IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Customs Appeal Nos. 40236 to 40239 of 2020

(Arising out of Order-in-Appeal Seaport Cus. II Nos. 20 to 23/2020 dated 20.01.2020 passed by Commissioner of Customs (Appeals II), No.60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Siemens Gamesa Renewable Power Private Limited, ...Appellant
(Earlier Known as Gamesa Renewable Private Limited),
No. 334, Futura IT Park, B Block, 8th Floor,
Old Mahabalipuram Road, Sholinganallur,
Chennai – 600 119.

Versus

Commissioner of Customs, ...Respondent
Chennai II Commissionerate,
Custom House,
No. 60, Rajaji Salai,
Chennai – 600 001.

APPEARANCE:

For the Appellant : Mr. Chirag Shetty, Advocate

For the Respondent : Ms. K. Komathi, Additional Commissioner / A.R.

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 08.06.2023
DATE OF DECISION : 18.08.2023

FINAL ORDER Nos.40696-40699/2023

Order :[Per Mr. Vasa Seshagiri Rao]

M/s. Siemens Gamesa Renewable Power Pvt. Ltd., Chennai have filed the following four appeals challenging the Order-in-Appeal Seaport Cus. II No. 20-23/2020 dated 20.01.2020 passed by the Commissioner of Customs (Appeals-II), Chennai rejecting their appeals for having not

filed in time. As an identical issue is involved in all these four appeals, these are taken up together for disposal by this common order.

2. The lower appellate authority has relied on the decision rendered by the Hon'ble Supreme Court in the case of Singh Enterprises Vs. Commissioner of Central Excise [2008 (221) ELT 163 (S. C.)] wherein it was held that the appellate authority has no power to allow the appeal presented beyond the said 30 days where delay can be condoned. The only contention of the appellant in all these four appeals is that the lower appellate authority has merely considered the date of dispatch as the date of communication as shown in the despatch register by the concerned group without verifiying whether the said despatch is as per the statutory provisions of the act governing the service of order, notices, etc.

Sl. No.	Appeal No. & Date before the Commissioner (Appeals)	B/E No. & Date	Declared unit price in Us$	O-in-O No. & Date	Date of communication of O-in-O as per Revenue	Redemption Fine (Rs.)	Penalty (Rs.)
1	C3-II/142/O/2019-Sea	7257997, dt. 27.10.2016	US$ 398/MT	56102/2017, dt. 08.06.2017	08.06.2017	2.50 crores	0.50 crores
2	C3-II/143/O/2019-Sea	5882719, dt. 06.07.2016	US$ 460/MT	56099/2017, dt.08.06.2017	08.06.2017	3.30 crores	0.60 crores
3	C3-II/144/O/2019-Sea	4491362, dt. 07.03.2016	US$ 397/MT	48003/2016, dt. 28.06.2016	29.06.2016	13.50 crores	1.00 crores
4	C3-II/145/O/2019-Sea	5126024, dt. 03.05.2016	US$ 360/MT	50222/2016 dt. 28.09.2016	28.09.2016	2.75 crores	0.50 crores

3. The facts of these cases are that the appellant had filed four Bills of Entry as per the details given in the above table for import of Prime Hot Rolled Steel Plates classifying under CTH 7120 and the price declared varied from US $360 to 460 per MT. Since, the DGFT had notified the minimum import price (MIP) for import of the said goods pertaining to CTH 7210 at CIF US $643 per MT *vide* Notification No. 38/2015-2020 dated 05.02.2020, the Additional Commissioner of Customs, Chennai, on adjudication had

confiscated the goods under Section 111 (d) of the Customs Act, 1962 imposed redemption fine and penalty for clearance of the impugned goods. It appears that the appellant had paid the applicable Customs Duty along with redemption fine and penalty for clearance of the impugned goods.

4. As even after elapsing of two and half years from the date of clearance of the goods and payment of duty including fines and penalties imposed, no order appeared to have been passed and received by the appellant in respect of assessment of above Bills of Entry wherein the appellant was forced to pay the above mentioned redemption fines and penalties apart from the duty. The appellant so requested *vide* their letters all dated 01.02.2019 addressed to the Additional Commissioner of Customs to pass speaking orders in respect of assessment of the impugned goods.

5. In response to their request letter, the Deputy Commissioner, Customs House, Chennai had informed *vide* letter F. No. S59/02/2016 Gr.4 dated 08.03.2019 and also *vide* letter F. No. S59/02/2016 Gr.4 dated 12.03.2019 that the orders had already been passed by the Adjudicating Authority and enclosed the copies of said Orders-in-Original so passed on 15.06.2017, 28.09.2016 and 28.06.2016. On receipt of the said orders on 11.03.2019 and 12.03.2019, then the Appellant had immediately filed the appeals on 19.03.2019 before the Commissioner of Customs (Appeals), Chennai claiming to be within the prescribed time limit under the provision of Section 128 of the Customs Act, 1962.

