



\$~34

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 10th December, 2024

+

W.P.(C) 14512/2024

M S CIENA COMMUNICATIONS INDIA PVT LTD.Petitioner

Through: Ms. Ashwini Chandrasekaran with
Ms. Priyanka Rathi, Ms. Shubhangi
Gupta, Advs. (M: 7838592852)

versus

THE PRINCIPAL COMMISSIONER OF CUSTOMS IMPORT &
ORS.Respondents

Through: Mr. Anurag Ojha, SSC, Mr. Dipak
Raj, Mr. Shubham Kumar, Advs. (M:
8860069704)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE AMIT SHARMA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The Petitioner is a company providing after sales support services of telecommunication networking equipment. It had imported certain goods which were subject matter of an investigation by the Directorate of Revenue Intelligence (DRI) Mumbai zone on the ground that there was misclassification of the goods. It is the Petitioner's grievance that despite the issue of classification having been settled in favour of the Petitioner, the Revenue Department is insisting on goods being released provisionally subject to Petitioner's furnishing of bonds.
3. The case of the Petitioner was that it was entitled to exemption under Notification No.24/2005 dated 1st March, 2005 but the DRI opined otherwise.



4. A show cause notice was issued on 26 February, 2021 and a demand of Rs. 13,01,83,674/- was raised along with interest on penalty.

5. A statutory appeal was filed before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) which was allowed on 18th December, 2023. In terms of the said order passed by CESTAT, the products which were imported by the Petitioner were to be classified under CTH 851770 and not CTH 85176290. The CESTAT observations are relevant and are set out below:

“27. On careful examination of the exemption entry at serial No. 13, at notifications dated 01.03.2005, 30.12.2006 and amendment introduced on the said exemption entry on 11.07.2014 indicate clearly that the exemption initially extended to 'All goods' covered under the heading 8517 was restricted in its scope of coverage to 'All goods of heading 8517, other than the specified goods at (i) to (iv) above namely, (i) soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers; (ii) optical transport equipments, combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS), Optical Transport Network (OTN) products, and IP Radios; (iii) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products; (iv) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) Products. Thus, the aforesaid specified products are not eligible for exemption under the above Serial No.13 after the amendment vide notification dated 11.07.2014. However, in terms of the exemption entry at Serial No.40, newly introduced with effect from 11.07.2014, the parts of all the goods which are excluded from the scope of entry at Serial No.13, have been made eligible for basic customs duty exemption, which enables domestic manufacture of such goods, by allowing the parts of such goods to be imported under the duty exemption to encourage capacity building in indigenous production of such goods. Thus, viewed from this



angle too, all parts of such goods at serial No.40, irrespective of its classification under any chapter of the First Schedule to Act of 1975, would be eligible for basic customs duty exemption.

28. We also find that in the impugned order the adjudicating authority has not given any justification or findings to come to the conclusion that all the impugned goods are 'Optical Transport Product or Switches', 'Optical Transport Network (OTN) products', or 'Carrier Ethernet Switch' in denying the benefit of BCD exemption. The adjudicating authority rather simply relied on the sample copy of invoice of Ciena Corporation, USA in which certain goods have been declared under sub-heading 851762. Inasmuch as, firstly the impugned goods needs to be classified under appropriate CTI and thereafter eligibility to exemption benefits has to be determined, we find that the impugned order had not followed this properly in terms of legal provisions of Customs Act, 1962 and the Customs Tariff Act, 1985. Further, inasmuch as "All goods of heading 8517, other those specified goods in (i) to (iv) above" are exempt from payment of basic customs duty (BCD), and in the absence of any conclusion that the impugned goods are of those category, which are specifically excluded by drawing proper classification and testing by authorised agencies in the form of test report or other evidences, it cannot be said that the impugned goods are excluded from availing the said duty exemption.

29. In view of the foregoing discussions and analysis, and on the basis of the judgement of the Hon'ble Supreme Court, we conclude that the impugned goods under consideration would appropriately be classifiable under CTH 8517 70 and not under CTH 8517 62 90, as claimed by Revenue."

