CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87137 OF 2022

[Arising out of Order-in-Original No: 33/2022-23/Commr/NS-V/CAC/JNCH dated 12th August 2022 passed by the Commissioner of Customs (NS-V), Nhava Sheva.]

Schaeffler India Ltd
Nariman Bhavan, 8th Floor, 227, Backbay Reclamation
Nariman Point, Mumbai- 400 021 … ***Appellant***

versus

Commissioner of Customs (NS-V)
Jawaharlal Nehru Customs House, Nhava Sheva,
Tal-Uran, Dist. Raigad, Maharashtra- 400 707 ***…Respondent***

APPEARANCE:

Shri Prakash Shah and Shri Suyog Bhave, Advocate for the appellant

Shri Adeeb Pathan, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 87464/2024

DATE OF HEARING: 05/06/2024
DATE OF DECISION: 04/12/2024

PER: C J MATHEW

This appeal of M/s Schaeffler India Ltd, though primarily arising from grievance that Commissioner of Customs (NS-V), Jawaharlal

Nehru Customs House (JNCH), Nhava Sheva has, in order[1] disposing off two show cause notices of 3rd May 2019 covering clearances effected between 12th May 2014 to 18th May 2018 – including corrigendum of 28th August 2020 restricting the coverage till 18th March 2015 – and of 11th September 2020 covering clearances effected between 24th March 2015 and 10th January 2020, confirmed liability to differential duty on 'synchronous intermediate ring / inner synchronous ring / synchro ring blanks' – required for the automotive industry – that had been assessed at rate corresponding to tariff item 8483 4000 of First Schedule to Customs Tariff Act, 1975 or to tariff item 8483 9000 of First Schedule to Customs Tariff Act, 1975 by charging rate of duty corresponding to tariff item 8708 4000 of First Schedule to Customs Tariff Act, 1975, raises several significant aspects of recovery under section 28 of Customs Act, 1962 that, according to them, nullifies the proceedings. Stemming from post-clearance audit under empowerment of section 17(6) of Customs Act, 1962, commenced with 'consultative letter' of 3rd December 2018 issued to M/s INA Bearings India Pvt Ltd, which was reported as having merged with the appellant from 22nd October 2018, and, notwithstanding which, the first of the notices was issued to M/s INA Bearings India Pvt Ltd, corrected, even as the proceedings were underway, by corrigendum substituting the appellant instead of the 'pre-merged' entity as well as truncating the period of

[1] [order-in-original no. 33/2022-23/Commr/NS-V/CAC/JNCH dated 12th August 2022]

demand, along with lowered duty liability, to 18th March 2015, followed by second notice for subsequent period that did not omit incorporation of the truncated portion in earlier demand, only to be culminated after the deadline stipulated in section 28(9) of Customs Act, 1962 for which section 28(9A) of Customs Act, 1962, enabling flexibility, in specified circumstances and subject to stipulations, was sought as refuge is assailed.

2. Thus, it is not only the re-classification that is under challenge, besides the entirety of proceedings on ground of limitation of time for invoking of section 28(4) of Customs Act, 1962 and and non-compliance with section 28(9) of Customs Act, 1962, but also that the appellant was not concerned with the imports effected by an entity that stood erased out of existence as on the date of issue of notice. The impugned order, confirming differential duty liability of ₹ 8,77,43,435 under section 28(4) of Customs Act, 1962, along with interest thereon under section 28AA of Customs Act, 1962 as well as imposition of penalty of like amount under section 114A of Customs Act, 1962, also determined fine of ₹ 11,00,00,000 under section 125 of Customs Act, 1962 for redemption, consequent to confiscation, of goods valued at ₹ 113,28,14,985 imported against the impugned bills of entry. The appeal also challenges the recourse to section 125 of Customs Act, 1962 in the light of settled law that only such goods as are available for confiscation may actually be subjected to redemption.

3. As classification is in dispute, it behoves us to ascertain conformity of the substitution with the law, as enacted, in the form of General Rules for Interpretation of the Schedule appended to Customs Tariff Act, 1975 and, as judicially determined, by the Hon'ble Supreme Court in *Hindustan Ferodo Ltd v. Collector of Central Excise [1997 (89) ELT 16 (SC)]* thus

> *'It is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No. 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.'*

and in *HPL Chemicals Ltd v. Commissioner of Central; Excise, Chandigarh [2006 (197) ELT 324 (SC)]* that

> *'28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue……'*

Learned Counsel for appellant and Learned Authorized Representative made elaborate submissions on the merit of the rival tariff headings. On perusal of the impugned order, it strikes us that both sides are unintendedly on common ground inasmuch as the lack of specific enumeration did not stand in the way of placing the impugned goods

within description intended for ‘gears’ under the rival headings and, though not addressed in as many words, both alternatives - as declared and as re-assessed - are sub-classifications, at ‘--’ level, that were, for national treatment, acknowledged as the tariff items. Consequently, the imported goods should, in terms of rule 1 of General Rules for Interpretation of the Schedule appended to Customs Tariff Act, 1975, first find fitment within