6. While disposing the said appeals, the Commissioner (Appeals) had sought verification report from the assessment group 4 in respect of communication of orders to the Appellant. The Deputy Commissioner, Gr. 4 had reported that as per their despatch register that the orders were sent to the Appellant on 15.06.2017 (2 orders), on 28.09.2016 and on 29.06.2016. Based on the report given by the Deputy Commissioner, which were never disclosed / known to the Appellant, the Commissioner (Appeals) had rejected the appeals on the ground of limitation. The

Commissioner (Appeals) had given following finding in the said impugned Order-in-Appeal that:

"In has been informed vide group letter dated 09.01.2020 that the Order-in-Original was dispatched as per the dated mentioned in table: 1

S.No.	Order-in-Original	Dated	Date of Despatch	Proof of Despatch
1	56102/2017	08.06.2017	15.06.2017	Sl. No. 87, ET183940678IN
2	48003/2016	28.06.2016	29.06.2016	As per Group-4 despatch register
3	50222/2016	28.09.2016	28.09.2016	Acknowledged copy attached
4	56099/2017	08.06.2017	15.06.2017	Sl. No. 88, ET183940681IN

From the above, it is held that the 4 appeals have been filed by Appellant much later than 90 days from the date of communication of the impugned order. Reliance is also place on Hon'ble Supreme Court's judgment in Singh Enterprises Vs. Commissioner of Central Excise [2008 (221) ELT 163 (SC)] wherein it was held that the appellate authority had no power to allow the appeal presented beyond the said 30 days where delay can be condoned. In view of above finding, it is held that the subject appeals are hit by limitation of time and liable to be rejected.
All the 4 appeals are rejected as time-barred"

7. Being aggrieved, the appellant have come before this forum.

8.1 In their grounds of appeal, the Appellant has submitted that they had never received the impugned Orders-in-Original except before 11.03.2019 by the communication *vide* letter dated 08.03.2019 issued by Deputy Commissioner, Gr4. Therefore, the date of communication of the Order in-Original must be considered as 11.03.2019. Since the Order-in-Original itself communicated/served on 11.03.2019 therefore the date of communication should be taken as 11.03.2019. Therefore, in terms of section 128 of the Customs Act, 1962, the Appellant have filed the present appeals without any delay. The provisions of Section 128 is as under:

"SECTION 128. Appeals to [Commissioner (Appeals)]. _ (|) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a (Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the

date of the communic ation to him of such decision or order:

[Provided that the Commissioner (Appeals) may, if he is satisfied that the Appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]"

8.2 Since, the Appellant had not been properly served / communicated the date of Orders-in-Original which were received only on 11.03.2019, therefore the communication of order should have been considered as 11.03.2019 and not the date of passing of order. Since the appeal before the Commissioner (appeals) was filed on 19.03.2019 itself. Accordingly, the first appeal was filed within 10 days from the date of actual communication therefore there is no delay in filing of first appeal before lower appellate authority under the provision of Section 128 of the Customs Act, 1962. Similar are the facts in respect of other appeals.

8.3 The appellant has put forth that though the Order-in-Original was said to have been dispatched by way of Registered Post or Speed Post they had never received the said order. Since 'service of Order-in-Original' not made as per the provision of section 153 of Customs Act, 1962, therefore the date of communication should be actual delivery of order on 11.03.2019.

8.4 It is the Appellant's submission that the service of order, notice etc., should have been done in the manner prescribed under the provision of Section 153 of the Customs Act, 1962. As per provisions of Section 153, the order has to be tendered or to be sent it by registered post with an acknowledgment due (RPAD) to the person for whom it is intended. The provision of Section 153 of the Customs Act, 1962 is reproduced for the facility of reference:

"153. Service of order, decision, etc.-
Any order or decision passed or any summons or notice issued under this Act, shall be served,--
(a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended; or

(b) if the order, decision, summons of notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the Custom house."

Accordingly, any other mode of service of order except as provided under the above provision shall not be considered as valid service of order in terms of above provision.

8.5 It has been submitted that the Lower appellate authority had failed to verify the mode of service of orders. Even relying on the document number shown in the report, the Lower appellate authority had again failed to verify the acknowledgement due card bearing the signature of the Appellant so as to confirm the compliance of the provisions of Section 153 as well as the actual date of service. The Lower appellate authority had also failed to verify the fact whether the statutory provision of Customs Act, 1962 had been followed or not while considering the date of despatch as date of communication / service. The lower appellate authority had made grave error while considering the date of signature of order by Adjudicating Authority as date of despatch by merely relying on the report by the Deputy Commissioner, Gr4.

9.1 The Ld. Advocate Mr. Chirag Shetty has submitted that the term 'Date of Service of Order' is well defined by the Hon'ble Supreme Court of India in the case of *Saral Wire Craft Pvt Ltd. Vs Commissioner Customs, C. Ex and Service tax [2015 (322) ELT 192 (S.C.)]* wherein it was held that the failure to take notice of statutory provision of service of order leads to gross miscarriage of justice. It was ruled that the affected party required to be served meaningfully and realistically. It has to be considered that the Adjudication order issued at the back of the Appellant had not been properly served which came to their notice only after applying for that. The Supreme Court held that where the law mandates tendering of order to the person, it is settled principle of law that if manner of doing a particular act is prescribed in the statute, act must be done in that manner or not at all. Tendering of order to unauthorized person or sending it without registered post acknowledgment due

(RPAD) not a valid service of order for computing the period of limitation.

9.2 Herein the present case of Appellant, though it is said to have been despatched but the mode of dispatch was not shown instead mere document number was mentioned. From this it cannot be ascertained whether the service of order had been done as per the prescribed method or not. Further there is no mention of acknowledgement of the said order by the Appellant, no acknowledgment due card was presented bearing the signature of the Appellant so as to negate the Appellant's claim that they have received the order only on 11.03.2019.

