

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.1320 of 2017

M/s. R.K.K.R Steels Ltd.,
Rep., by its Director Mr.Joseph Philip,
No.6/13 North Avenue,
Kesavaperumal Puram,
Chennai - 600 028. Appellant/Appellant

-vs-

The Commissioner of Customs (Export)
(Presently re-designated as Commissioner of
Customs Chennai IV Commissionerate),
Custom House, 60 Rajaji Salai, Chennai - 60 001.
... Respondent/Respondent

Civil Miscellaneous Appeal filed under Section 130 of
Customs Act, 1962 against the order of the Customs, Excise and
Service Tax Appellate Tribunal, South Zonal Bench, Chennai in
Final Order No.40234/2017, dated 09.02.2017 in Appeal
No.C/484/2005-DB.

For Petitioner : Mr.Hari Radhakrishnan

For Respondent : Mr.A.P.Srinivas,
Senior Panel Counsel

JUDGMENT

[Delivered by T.S.Sivagnanam, J.]

Heard Mr.Hari Radhakrishnan, learned counsel for the
appellant and Mr.A.P.Srinivas, learned Senior Standing Counsel
for the respondent.

2.This appeal, by the assessee, is directed against the
final order passed by the Customs, Excise and Service Tax
Appellate Tribunal (in short, "the Tribunal") in Final Order
No.40234 of 2017 dated 09.02.2017.

3.The above appeal has been filed raising the following substantial questions of law:-

"(i) Whether the Hon'ble Tribunal failed to appreciate that the second test report dated 29.08.2005 issued by the National Metallurgical Laboratory (NML) would be determinative of the issue particularly when the Commissioner of Customs chose to agree to the Appellant's request for re-test of the goods imported in one lot?

(ii) Whether the Tribunal had erred in upholding the imposition of penalty by holding that the appellant had misdeclared the description of the goods when the declaration was made as per the import documents issued by the supplier abroad?"

4.The assessee imported two consignments of goods declaring the same as non-alloy heavy metal scraps. The first consignment was cleared making provisional assessment under Section 18 of the Customs Act, 1962 and the samples, which were drawn and sent for testing, vide test report dated 01.07.2005, were certified that the samples cannot be classified as non-alloy steels.

5.Immediately, the appellant filed a representation on 26.07.2005 to the Commissioner of Customs (Exports) requesting for a re-test. In the said representation, the assessee pointed out the following salient points to justify their request for re-test:-

- Material is HMS of 'Non Alloy' type meant for melting only.
- Material will be melted and converted into Bars/Rods for construction and so we only wanted Non Alloy Steel Scrap and not any Alloy Steel Scrap.
- Cargo is from Angola in Africa where only such scrap of Non Alloy in nature is found. It is not imported from any developed country like EU or USA. Also our booking/contract with the exporter is for "Non Alloy Steel Heavy Melting Scrap of African Origin".
- Sample was drawn by AO (Docks) with the ideal of checking if it was non-alloy in chemistry and then sent in a sealed cover to NML for testing.

- In a lot of 500 MT's drawing one sample by someone other than NML could have led to a bias in reporting its chemistry. Sampling techniques are quite sophisticated and only experts like NML have the capability to draw a representative sample when checking for its chemistry.
- Moreover Scrap is not a manufactured product and basically is arising from various sources which are collected by the exporter in Luanda and then shipped to us. Hence it raises doubts on the chemistry of the whole parcel when just one sample is drawn and that too not by proper sampling methods which NML is capable of adhering to.
- RKKR Steels Ltd has been in existence for over 50 years and have till today not a single case of mis-declaration or wrong valuation.
- Although we have cleared 90% of the Cntrs, the scrap from these Containers is lying in our yard in Tirvottiyour and this can be inspected at any time.

6.The request, made by the assessee, was favourably considered and a second set of samples was drawn. By then, only two containers remained to be cleared and the other containers were cleared by the Customs. The result of the second test, vide test report dated 21.08.2005, was in favour of the assessee. There is no dispute on this fact. In the light of the finding recorded by the Commissioner in Order-in-Original dated 06.10.2005, in paragraph 15 therein, the present proceedings arose out of an Order-in-Original, by which the assessee has been directed to pay customs duty on the ground of mis-declaration and also liable for confiscation and imposition of penalty. The Tribunal, while confirming the Order-in-Original, opined that the sample taken from the first lot of goods, provisionally released resulted in adverse report against the assessee and in the absence of re-test, in respect of those samples, the test report of the second consignment against the first lot of consignment, is untenable.

