheva. During the course of personal hearing, the appellants reiterated that the part shipment, now under clearance should also be assessed as a part of the diesel generating set under CTH 8502.13 and placed reliance on judgment reported in 1900 (31) ECK 177 (SO relating to split shipment of copying machine which held the imports as of the complete machine.

2. Deputy Commissioner of Customs rejected the appellant's claim on the grounds that the other two shipments comprising the main generator have been cleared from Jawahar Custom House, Nhava Sheva as a generator under heading 8502.13 and there is no tenable reason to club the present bill of entry with part clearance made through Nhava Sheva.

Further he observed that the panels of electric control and distribution are specifically covered under heading 85.37 of the Customs Tariff and ordered that the goods be assessed to duty under the chapter heading 8537.10 and correspondingly for additional duty.

Aggrieved by the same, the appellants preferred appeal before the Commissioner of Customs (Appeals) Airport, Mumbai who in turn upheld the order-in-original and rejected the appeal. Hence the present appeal by the appellants.

3. The Commissioner (Appeals) had observed in his impugned order that "it is a difficult task to examine all the goods imported through various consignments and that too at different ports after they have been cleared to satisfy whether all the imports put together make a complete equipment or plant or otherwise. The right course should have been to declare their intent at the time of very first import and the appellant should have availed the benefit of present import and thus subjected themselves to the strict scrutiny of all the imports as provided under the provisions of Project Import. Hence, such claim at a subsequent stage cannot be accepted. Thus in principle, I am of the view that such types of requests are not sustainable. The impugned order is legally maintainable.

4. On behalf of the appellants it is submitted that the learned Commissioner (Appeals) without going into the facts of the case and without dealing with the judgment of the Hon'ble Supreme Court in the case of Sharp Business Machines Pvt. Ltd. and other Tribunal pronouncements, has passed the impugned order stating that it is not possible to ascertain whether all the 3 imports constituted a complete equipment for a plant when the fact remain that; all the 3 invoices admittedly added upto the contract value under the agreement dated 02.08.1999 and the D.G. set could never work without a Electric Control Panel. Therefore, they challenge the impugned order on the following grounds: (a) The learned

Commissioner ought to have considered the agreement dated 02.08.1999 for total import value of DM 7,212,168, being the Diesel Generator Set which shall shipped under 3 consignments. The third consignment came by Airport instead of sea, which does not warrant to classify separately as an electric part instead of being classified as part of the machine which was already cleared earlier by the Sea Customs under the Customs tariff 8502.

(b) The Electric Control Panel is an integral component of the Diesel Generator Set without which it cannot function and ought to have been classified by the Customs Authorities under Chapter Heading 8502.

(c) The goods were imported against the irrevocable Letter of Credit, under Agreement dated 02.08.1999, there were no allegations nor there was any additional remittance nor is there any allegation of under invoicing. Therefore, they pray to set aside the impugned Order. Sharp Business Machines Pvt. Ltd. v. Collector of Customs and subsequent decisions of the Tribunal based on the Sharp Business Machines Pvt. Ltd. In the above decision in para 13 it is observed as follows: 13. It is an admitted position that goods covered by the three bills of entry Nos. 2044, 2045 and 2046 were all dated 3-2-1987 and had been shipped from Hongkong on the same day i.e. on 21-1-1987. The entire goods had arrived on the same day and by the same flight on 30th January, 1987. The goods covered under the three bills of entry have been supplied by the same supplier viz. M/s Paralax Industrial Corp., Hongkong. The goods covered by these bills of entry are ten numbers copiers in SKD/CKD condition, accessories, spares, consumables and excess items. The goods covered by the 4th bill of entry are four numbers copiers in SKD/CKD condition and consumables.

The licence produced is valid for certain components and is not valid for fully assembled copiers. The fully assembled copiers are the end products of the importers and hence cannot be imported by them. Plain Paper Copiers are electronic equipments. In Sony India Ltd. v. Commissioner of Customs. ICD, New Delhi the ratio of Sharp Business Macnmes Pvt. Ltd came up for consideration. In para 32 of the judgment the Larger Bench has observed as follows: In Sharp Business Machines Pvt. Ltd. v. C.C. 1900 (49) E.L.T. 640 (S.C.) the importer had

purchased 14 fully semi-finished Plain Paper Copiers, dismantled them and imported the same in SKD/CKD condition in the guise of parts and accessories under the phased manufacturing scheme of Import Policy. Under the above Policy in order to give incentive and encouragement to the new entrepreneurs establishing small scale industries permission was granted under the first phase to import 62% of the components and the balance of 38% was to be manufactured by them indigenously. The Policy was not for those who are to import 100% of the components of fully finished and complete goods manufactured in a foreign country. Admittedly, the import of fully finished plain paper copier was prohibited. Goods imported were covered by 3 Bs/E, dated 3-2-1987 shipped from Hong Kong. Goods covered by these Bs/E were 10 Nos. paper copiers in SKD/CKD condition, accessories, spares, consumables and excess items. The fourth B/E covered 4 Nos. of copiers in SKD/CKD condition and consumables. The licence produced by the assessee did not cover all the items imported since as mentioned earlier the assessee was entitled to only 62% of the components of copiers whereas it imported 100%. It was also found that if all the parts were viewed individually none of the items tallied with the licence. Value was also misdeclared. The Tribunal took the view that one has to look into respective licence and not to all the consignments covered by different Bs/E assembled together. The above view taken by the Tribunal was held incorrect by the Apex Court after noting that fully finished plain paper copier was prohibited item for complete fraud on the Import Policy. It was held that in the above circumstances the Tribunal was not right in taking the view that one has to look into respective licence and not to the fact that if all the consignments covered by B/E assembled together there will be a full and complete machinery. It was in this background of the facts that the Apex Court took the view that consignment covered by all the Bs/E assembled together should be looked into, to examine whether the importer was importing an item which is totally prohibited under the Policy.

35. We, therefore, hold that the decision of the German Court also did not support the action of the Commissioner in combining 94 consignments under 94 different Bills of Entry spread over a period from April, 1995 to January, 1997 to hold that components imported are to be considered as CTV unassembled by applying Rule 2(a) of Interpretative Rules.

6. While we cannot agree with the learned Commissioner's finding of the difficulty expressed, we would uphold the conclusion arrived at, by the learned Commissioner, in dismissing the prayers for assessing the subject imports as D.G. set/power plant. The plea of the importers and the appellants before us to apply ruling of the Hon'ble Supreme Court's decision in the case of Sharp Business Machines Pvt. Ltd. (cited supra) is considered. We cannot apply the said ruling in the facts herein as in that case the question of Import Trade Control Prohibition and the Apex Court was not concerned with the question of Classification and Assessment of imports being made on different Bills of Entry and whether components so imported over a period of time and places and sought to be cleared on different bills of entry would constitute the import of a single machine/equipment. The later issue i.e. whether an imports made over different bills of entries should be construed as that of components or of a single machine/equipment was the subject matter of the reference made to the Larger Bench in the case of Sony India Ltd. (cited supra). Wherein the Larger Bench has differentiated the ruling of the Apex Court in the case of Sharp Business Machines Pvt. Ltd. (cited supra). We would be bound by the decision in the reference answered by the Larger Bench and the differentiation arrived.

7. In this view of the matter, we cannot allow this appeal and would uphold the assessment as components arrived at by the lower authorities.

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