9.3 In fact, the assessee Appellant had received the said order only after a request for passing of speaking order was submitted *vide* their letter dated 01.02.2019. The copy of the request letter dated 01.02.2019 is reproduced herein below:

Date: 01.02.2019

SIEMENS Gamesa
RENEWABLE ENERGY

To,
The Additional / Joint Commissioner,
Customs House, Rajajisalai,
Chennai.

Dear Sir,

Subject: Issuance of speaking order in case of assessment of Bill of Entry Number 7257997 dated 27.10.2016.

We, M/s Siemens Gamesa Renewable Power Private Limited (earlier Known as Gamesa Renewable Pvt. Ltd.,), Chennai had sought clearance of our imported goods namely HR Plate pertaining to chapter heading 72103090. Therefore we have filed Bill of Entry Number 7257997 dated 27.10.2016 on the basis of the CIF value of the imported goods which was $ 398 per MT. However sir, your good office had directed us to pay the Redemption fine of Rs. 2,50,00,000/- and Penalty of Rs. 50,00,000/- since there was breach of the condition of the DGFT. We had paid all the due as required by your goods office and cleared the goods.

S.N.	BE NO.	BE DATE	FINE	PENALTY	TOTAL
1	7257997	27.10.16	2,50,00,000	50,00,000	3,00,00,000
	TOTAL		2,50,00,000	50,00,000	3,00,00,000

However sir, we have not received any speaking order in respect of above imposition of redemption fine and penalty. Your kind goodself is requested to kindly issue a Speaking Order in Original in terms of provision of Customs Act, 1962 in the interest of justice. We are enclosing the following documents for your perusal and reference purpose:

01. Copy of above listed Bill of Entry;
02. Copy of Challans showing payment of redemption fine and penalty.

Please do the needful in the interest of justice. Please acknowledge.

Thanking you,

Yours sincerely,
For Siemens Gamesa Renewal Power Private Limited
(Earlier Known as Gamesa Renewable Pvt. Ltd.)

Authorized Signatory

ADDL. COMMISSIONER OF CUSTOMS, CHENNAI-II
04 FEB 2019
CUSTOM HOUSE, CHENNAI-600001

Siemens Gamesa Renewable Power Private Limited
(Formerly 'Gamesa Renewable Private Limited')

The Futura, Block B, 8th Floor,
No.334, Rajiv Gandhi Salai,
Sholinganallur, Chennai 600 119,
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SIEMENS GAMESA RENEWABLE POWER

9.4 Only after getting the reply *vide* F. No. S59/02/2016 Gr.4 dated 08.03.2019 in response to above mentioned request on 11.03.2019 along with copy of Order-in-Original, the Appellant had immediately filed the appeal on 19.03.2019 i.e, within 07 days from the date of receipt of impugned Order-in-Original which was within the prescribed time limit of 60 days as provided under Section 128 of the Customs Act, 1962. The Copy of the communication made by the Deputy Commissioner, Group 4, Customs House, Chennai-II is reproduced herein below:

IS15700:2005 Cft No.SQ/L-6000140

वित्त मंत्रालय MINISTRY OF FINANCE

राजस्व विभाग DEPARTMENT OF REVENUE

आयुक्त सीमा शुल्क का कार्यालय, चेन्नै – II OFFICE OF THE COMMISSIONER OF CUSTOMS, CHENNAI-II

सीमा शुल्क भवन, 60, राजाजी सालै, चेन्नै-600 001 CUSTOM HOUSE, 60, RAJAJI SALAI, CHENNAI- 600 001.

दूरभाष:044 25230371, 044 25267778 Phone: 044 25230371, 044 25267778

F. No. S59/02/2016 – Gr-4 Date: 08.03.2019

To,

M/s. Siemens Gamesa Renewable Power Pvt. Ltd.
The Futura, Block 8, 8th Floor
No. 334, Rajiv Gandhi Salai,
Sholinganallur, Chennai - 600119

Sub :- Forwarding of Order- In Original in case of assessment of Bills of Entry No. 4491362/07.03.2016, 5882719/06.07.2016 ,7257997/27.10.2016 & 5126024/ 03.05.2016 - Reg.

Ref:- Your letters dated 01.02.2019 requesting issuance of speaking order in original.

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Please refer to your letter dated 01.02.2019 on the above mentioned subject

2. Vide above said letter, it was requested to issue a speaking order in original in case of assessment of Bills of Entry No. 4491362/07.03.2016, 5882719/06.07.2016, 7257997/27.10.2016 & 5126024/ 03.05.2016. In this regard, it is informed that order-in-originals are already passed in case of above said B/Es (copies enclosed herewith). The details of O-I-O are as follows:

Sr. No.	B/E No. with Date	Order-In-Original No.	O-I-O Issuance date
1	4491362/07.03.2016	48003/2016	28.06.2016
2	5882719/06.07.2016	56099/2017	08.05.2017
3	7257997/27.10.2016	56102/2017	08.06.2017
4	5126024/03.05.2016	50222/2016	28.09.2016

Yours Sincerely,

SIEMENS GAMESA RENEWABLE POWER PRIVATE LIMITED

SIEMENS GAMESA RENEWABLE POWER PRIVATE LIMITED

9.5 The Ld. Advocate has argued that the above said service of order by the Deputy Commissioner, Gr. 4, Customs House, Chennai had not mentioned any earlier dispatch of the order to the assessee Appellant. When the order is required by the assessee in respect of assessment of particular Bill of Entry, the intent of assessee to challenge such assessment is

obvious and un-doubtable. While servicing of order issued on the 15.06.2017, the Deputy Commissioner had not mentioned the date of earlier service of order to the Appellant since the order was not actually served to the Appellant. However, while reporting to the Commissioner (Appeal) the same assessment group claimed that the order was dispatched already on 15.06.2017. Here the date as stated by the letter of group is also doubtful since the date of order is stated as 08.06.2017 while the Adjudicating Authority signed the said order on 15.06.2017 and the same date was claimed as date of dispatch without proof of acknowledgment for having received by Appellant.