7.We do not agree with the stand taken by the Tribunal, because the test reports are based on random samples drawn by the Department. Admittedly, when the first sample was drawn, after the assessee presented the bills of entry for clearance, there was no notice to the importer as to from which container the samples were drawn. Though the goods have been released, it is only a case of provisional release and the Department having accepted the request made by the appellant for a re-test and the

test report on the second test having gone in favour of the assessee and the benefit having been extended to the remaining goods, in our considered view, the transaction cannot be split up into two, more so when there is no notice issued to the assessee as to from which containers the samples were drawn at the first instance.

8. In any event, if samples are drawn, it goes without saying that it is random sample and if the test report of the sample certifies as pre-standard as declared by the importer, then it is presumed that the entire goods, which are covered in that consignment/bills of entry are of such nature. The onus is on the Department to prove that the goods, which are contained in the containers are all different category than what was drawn for the purposes of making test. If such is the allegation, then it would amount to a case of concealment or wilful misstatement with an intention to smuggle the goods. In the absence of any such allegation, the benefit of the second test report ought to have been granted to the assessee in respect of the entire goods, which were imported vide two bills of entries. Interestingly, in respect of subsequent bill of entry for the same product, the Department had drawn samples and conducted a test and by report dated 05.07.2007, the Laboratory, even at the first instance, certified that the samples can be classified as non-alloy steels.

9. It is noteworthy to mention that the goods, which were released after the first test report was a provisional release of the cargo. Therefore, any order of release made on provisional basis is subject to a final order to be passed by the Department after adjudication. This is one more reason, which has convinced us to extend the relief to the assessee.

10. Thus, for the above reasons, we find that the order, passed by the Commissioner of Customs, is wholly untenable, equally, the order passed by the Tribunal, confirming such order.

11. For the above reasons, this civil miscellaneous appeal is allowed, the impugned orders are set aside and the substantial questions of law are answered in favour of the appellant/assessee and against the Revenue. No costs.

Sd/-

Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

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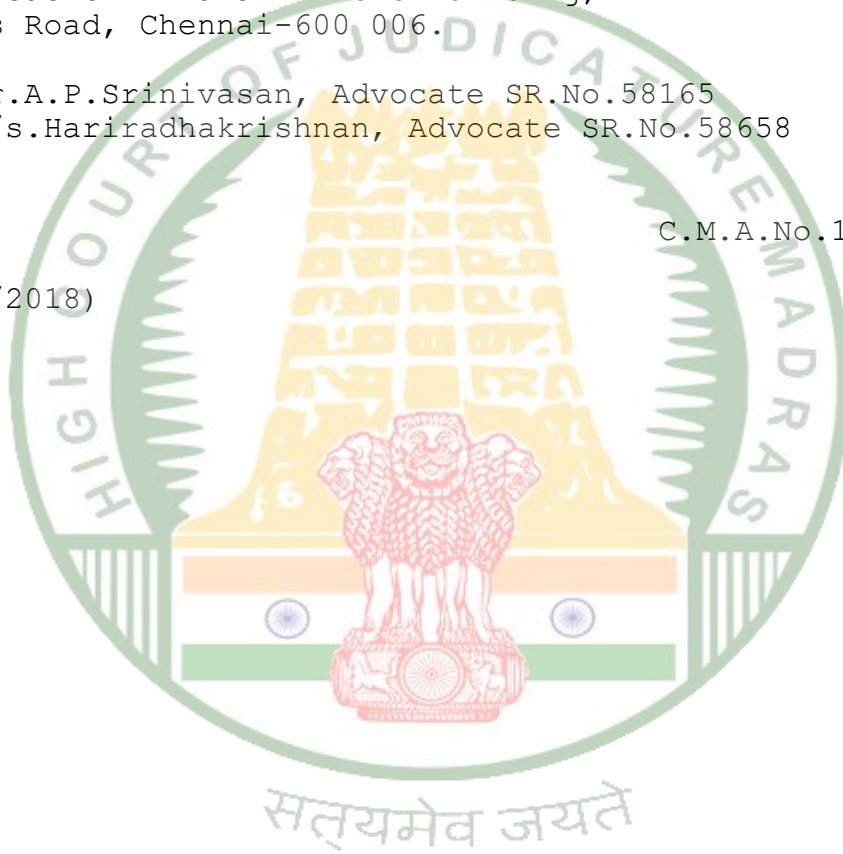
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2. The Customs, Excise and Service Tax Appellate Tribunal,
No.26, Sashtri Bhavan Annexe Building,
Haddows Road, Chennai-600 006.

+1cc to Mr.A.P.Srinivasan, Advocate SR.No.58165

+1cc to M/s.Hariradhakrishnan, Advocate SR.No.58658

C.M.A.No.1320 of 2017

VGII(CO)
RMP(24/09/2018)



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