Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 1

CustomsAppeal No. 10569 of 2013-DB

(Arising out of OIO-KDL/COMMR/55/2012-13 Dated-30/01/2013 passed by Commissioner of CUSTOMS-KANDLA)

Apca Power Private Limited ..... Appellant
Apca House,B-2, Sector-2,
Noida, Uttar Pradesh

VERSUS

C.C.-Kandla ..... Respondent
Custom House,
Near Balaji Temple,
Kandla, Gujarat

WITH

Customs Appeal No. 10655 of 2013-DB

(Arising out of OIO-KDL/COMMR/55/2012-13 Dated-30/01/2013 passed by Commissioner of CUSTOMS-KANDLA)

Photon Energy Systems Limited Ltd..... Appellant
775-K, Road No. 45,
Jublee Hills,Hyderabad

VERSUS

C.C.-Kandla ..... Respondent
Custom House,
Near Balaji Temple,
Kandla, Gujarat

AND

Customs Appeal No. 10725 of 2013-DB

(Arising out of OIO-KDL/COMMR/55/2012-13 Dated-30/01/2013 passed by Commissioner of CUSTOMS-KANDLA)

Megha Engineering & Infrastructures Ltd ..... Appellant
S-2, Technocract Industrial Estate,
Balanagar,Hyderabad
Andhra Pradesh

VERSUS

C.C.-Kandla ..... Respondent
Custom House,
Near Balaji Temple,
Kandla, Gujarat

APPEARANCE:
Shri. Amal Dave, Advocate for the Appellant
Shri. G. Kirupanandan, Assistant Commissioner(AR) for the Respondent

CORAM: HON'BLE MR. RAJU, MEMBER (TECHNICAL)
HON'BLE MR. SOMESH ARORA MEMBER (JUDICIAL)

Final Order No. A/ 11091-11093 /2023

DATE OF HEARING:28.04.2023
DATE OF DECISION:02.05.2023

Somesh Arora

The appellant filed Bill of Entry and claimed exemption vide Notification No. 01/20-Cus dated 06.01.2011 applicable to all items of Machinery apparatus required for setting up of a Solar Power Generation Project, when imported into India. The relevant certificate to claim exemption from Ministry of New and Renewable Energy was duly produced to claim such exemption. Department, however made investigations against them on the ground that certificate was obtained and exemption claimed. Even when they were not owners of the goods and High Sea Sale Agreement were shown just for the sake of exemption. Whereas there were already underlying but unexecuted agreements entered into between M/s. Photon Energy Systems Ltd. (Hyd.), (hereinafter referred as "M/s. PESL") and with M/s. Megha Engineering and Infrastructures Limited, Hyderabad(hereinafter referred to as"M/s. MEIL").Department, therefore, was of the view that High Sea Sale Agreement were not genuine and it under took investigation by recording various statements to show that the exemption has been wrongfully claimed, whereas the underlying EPC contract provided that it was duty of M/s PESL to procure all the equipment and to pay customs duty. In the impugned order the Ld. Commissioner holding that the term `importer' under Section 2(26) in relation to any goods at any time between their importation and their clearance from home consumption, includes any owner or any person holding himself to be importer found that M/s. APCA is not but M/s. MEIL, being owner of the goods, the real importer. The learned

Adjudicating Authority also held that High Sea Agreement of were not genuine agreements and therefore APCA was not the owner and also not the importer and therefore wrongly claimed an exemption, which was meant for importer. The Learned AR vehemently put forth his arguments and submitted that Section 2 (26) permitted them to see and adjudge who the real owner was and because High Sea Sales Agreement were improper, therefore, M/s MEIL being a real owner was the importer, even as per section 2(26)and only they could have claimed exemption by producing relevant documents from the concerned Ministry.

2. As against this, the Advocate for the appellant argued that for the purpose of Section 2(26) of the Customs Act, 1962the importer is one who holds himself as an importer for the purposes of importation by filing Bill of Entry etc., and that department has not brought anything on record that certificate produced by them from the Ministry of New & Renewable Energy was at any stage withdrawn or got cancelled by it. That in the absence of any claim by anyone of being an owner in the transaction, department is precluded from itself determining ownership for the purposes of Sec. 2(26). That department correctly held them to be the importer before the goods were cleared for home consumption on the basis of their holding themselves as importer by filing documents like Bill Of Entry and had correctly given benefit of exemption notification on the basis of a proper certificate issued in their name as `importer'. He relied upon the following case law:-