9.6 The Ld. Advocate has submitted that the actual service of order was done by the Department only on 11.03.2019 *vide* letter F. No. S59/02/2016 Gr.4 dated 08.03.2019 in response to above mentioned request made on 01.02.2019. However, the learned Commissioner (Appeals) had rejected the appeal merely on the ground that the appeal filed as much later than 90 days from the date of dispatch/communication, without verifying the fact that whether the Appellant had received the said order or not on the said dates claimed as date of communication. Therefore, the Order-in-Appeal so passed by the Commissioner (Appeals) is unjustified and without any base.

9.7 There is no mention about the acknowledgment of the said post as mentioned in the impugned Order-in-Appeal, to the assessee Appellant. If the order is said to have been dispatched with "registered post or speed post with acknowledgment due" the Department ought to have produced the acknowledgment card bearing the signature of the assessee. The learned Commissioner (Appeals) only got satisfied with the fact that the Order-in-Original was sent to the assessee Appellant by relying on the entry in dispatch register which shows the document number of post, without verifying the fact that the said Order-in-Original was actually received by the Appellant or not. By virtue of ruling given by the Supreme Court, *every effort must be taken to meaningfully and realistically serve the affected party so as not merely to ensure that he has knowledge thereof but also*

to enable him to initiate any permissible action. If the assessee would have received the order, it could have filed an appeal in time.

9.8 The order was issued on 15.06.2017 in respect of assessment done in November 2016. The order was issued after 8 months from the date of assessment and clearance of goods. Therefore, the order was issued on the back of the assessee Appellant and accordingly it cannot be said that the assessee had the knowledge of the issuance of the order. The orders were only served on the Appellant on 11.03.2019 and 12.03.2019 in response to their request dated 01.02.2019 for passing a speaking order. Therefore, the date of communication to be taken on 11/12.03.2019 and not 15.06.2017, 29.06.2016 and 28.09.2016.

9.9 It has been further submitted that *'mere showing entry in despatch register cannot be termed as acknowledgment by the Appellant'.* This view is supported by the ruling of Hon'ble High Court of Madras in case of *M/s. Sri Steel Vs. Commissioner of Customs, Chennai reported in 2020-TIOL-452-MADRAS HIGH COURT-CUSTOMS* as given below:-

> *"3. Having heard the learned counsels on either side, we find that the learned Tribunal has not mentioned anything about the acknowledgment of the speed post containing Order-In-Appeal, to the Assessee. If the order would have despatched in 'Speed post with Acknowledgment Due', the Department ought to have produced the Acknowledgment Card bearing the signatures of the Assessee. The learned Tribunal only got satisfied with the fact that the Order In-Appeal was sent to the Assessee through Speed Post and has dismissed the Application for Condonation of delay, without verifying the fact that the Order In-Appeal has been received by the Assessee or not. Mere despatching of order does not imply the receipt of the same. If the Assessee would have received the order, it could have filed the Appeal in time. Therefore we are satisfied that the learned Tribunal was not justified in dismissing the Application on the ground of limitation. Time and again, the Higher Constitutional Courts direct the learned fact finding Tribunals below not to be trigger-happy to dispose or the cases for default of appearance or on mere delay. The Tribunals being the fact finding body is under a legal obligation to decide the Appeal on merits even upon hearing one of the sides and they cannot dismiss the appeals for such aforesaid reasons. Their duty to decide the case on merits is not removed for want of assistance from the side of parties before them"*

This ruling of High Court is squarely applicable to this case as the Commissioner (Appeals) only got satisfied with the fact that there is entry in the said dispatch Register without verifying the crucial acknowledgment for receipt of the said order by the Appellant. Therefore, the observation of the Commissioner (Appeals) considering the date of dispatch as date of communication is not unjustified, unverified, invalid and illegal and rendered the impugned Order-in-Appeal liable to be set aside.

9.10 He has also placed reliance on the judgment of Tribunal Chennai in the case of R. Sundararaj Vs. Commissioner Of Customs, Tuticorin [2018 (363) E.L.T. 426 (Tri. - Chennai)] wherein the application for condonation of delay was allowed by observing that though the despatch register produced by the Department showing that order copy was sent by speed post, it was nowhere reflecting that it was sent with an acknowledgment due. It was also observed that the Appellant received the order only after applying for it. Therefore, the delay was condoned.

9.11 Further in the Case of Hotline Electronics Ltd. Vs. Commissioner Of Service Tax, Noida reported at 2019 (369) E.L.T. 1579 (Tri. - All.), the Allahabad Bench of the CESTAT had observed that service of order to be effected with proof of delivery. It was also observed by the Hon'ble CESTAT that in the absence of proof of delivery, the Commissioner (appeals) is not right in taking the date of dispatch as relevant date for calculation of limitation period. Therefore, the date of receipt as shown by the Appellant was accepted.