> *‘Parts and accessories of the motor vehicles of headings 8701 to 8705’*

corresponding to heading 8708 of First Schedule to Customs Tariff Act, 1975 before discard of claim of coverage within

> *‘Transmision shafts (including cam shafts and crank shafts) and cranks; bearing houses and plain shaft bearings; gears and gearing; ball or roller screws; gear boxes and other speed changers, including torque converters; flywheels and pulleys, including pulley blocks; clutches and shaft couplings (including universal joints)’*

corresponding to heading 8483 of First Schedule to Customs Tariff Act, 1975 as unacceptable whether for inaccuracy or relative inexactitude and, it not being the case of the adjudicating authority that the claimed heading did not exclude ‘parts of gears’, implies recourse to rule 3 of General Rules for Interpretation of the Schedule appended to Customs Tariff Act, 1975 which calls into question appropriateness of invoking of section 111 of Customs Act, 1962.

4. The decisions *supra* of the Hon'ble Supreme Court require the onus of appropriateness of substituting heading to be discharged by customs authorities. On perusal of the impugned order, we note that, though commencing with

> *'18.2. In view of above submissions and the descriptions/explanations available in websites of the Noticee in internet, it is apparent that the imported item - 'synchronizer ring' is a part of synchronizer pack. The synchronizer ring has conical surface, which comes into contact with friction cone of the gearwheel. The purpose of synchronizer ring is to produce friction torque in order to decelerate/accelerate the input shaft during the gearshift. Thus, it is evidently clear that synchronizer ring is a part of motor vehicle. Synchronizer ring is essential component in a vehicle transmission and determine the comfort of manual transmissions, automatic transmissions, and double clutch transmissions. Contemporary developments in the mobile machinery sector include the transition from non-synchronised to synchronised gearbox, principally in Asia, or the introduction of automated gearshift processes due to the new concept of dual clutch gearboxes. The importer in their submission also stated that the item - "Ring" is part of Gear Box, Therefore, I find that the imported item - 'Ring' is part of gear box. I also find that the item 'Ring' is not an integral part of vehicle engine.'*

the adjudicating authority, after that peremptory disposition with mystifying reference to 'vehicle engines', has gone on to discuss inapplicability of the declared tariff items thus

> *'18.4.3 ……. In view of above detailed HSN explanatory notes, I find that the item - 'Synchronous Ring' a part of Gearbox of Motor Vehicle is neither excluded from Section XVII by virtue of Section*

> *Note 2 of Section XVII, as claimed by the Noticee nor covered more specifically elsewhere in the Nomenclature. Further, it is also an admitted fact that the item 'Synchronous Ring' a part of Gearbox is solely and principally used for Motor Vehicle only and the Motor Vehicles are classifiable under Chapter 87.'*

and falling back on the *Explanatory Notes* of Harmonized System of Nomenclature (HSN) pertaining to the proposed heading as also decisions on classification which, however, are not about the goods impugned here, before recording that

> *'18.7. I further find from the import invoices issued by Schaffler, available in EDI system uploaded in e-sanchit, clearly mention CTH of the item as - 87084090.*
>
> *18.8. In view of above, supplier's invoice, chapter heading, explanatory notes, applying the test of commercial identity of the goods and my findings in above Paras, I have no doubt in my mind to arrive at conclusion that the imported item - 'Synchronous Ring' being a part of Gearbox of Motor Vehicles - Cars (as mentioned in SCNs and the Noticee in their submission did not contradict the fact that the item under import is not a part of cars), rightly classifiable under CTH 87084000 which covers - Gear boxes and parts thereof.'*

At no stage is there an independent, comprehensive ascertainment of fitment of the impugned goods within heading 8708 of First Schedule to Customs Tariff Act, 1975, and more especially on the category of motor vehicle of which it is a part, which is of essence before proceeding to the description at the tariff item level below the heading. It was necessary to demonstrate that the impugned goods are,

uncontestedly, parts of motor vehicles in which 'commercial parlance' may be of assistance only for comprehending the description. The failure to be specific about the particular type of motor vehicle of which the impugned goods was to be a part is fatal to affirmation of the process by which the substituting tariff item was adopted.