- Nalin A. Mehta Vs. Commissioner of customs, Ahmedabad-2014 (303) ELT 267 (Tri.-Ahmd.)
- Schlumberger Asia Services Ltd. vs Commr. Of Cus. (Adj.), Mumbai -2015 (330)ELT 369 (Tri.- Mumbai.)
- Inderjit Nagpal Vs. Commissioner of Cus. & C.Ex., Goa- 2017 (357) ELT 1029 (Tri.-Mumbai)

3. Learned AR for the department on the other hand relied upon the following case law:

- C.C (Preventive Vs. Aafloat Tsxtiles (I) P. Ltd-2009 (235) ELT 587 (S.C)
- C.C (Air) Chennai-I Vs. Samynathan Murugesan -2009 (247) ELT 21 (Mad.)
- Vigneshwara Exims Vs. Assistant Commissioner of Customs, Tuticorin-2020 (374) ELT 186 (Mad.)
- Giriraj Renewables Pvt. Ltd-2018 (17) GSTL 156 (App. AAR-GST)

4. We find that the issue is basically related to interpretation of Section 2(26) and its scope. Department has contended that under High Sale Agreements ownership was not transferred and therefore M/s APCA was never an owner for the imported goods. We find that, in the course of the findings of the Commissioner there has been no discussion as to whether the person who holds himself as importer and whom the Ministry Of Renewable Energy also accepted as an importer can at the time of import, be prevented from availing benefit of Exemption Notification No. 01/2011-Cus., dated 06.01.2011 which is reproduced below:-

> ***Solar power generation projects—Exemption to all instruments etc. for setting up***
>
> *"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the government of India in the Ministry of Finance (Department of Revenue) No. 30/2010-Customs, dated 27th Feb. 2010, the Central Government on being satisfied that it is necessary in the public interest so to do, hereby exempts all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility, when imported into India, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as is in excess of 5% ad valorem, and from the whole of the Additional Duty of Customs leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely :-*

> *(1) the importer produces to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, a certificate, from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of New and Renewable Energy to the effect that the goods are required for initial setting up of a project or facility for the generation of power using solar energy, indicating the quantity, description and specification thereof; and the said officer recommends the grant of this exemption ; and*
> *(2) the importer furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, that such imported goods will be used for the purpose specified and in the event of his failure to comply with this condition, he shall be liable to pay, in respect of such goods as is not proved to have been so used, an amount equal to the difference between the duty leviable on such goods but for the exemption under this notification and that already paid at the time of importation".*

It is to be noted that conditions (1)& (2) of the exemption notification refers to `importer' and condition (2) refers to post import condition of `used for the purpose' and not of self-use or use in own project etc. Department is not making any case of breach of post import condition in the present instance. We find that there is no conflict, rather legislative mind has been well applied to condition the terms of notification in tandem with requirements of Sec.2(26), where owner or importer both can be importer by holding out.

It is a fact that there is no claim to the contrary in this matter by M/s. MEIL or PESL, that they were the owners of the goods and hence importer. Department has of its own after clearance of the goods gone on to say that High Sea Sales Agreement being in genuine, the persons whoheld out himself as an importer is not so. The department it appears is proceeding on incorrect basis that only owner alone can be importer for Sec2(26) and not the person holding itself as an importer. Once this notion is discarded and person holding itself as an importer taken as included in purview of Section 2(26), all high sea sales agreement or their authenticity is relegated to irrelevance. Further, there being no dispute to the title of the goods or claim to the contrary, rather shows that there was consensus or not disagreement between the parties, which clearly points out that everything actually

happened with some understanding or agreement, oral or otherwise. Despite this, department has still decided to investigate ownership. Regarding the case law relied upon by the learned AR, we find that the matter reported in 2009 (235) ELT 587 (S.C) i.e. Commissioner of Customs (Prev) Vs. Aafloat Textiles (I) P. Ltd was considering the forged Sale licence from market against consideration which, sale licence was found to be fake. The Hon'ble Supreme Court then held that even if such licence if purchased for consideration by any buyer, will vest in the buyer unless he is shown to have done due diligence. Same we find cannot be applied to the facts of this matter, where even the certificate issued by the M/s Renewable Energy Pvt. Ltd has not been got cancelled by the department. In 2020 (374) ELT 186 (Mad.) Vigneshwara Exims Vs. Assistant Commissioner of Customs, Tuticorin, we find therewere conflicting claims of ownership which is not the case in the present instance. In 2018 (17) GSTL 156 (APP AAR-GST) in the matter Giriraj Renewables Pvt, the matter pertained to GSTAct and its interpretationis not therefore relevant for our purposes. To the contrary, we find that in the matter of Schlumberger Asia Services Ltd Vs. Commr. Of Cus. (Adj.), Mumbai the larger bench of this Tribunal after difference of opinion in para 35.3,though the member hearing the difference of opinion held as follows:-