9.12 Similarly in the case of Ultratech Cement Ltd. Vs. Commissioner of Central Excise and Service Tax, Raipur reported at 2018 (363) E.L.T. 165 (Tri, - Del) wherein the Principal Bench of CESTAT had also ruled that since Impugned order not been communicated in the manner prescribed in statute and so should not be construed as proper communication.

10. In view of above rulings and judgments given by the Hon'ble Supreme Court, Hon'ble High Court of Chennai

and various other judgments given by the various Benches of this Hon'ble CESTAT, the service of order is considered as complete where the proof of date of effective receipt of the impugned order is also received by the Adjudicating Authority. Mere showing in the despatch register is not considered as sufficient compliance of the provision of Section 153 of the Customs Act, 1962 unless supported by the proof of acknowledgement by the recipient in the acknowledgment due card bearing the signature of the Appellant or any other like proof of delivery of orders.

11. In the present case of Appellant, the learned Commissioner (Appeals) failed to observe the statutory provisions of the service of notices, order provided under Section 153 of the Customs Act, 1962. Such failure rendered the Order in-Appeal as invalid and illegal.

12.1 Further, the Ld. Advocate has submitted the following on merits of the case. The goods imported by the Appellant were not liable for confiscation under Section 111(d) of the Customs Act, and the confiscation of such goods was ex-facie illegal and without jurisdiction. When the goods were not liable for confiscation, no redemption fine could have been imposed or upheld in the present case.

12.2 Section 111(d) of the Customs Act provides for confiscation of any goods which are imported or attempted to be imported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force. Admittedly, the goods in question i.e., Prime Hot Rolled Steel Plates Shot-blasted/Coated with Zinc Silicate classifiable under CTH No. 72103090 of the Customs Tariff are freely importable. No license or permission/permit of any authority under any law for the time being in force is required for importing these goods in India. These goods are also not restricted for imports by any canalizing agencies like State Trading Enterprises or any Government Corporation, or the like; but any person can import these goods in any quantity for using them in manufacture as well as trading in the country. These goods are free" for import under the Customs Act, the Foreign Trade Policy, and all other applicable laws.

Therefore, while importing such freely importable goods, the Appellant has not committed any violation as contemplated under Section 111(d) of the Customs Act.

12.3 That it was observed by the Adjudicating Authority that fixing of MIP by the DGFT was in the nature of a restriction imposed under Section 3 of the Foreign Trade Act; but this observation is legally incorrect. The MIP notification issued under Section 3 of the Foreign Trade Act is not in the nature of any prohibition for importing the goods in question. The fact is that under Section 3 of the Foreign Trade Act, the DGFT does not possess any power or jurisdiction to fix "price" of any goods imported in India, because such power and jurisdiction is conferred upon the Central Board of Excise & Customs under Sub Section (2) of Section 14 of the Customs Act. Admittedly, no tariff value in the nature of the price of the goods in question for assessment of custom duties thereon has been fixed by the Board by virtue of any Notification issued under Section 14(2) of the Customs Act.

12.4 The Hon'ble Madras High Court has conclusively held in case of S. Mira Commodities Pvt. Ltd. Vs. UOI 2009 (235) ELT 423 (Mad.) that price fixing on an artificial basis cannot be done under the Foreign Trade Act. Thus, legally, MIP of US$ 643 per MT notified by the DGFT *vide* Notification No.38/2015-20 was without any basis and without any jurisdiction. Factually, neither Section 3 of the Foreign Trade Act nor the Notification issued thereunder i.e., Notification No.38/2015-20 lays down that import of Hot Rolled Steel Plates like those imported by the Appellant, classifiable under CTH No.72103090, having less price was not permissible; or that imports of such goods were restricted only for the goods having price of US$ 643 per MT or above in the international market. MIP introduced *vide* the above referred Notification was ex-facie immaterial for the purpose of allowing import of the concerned goods, and therefore also the order of the Adjudicating Authority is incorrect and illegal in so far it is held therein that fixing of MIP by the DGFT was to impose restriction.

12.5 Moreover, assuming that notifying MIP *vide* a Notification issued under Section 3 of the Foreign Trade was in the nature of a "restriction" for import, the goods of lesser value imported in India cannot be confiscated under Section 111(d) of the Customs Act, because confiscation thereunder is allowed only for the goods whose import is prohibited. Therefore, the goods imported by the Appellant were not liable for confiscation under Section 111(d) of the Customs Act, and consequently the order of the Adjudicating Authority upholding confiscation and also imposing of redemption fine for such goods is illegal, and liable to be set aside.

12.6 The Adjudicating Authority has committed a grave error of jurisdiction in confiscation of the goods imported by the Appellant; and since the goods were not liable for confiscation under the Customs Act, the order of the Adjudicating Authority for imposition of redemption fine is also wholly illegal. Therefore, confiscation and imposition of redemption fine for the goods in question deserve to be quashed and set aside.