6. On the basis of the classification as was decided by the CESTAT, the Petitioner continued to import goods into India. However despite the CESTAT's order dated 18th December, 2023, in respect of several bills of entry it is the case of the Petitioner that it was compelled to get provisional assessment done and accordingly release of goods were affected.



7. The grievance of the Petitioner is that this procedure continued on behalf of the DRI and there were more than 400 bills of entry which were to be assessed and on each of them the DRI insisted that the provisional assessment would be done.
8. According to the Petitioner after the CESTAT's order, it is entitled for release of its goods as per classification decided by the CESTAT and cannot be subjected to provisional assessment.
9. On behalf of the DRI, it is the case of the Department that the CESTAT's order dated 18th December, 2023 is under challenge before the Hon'ble Supreme Court in Civil Appeal Diary No. 11008 of 2024 and, therefore, the Department is insisting on provisional assessment. It is the contention on behalf of the Department that under Section 18(1)(c) of the Act, the Department has the power to insist on provisional assessment when the issue has not attained finality.
10. Under Section 18 of the Customs Act, 1962, provisional assessment of duty is permissible under the following circumstances:

“18. Provisional assessment of duty.

(1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in Section 46 [and Section 50] [Inserted by Finance Act, 2018 (Act No. 13 of 2018), dated 29.3.2018.] –

[(1-A) Where, pursuant to the provisional assessment under sub-section (1), if any document or information is required by the proper officer for final assessment, the importer or exporter, as the case may be, shall submit such document or information within such time, and the proper officer shall finalise the provisional assessment within such time and in such manner, as may be prescribed.] [Inserted by Finance Act, 2018 (Act No. 13 of 2018), dated 29.3.2018.]

(a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for



the assessment of duty on the imported goods or the export goods, as the case may be; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or

(c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty, the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then-

(a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of [the duty finally assessed] [Substituted by Act 56 of 1974, Section 3 and Schedule II, for "the finally assessed" (w.e.f. 20.12.1974).], the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order under sub-section (2), at the rate fixed by the Central Government under section [28-AA] [Substituted '28-AB' by Finance Act, 2018 (Act No. 13 of 2018), dated 29.3.2018.] from the first day of



the month in which the duty is provisionally assessed till the date of payment thereof.

(4) Subject to sub-section (5), if any refundable amount referred to in clause (a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27-A till the date of refund of such amount.

(5) The amount of duty refundable under sub-section (2) and the interest under sub-section (4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to- (a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person; (b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use; (c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person; (d) the export duty as specified in section 26; (e) drawback of duty payable under sections 74 and 75.”

11. In fact, in terms of the notification dated 25th November, 2011, provisional assessment is to be made when the importer is unable to make a self-assessment or if any of the conditions under Section 18(1) of the Customs Act, 1962 are satisfied.

12. There is no other ground urged by the Department except the fact that the appeal is pending before the Hon’ble Supreme Court for the CESTAT order dated 18th December, 2023.

13. In the opinion of this Court, the mere pendency of the appeal would not entail the department to insist on provisional assessment of the goods. Since there is no stay of the order of CESTAT, the goods would have to be released



in terms of the CESTAT order dated 18th December 2023 as per the classification as directed by the CESTAT i.e., **CTH 851770** . Needless to add, the release of the goods shall be subject to the final judgment of the Hon'ble Supreme Court in the pending Civil Appeal and the consequences thereof, if any, which shall be fastened on the parties. Accordingly, the Petitioner shall be entitled to seek release of goods as per the CESTAT order, subject to the final decision of the Supreme Court in the pending Appeal and any directions that may be issued therein, which would have to be complied with.

14. The writ petition is disposed of in these terms. Pending applications, if any, are also disposed of. No further orders are called for.

PRATHIBA M. SINGH
JUDGE

AMIT SHARMA
JUDGE

DECEMBER 10, 2024/kr/bh