> ***"35.3*** *I agree with the appellant that, the reason assigned by the respondent for confirming the demand for duty against it i.e., on the premise that it was the owner of the goods is manifestly incorrect and contrary to the accepted position in the notice to the effect that the ownership always vested with the holding/associated companies overseas. This position has been time and again reiterated in the show cause notice, the relevant extracts of which reads as under :*
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> > *"3(d)……majority of the imports are from their parent or associated firms located in Dubai, France, Calcutta and United States. There is no outright sale of the imported goods to M/s. SASL Mumbai or the contracting agency. The service charges are paid to parent firm directly. The title of the imported tools and spares remains with the parent firm. ……"*
> >
> > *"8……The nature of the transaction i.e. without the sale of the imported goods and without sending consequential remittances abroad against the specific imports with the contracting agency and the parent firm facilitated M/s. SASL to prepare parallel set of*

> *invoices reflecting a nominal value exclusively for customs purposes……"*
>
> *Quite apart from the above, I also agree with the appellant that, prior to the goods being cleared for home consumption the law provides with an option either to the person causing the import, owner of the goods or any other person holding himself out to be the owner to come forward and file the Bill of Entry as an importer. One of the three having elected to become the importer, such a person cannot subsequently resile from the consequences which flow from such an election. It appears that insofar as courier imports are concerned it is the courier which held itself out to be the importer and filed a bill of entry seeking clearance of the goods. If there was any misdeclaration of value, the only course of option available to the Revenue was to raise a demand, if any, against the courier. Even under the Courier Import (Clearance) Regulations, 1995, which have been relied upon by Member (Technical) it is the authorised courier who is required to file a bill of entry seeking clearance of the goods imported by it. The consignee or the CHA on its behalf can only with the concurrence of the courier file a bill of entry in the prescribed form seeking clearance of the goods. There is absolutely no evidence which would even suggest let later alone establish that either the appellant or the CHA on its behalf, had with the concurrence of the courier, filed a bill of entry seeking clearance of the goods imported through courier". (emphasis supplied)*

The views expressed assume importance as they from part of the majority view. It is clear from the observation that between the person causing the import or the owner, the choice of filing Bill of Entry has to be exercised by coming forward and filing Bill of Entry and once that exercise is done, then no one can subsequently resile from the consequences, which flow from such choice/election. We, therefore, find that terming of import as improper, even when there is no contest to the ownership, and the person claiming to be importer continues to hold himself as an importer and the Ministry issuing certificate continues to treat the appellant as the importer, is not maintainable.

5. We are also guided in our findings by the following decision of the Hon'ble Bombay High Court as reported in**2009(241)E.L.T 168 (Bom.) i.e. HAAMID FAHIM ANSARI VS. COMMR. OF CUS. (IMPORT),NHAVA SHEVA**. From the said case following para isbeing reproduced below:-

> ***"5.****In other words, imports have been done in the name of the petitioner but for some other person. In so far as respondents/Customs*

> *Authorities is (sic) concerned, they have not pointed out to us any provision under the Customs Act or any Rule or Regulation framed thereunder by which the person having valid IEC Number and having paid the custom duty is prevented from importing goods. At the highest, if the petitioner has obtained IEC number by misrepresenting the Ministry of Commerce and Industry and Director General of Foreign Trade, it is for that body to take action".*

It is thus abundantly clear that department cannot self assign to itself the duty of declaring bad in law the certificate issued to the importer by Ministry of Renewable Energy or decide title of the goods, even when no one is disputing ownership. And existence or otherwise of High Sea Sales Agreement makes no difference under Section 2 (26) of the Customs Act, 1962 regarding documented and claimed "Importer". In the face of irrelevance of high sea sales agreements in view of requirements of Section 2(26), *Frustra probatur quod probatum non relevant* (that what is proved in vain when proved is not relevant) applies in the instant case.

6. The finding to the contrary, by the learned Commissioner is accordingly set aside with consequential relief in penalty, as far as present appellants are concerned.

(Pronounced in the open court on 02.05.2023)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

PRACHI