12.7 The Adjudicating Authority has committed a further error in imposing penalty on the Appellant in the present case, because no penalty under Section 112(a) of the Customs Act was permissible in the facts of the present case. There was no loss of revenue or any undue gain to the Appellant in this case. The principle for penalty laid down by the Hon'ble Supreme Court in case of M/s. *Hindustan Steel Limited* reported in 1978 ELT (J159) was therefore applicable, and accordingly penalty imposed on the Appellant is liable to be set aside. Section 112(a) of the Customs Act provides for penalty on any person, who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act. Now, the goods imported by the Appellant were not liable to confiscation under Section 111, and therefore no penalty under Section 112(a) was permissible to be imposed. Moreover, the Appellant has filed Bills of Entry for the imported goods, and all details and particulars about the imported goods have been fully and truthfully disclosed while filing such Bills of Entry with all

relevant import documents. There is no lapse or any irregularity on the Appellant's part in importing and clearing the goods for home consumption. The Appellant has thus not done anything nor omitted to do anything, which would have rendered the imported goods liable to confiscation. No case of abetment in doing or omission of any act rendering the imported goods liable to confiscation exists, and no such case is even made out against the Appellant by the Revenue. Therefore, no penalty at all could have been lawfully and justifiably imposed on the Appellant under Section 112(a) of the Customs Act in this case.

12.8 Penalty on the Appellant has been even otherwise unjustified and illegal. The matter of penalty is governed by the principles as laid down by the Hon'ble Supreme Court in the land mark case of M/s. Hindustan Steel Limited wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the assessee was guilty to conduct contumacious or dishonest and the error committed by the assessee was not *bonafide* but was with a knowledge that the assessee was required to act otherwise, penalty might be imposed. It is held by the Hon'ble Supreme Court that in other cases where there were only irregularities or contravention flowing from a *bonafide* belief, even a token penalty would not be justified. The Appellant states that imposition of penalty in this case is bad in law inasmuch as there is no violation of any nature committed by them. The Appellant has not acted dishonestly or contumaciously and therefore, even a token penalty would not be justified. There is also no specific reason or ground spelt out in the impugned order for upholding penalty on the Appellant. Therefore, penal liability upheld by the Adjudicating Authority deserves to be set aside.

12.9 Confiscation of any goods and imposition of penalty are quasi-criminal in nature, and therefore confiscation and penalty would be permissible only in a case where there was any *malafide* intention on part of any importer, who attempted to import goods in contravention of any prohibition, or who attempted to evade payment of custom

duties leviable on such goods. However, the goods imported by the Appellant are freely importable, and there is no loss to Revenue nor any undue gain to the Appellant in importing these goods having the transaction value of US$ 398 per MT. There being no *malafide* intention on the Appellant's part, the orders of confiscation of the goods and penalty on the Appellant were even otherwise unreasonable, arbitrary and unjustified. Since the Adjudicating Authority has upheld confiscation and imposition of penalty in this case, where admittedly there was no *malafide* intention on the Appellant's part and no revenue loss nor does any undue gain to the Appellant, Such orders deserve to be set aside in the interest of justice.

12.10 Even otherwise, the quantum of redemption fine imposed is too excessive. Hon'ble Supreme Court on various occasions e.g., in case of *Commissioner of Customs Ahmedabad Vs. Jayant Ointment Pvt. Ltd. [1988 (100) ELT 10], Jain Exports Pvt. Ltd. Vs. UOI [1996 (66) ELT 537]* held that quantum of redemption fine depends on circumstances of each case and no hard and fast rule may be laid down. Fine could be imposed in cases of *bona fide* imports. However section 125 of Customs Act, 1962 provide that the such fine shall not exceed the market price of the goods less that the duty chargeable thereon.

12.11 It is to submit that the Appellant is engaged in the business of manufacture of goods like parts and components of Wind Operated Electricity Generating Equipment, which are installed at various locations in the country. The Appellant requires various materials and inputs for manufacture of such goods, one of them being Hot Rolled Steel Plates, and therefore the Appellant has been importing such materials for being used in relation to manufacture of parts and components of Wind Operated Electricity Generating Equiprment. Since the Appellant is not a trader but a manufacturer and running the business under loss, therefore imposing such huge redemption fine is invalid and illegal. The company has incurred losses of Rs.705.18 crores and Rs.50.68 crores during the years ended March 31, 2019 and 2018 respectively. Accordingly, it can be said that the

Appellant had not gained any undue benefit from the impugned import of its own raw materials. Therefore, the imposition of redemption fine must be considered as invalid and illegal.

12.12 It is to submit that the matter involved in the present case is that whether imposition of huge redemption fine and penalty is justifiable where there is breach of the DGFT notification in the circumstances that the goods are freely importable in the said impugned notification itself and there is no evasion or *mens-rea* involved.

12.13 It is to submit that the quantum of redemption fine and penalty was decided by CESTAT, Ahmedabad in the Appellant's own case which is reported as *Siemens Gamesha Renewable Power Pvt. Ltd. Vs. Commissioner of Customs (Mundra Port) [2019 (365) E.L.T. 631 (Tri. - Ahmd.)]* wherein it was held as follows:-

> ***"10.*** *As regard the redemption fine and penalty imposed by the lower authorities, we are of the view that there is indeed violation of Foreign Trade Policy that despite the minimum import price fixed by the DGFT, the appellant have imported the goods which is carrying the value below minimum import price, therefore, they have violated the condition, however, this violation does not result into any Revenue loss to the Government or any undue gain to the appellants. Therefore, looking to the gravity of offence and considering the setting aside the enhancement of value, we are of the view that lower authority have imposed the redemption fine and penalty disproportionately. Accordingly we reduce the redemption fine and penalty as under :*

Appeal No.	As per Impugned order		Reduced as per this order	
	R.F.	Penalty	R.F.	Penalty
C/11799/2017	2,50,00,000/-	70,00,000/-	25,00,000/-	7,00,000/-
C/11800/2017	3,75,00,000/-	45,00,000/-	37,00,000/-	5,00,000/-
C/11801/2017	1,70,00,000/-	50,00,000/-	17,00,000/-	3,00,000/-