5. Furthermore, the adjudicating authority did not appear to attach any significance to the 'free floating' sub-classifications that both the respective descriptions were before donning the mantle of tariff item for national tax policy. Moreover, the principle emerging from exclusion in the notes to chapters/sections, as intended to accord precedence to the more specific of the descriptions for purposes of tax rate assigning, appears to have been overlooked in the impugned order. Time and again, the Tribunal has had occasion to point out that the First Schedule to Customs Tariff Act, 1975 is, first and foremost, for policy makers to design and structure national tax. A finding that confirms the proposal in the show cause notice without acknowledgement of 'wholism' in the structure of the Schedule and, instead, perceiving it as a menu of tax rates is not consonant with law as enacted and judicially determined. Nor is that expected from seasoned tax administrators whose familiarity with the nature and purpose of the Schedule is cultivated from the very beginning. Normally, such deficiency would have the effect of setting the revision aside and remanded for fresh ascertainment.

6. However, issues undermining the maintainability of the proceedings raised by Learned Counsel is cause for pause to examine if remand would serve any useful purpose. The first of these is limitation inasmuch as both notices cover periods beyond normal limitation and it was contended on behalf of the appellant that invoking of section 28(4) of Customs Act, 1962 is contrary to law. As far as the first notice is concerned, it was contended that the corrigendum, having altered both the noticee and the period of demand, cannot be merged with the original notice and that fresh notice of 20th August 2020 is barred from deployment to recover duties on imports effected between 12th May 2014 and 18th March 2015. It was further contended that the notice was lacking in concrete grounds for concluding that they had indulged in collusion, willful misstatement or suppression of facts to proceed with recovery beyond the normal period of limitation. Reliance was placed on the decision of the Hon'ble Supreme Court in *Nizam Sugar Factory v. Collector of Central Excise, Andhra Pradesh [2006 (197) ELT 465 (SC)]*, of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Mumbai-II v. Cona Industries [2017 (352) ELT 12 (Bom)]* and of the Tribunal in *Mahindra & Mahindra Ltd v. Commissioner of Central Excise, Mumbai-V [2005 (186) ELT 194 (Tri-Mumbai)]* to counter reference in the impugned order to the decisions of the Hon'ble High Court of Delhi in *Maldhari Sales Corporation v. Union of India [2016 (334) ELT 418 (Del)]* and of the

Tribunal in *Commissioner of Central Excise, Daman v. Caprihans India Ltd [2010 (261) ELT 357 (Tri-Ahmd)]* and in *Uniworth Textiles Ltd v. Commissioner of Central Excise, Nagpur [2009 (244) ELT 401 (Tri-Del)]*.

7. The argument of Learned Counsel on the illegality of recourse to section 28(4) of Customs Act, 1962 in two successive show cause notices for successive periods by pressing the several judicial decisions may not find much favour inasmuch as those pertain to central excise duties recoverable from a registered assessee attached to specific territorial jurisdiction which eliminates scope for presuming the tax administration to continue remaining blindsided after the first occurrences. Contrarily, on the customs side, each transaction creates assessee only for the time that the goods are 'imported' or 'exported', as the case may be. That, indeed, was harped upon by Learned Authorized Representative and we see no reason to discard either that submission or the discard of that submission in the impugned order. Concomitantly, separate findings on facts of each import, which is consummation of such treatment of the transactions, is glaringly absent in the impugned order. Consequently, we park the issue of limitation of time-bar for the nonce as that, too, is remediable in fresh proceedings.

8. It was further argued that the stipulation in section 28(9) of Customs Act, 1962 has been observed in its breach. On perusal of the

scheme of limitation for completion of adjudication process, we note that there are two exceptions: in the *proviso* therein, permitting a higher authority, which, in the present instance, is the Chief Commissioner of Customs, to extend the decisional timeline for a limited period and in section 28(9A) of Customs Act, 1962 for the adjudicating authority to defer completion in specified circumstances subject to communication of such intent to the notices. Exercise of the first of the exceptions may raise issues of affected noticees being kept in the dark by such decision on the part of an authority placed beyond the appellate remedy available in the statute; this is not mere indulgence in speculation for the lack of opportunity afforded to noticees for contesting the intended deferment on facts as mandated by section 28(9A) of Customs Act, 1962 leaves only the former in the running to validate the delay. In either event, the records are silent on compliance with the law by having obtained sanction of Chief Commissioner of Customs or by issue of notice of deferment of proceedings. The noticees were proceeded against for alleged breach of law and that is all the more reason to assure that the adjudicating authority has not breached the law. Howsoever eminent the tax administrator be and whatever be the loftiness of the consummation sought, justification which is abhorrent to the law finds no echo in us. To us, it demonstrates conviction that the mantle of office places the authority above the law and that is no grace in a creature of the statute. The impugned order stands tainted by non-compliance with procedure

established in law and, in all probability, irremediably so.