> ***11.*** *Accordingly we reduce the redemption fine and penalty as mentioned in the above chart. The impugned orders stand modified to the above extent. All the appeals are partly allowed in above terms."*

Fine and Penalty should commensurate the gravity of offence and margin of profits

13. It has been further submitted that the redemption fine and penalty should commensurate with the gravity of

offence and margin of profits. They have placed reliance on the judgment of the Tribunal in *CC Vs. Skefco India Bearing Co Ltd. [1990 (49) ELT 1994]*. There is no offence on the part of the Appellant; no *mens-rea* was found and there is no mis-declaration with an intent to evade the customs duty payment. However, cumulative redemption fine and penalty were imposed to the tune of Rs.3.00 Crore {Redemption fine Rs.2.50 Cr + Penalty Rs.0.50 Cr}. Without accepting, even if the MIP is Considered as assessable value then the differential duty comes to approximately Rs. 2,20,26,433/- only. Therefore, for violation of differential duty of Rs.2.20 Crore, imposition of such huge fine and penalty (Rs.3.00 Crore Cumulative} must be considered excessive and therefore the same should have to be set aside in the interest of justice.

14. The Ld. Authorized Representative Smt. K. Komathi, Additional Commissioner representing the Revenue has submitted that all the Orders-in-Original passed in respect of the appellant have been dispatched timely as evidenced by the entries in the dispatch register and also by the speed post transaction numbers which was properly considered by the Commissioner (Appeals) to hold the appeals filed were hit by limitation. She has supported the findings of the Commissioner (Appeals) resulting in the appellant relying on the Supreme Court's judgment in the case of *Singh Enterprises Vs. Commissioner of Central Excise [2008 (221) ELT 163 (SC)]* wherein it was held that the appellate authority has no power to allow any appeal presented beyond 30 days delay which can be condoned. She has thus argued that the appeals are not maintainable and deserves to be rejected.

15. We have heard both sides and also considered the grounds of appeal and the submissions made by both the parties and evidence as available in the appellate records.

16. The main issue that has to be decided in these appeals is whether the provisions of Section 153 of the Customs Act, 1962 are complied with or not in serving the Orders-in-Original dated 15.06.2017, 28.06.2016 and

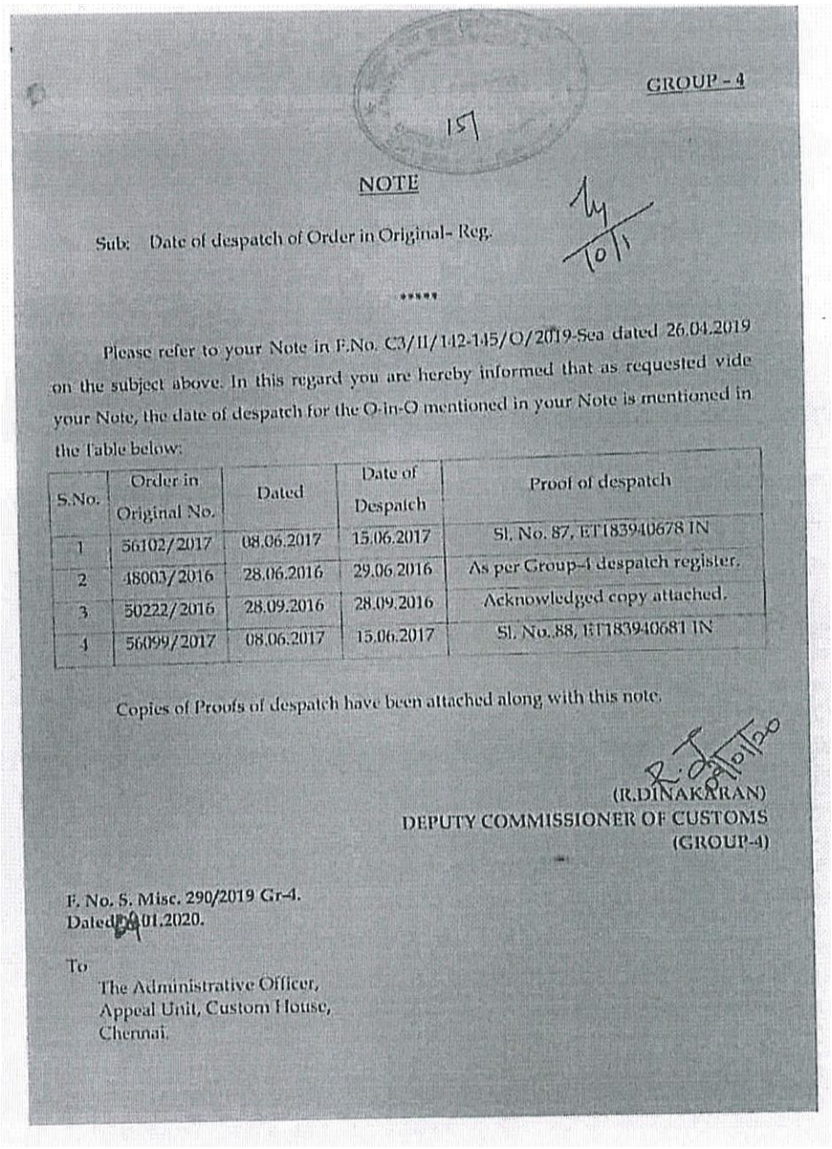
28.09.2016 passed by the Additional Commissioner of Customs against the appellant.