9. Submitting that jurisdictional defects cannot be cured through corrigendum, it was pointed out that the decision of the Hon'ble Supreme Court in *Kiran Singh v. Chaman Paswan [AIR 1954 SC 340]* and of the Hon'ble High Court of Madras in *Vijay Television (P) Ltd v. Dispute Resolution Panel [(2014) 46 taxmann.com 100 (Madras HC)]* had settled the law on that score while the Tribunal had held, in *Chawla Trading Co v. Commissioner of Customs (Export), Nhava Sheva [2015 (330) ELT 470 (Tri-Mumbai)]*, in *Mahindra & Mahindra Ltd v. Commissioner of Central Excise, Mumbai-V [2006 (196) ELT 62 (Tri-Mumbai]* and in *Penguin Electronics (P) Ltd v. Commissioner of Customs (General) [2005 (186) ELT 194 (Tri-Mumbai)]*, that corrigendum issued after commencement of adjudication was invalid. Reliance was placed on the decision of the Hon'ble Supreme Court in *Shabina Abraham v. Commissioner of Central Excise & Customs [2015 (322) ELT 372 (SC)]* on the significance of the 'present tense' in the said expression which, though was then, at least, defined in Central Excise Act, 1944 and, in particular, to the manner in which the importance of first principles found favour therein as well as to the decision of the Hon'ble High Court of Bombay in *Bennet Coleman and Company Ltd v. Union of India [(2023) 294 Taxman 372 (Bombay)]* and several others on the same lines.

10. The corrigendum that was issued, even as the process instituted

by the original was underway, altered the noticee and period of coverage; the latter is without any offer of justification and the former only upon being intimated of erasure of existence, as a person, well before the issue of notice. The very lack of justification is cause for conjecture; it appears to confer benefit even while insinuating a new noticee for fastening the recovery onto and is without any prejudice, ultimately, for the apparently ‘sacrificed’ recovery was reinstated in the second notice. Thus it came about that the alleged liability of erased entity was sought to be tethered afresh onto the entity into which importer had merged. Merger, notwithstanding the commercial and statutory absorption thereof, is culmination of process prescribed by law and it is moot if a liability, intended to be created by show cause notice, unrecognized and unacknowledged by the institutional mechanism for approval of erasure of the merged entity, can be visited on the absorbing entity. An appeal of such absorbed entity before the Tribunal abates unless the absorbing entity chooses to pursue the appeal. An appeal of Revenue may be pursued only upon acknowledgement of claim before the competent authority established by law. From this, we entertain doubts on validating the substitution of noticee and, more particularly, as the carryover of potential liability, as yet unknown to customs authorities, from the approval of merger has not been dealt with in the impugned order. In the absence of any discussion thereto in the impugned order, we are unable to conclude that the adjudicating

authority was enabled to venture upon such substitution.

11. More to the point is the validity of recovery proceedings initiated, under the authority of

> *'(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-*
>
> *(a) collusion; or*
> *(b) any wilful mis-statement; or*
> *(c) suppression of facts,*
>
> *by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.'*

in section 28 of Customs Act, 1962, against M/s Schaeffler India Ltd without any discussion on them being 'person chargeable with duty..' – an expression bereft of elaboration in the statute - with appellant herein not conforming to

> *'(26) ''importer'', in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer;'*

either by way of being owner of the goods or by having held out to be

importer at the time of import and the impugned order, not having established that the appellant, from the existence of the impugned goods at the time of merger or of any gains from sale thereof having accrued among assets and liabilities transferred to the appellant, was amenable to characterization as

> *'(3A) "beneficial owner" means any person on whose behalf the goods are being imported or exported or who exercises effective control over the goods being imported or exported;'*

in section 2 of Customs Act, 1962. The appellant was deemed to stand in place of the importer and, as a consequence of alleged 'willful misstatement' or 'suppression of fact' by the importer while, concurrently, deprived of wherewithal to defend the acts of the importer at the relevant point in time. Consequently, a noticee unknown to the impugned transactions has not only been brought within the proceedings under section 28 of Customs Act, 1962 but also adjudicated as liable to pay the differential duty and fastened with consequential detriments. That, by no stretch, can be accepted as the intent of the law that, in effect, has been set out by the Hon'ble Supreme Court in *re Shabina Abraham* thus

> *'31. .....It is therefore, necessary to reiterate the law as it stands. In Partington v. A.G., (1869) LR 4 HL 100 at 122, Lord Cairns stated :*
>
> > *"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown*

> *seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute".*

32. In Cape Brandy Syndicate v. IRC, (1921) 1 KB 64 at 71, Rowlatt J. laid down :

> *"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

33. This Court has, in a plethora of judgments, referred to the aforesaid principles. Suffice it to quote from one of such judgments of this Court in Commissioner of Sales Tax, Uttar Pradesh v. Modi Sugar Mills, 1961 (2) SCR 189 at 198 :-

> *"In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."*

13. The notice, not being in accordance with the law, merits that the impugned order be set aside. Accordingly, the appeal is allowed.

(Order pronounced in the open court on 04/12/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*