17. There are four appeals filed against the above orders of the Additional Commissioner, Custom House, Chennai as per the details given below ordering for confiscation of imported goods under Section 111 (d) of the Customs Act, 1962 and for imposition of redemption fines and also penalties on the appellant for alleged contravention of importing prime rolled hot steel plates classified under CTH 72103090 declaring a unit price which was lesser than the minimum import price fixed for such products *vide* Notification No. 38/2015-2020 dated 05.02.2016 by the Ministry of Commerce and Industry.

Sl. No.	Appeal No. & Date	O-in-O No. & Date	B/E No. & Date	Declared unit price in Us$	Date of communication of O-in-O
1	C3-II/142/O/2019-Sea	56102/2017, dt. 08.06.2017	7257997, dt. 27.10.2016	US$ 398/MT	08.06.2017
2	C3-II/143/O/2019-Sea	56099/2017, dt. 08.06.2017	5882719, dt. 06.07.2016	US$ 460/MT	08.06.2017
3	C3-II/144/O/2019-Sea	48003/2016, dt. 28.06.2016	4491362, dt. 07.03.2016	US$ 397/MT	29.06.2016
4	C3-II/145/O/2019-Sea	50222/2016 dt. 28.09.2016	5126024, dt. 03.05.2016	US$ 360/MT	28.09.2016

18. We find that the lower appellate authority has not considered the submissions on the merits of the appeals as it was held that they were not filed within the statutory period of 60 days in terms of provisions of Section 128 of the Customs Act, 1962. All these Orders-in-Original were issued in the years 2016 and 2017 whereas the appeals were filed only on 19.03.2019, thus, beyond the condonable period of 30 days by the Commissioner of Customs (Appeals). Whereas, the appellant has submitted that they received the Orders-in-Original copies only on 11.03.2019 and 12.03.2019 *vide* letters dated 08.03.2019 and 12.03.2019 by the Deputy Commissioner of Customs (Group 4), Custom House, Chennai. On enquiry from the concerned group regarding the

date of communication of the above Orders-in-Original, the group *vide* their letter dated 09.01.2020 had communicated that all the Orders-in-Original were dispatched as per the dates given below:-



GROUP - 4

NOTE

Sub: Date of despatch of Order in Original- Reg.

*****

Please refer to your Note in F.No. C3/II/142-145/O/2019-Sea dated 26.04.2019 on the subject above. In this regard you are hereby informed that as requested vide your Note, the date of despatch for the O-in-O mentioned in your Note is mentioned in the Table below:

S.No.	Order in Original No.	Dated	Date of Despatch	Proof of despatch
1	56102/2017	08.06.2017	15.06.2017	Sl. No. 87, ET183940678 IN
2	48003/2016	28.06.2016	29.06.2016	As per Group-4 despatch register.
3	50222/2016	28.09.2016	28.09.2016	Acknowledged copy attached.
4	56099/2017	08.06.2017	15.06.2017	Sl. No.88, ET183940681 IN

Copies of Proofs of despatch have been attached along with this note.

(R.DINAKARAN)
DEPUTY COMMISSIONER OF CUSTOMS
(GROUP-4)

F. No. S. Misc. 290/2019 Gr-4.
Dated 09.01.2020.

To
The Administrative Officer,
Appeal Unit, Custom House,
Chennai.

19.1 Now, the dispute that is crystallized in these appeals is to determine the date of actual receipt of these Orders-in-Original passed against the appellant. The provisions of Section 153 of the Customs Act, 1962 are extracted below for ready reference:-

> ***"Section 153 in the Customs Act, 1962***
>
> *153. Service of order, decision, etc.—Any order or decision passed or any summons or notice issued under this Act, shall be served,—*
>
> *(a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; or*

(b) if the order, decision, summons of notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house."

19.2 A perusal of the provision of Section 153 of the Customs Act, 1962 makes it clear that service of order, summons or decision has to be carried out by tendering or sending it by registered post to the person to whom such order summons or decision is intended or to his agent.

20.1 On one side the Revenue is producing evidence regarding dispatch of the Orders-in-Original to the appellant on the basis of the entries made in the dispatch register and also by speed post transaction details. However, the appellant is disputing the receipt of Orders-in-Original and vehemently argued that the relevant orders were received only on 11/12.03.2019. The appellant has also submitted that they were forced to pay the fines and penalties for clearance of the impugned goods. Relying on the decision of the Hon'ble Supreme Court in the case of *Saral Wire Craft Pvt. Ltd. Vs. Commissioner of Central Excise and Service Tax [2015 (322) ELT 192 (SC)]*, the appellant submitted that though the orders said to have been dispatched, the dates of receipt are not shown and the service of orders cannot be termed to have been done as per the prescribed method under Section 153 of the Customs Act, 1962 as there is no proof of acknowledgement that these were received by the appellant. Hon'ble Supreme Court has held in this case that where the law mandates tendering of any order to the person, it is the settled principle of law that if manner of doing a particular act is prescribed in the statute, the act must be done in that manner or not at all. Tendering of an order to an unauthorized person or sending it without 'registered post with acknowledgement due' is not considered as a valid service of order for computing the period of limitation. It has been held therein as follows:-

"9. It is an anathema in law to decide a matter without due notice to the concerned party. Every effort must be taken to meaningfully and realistically serve the affected party so as not merely to ensure that he has knowledge thereof but also to enable him to initiate any permissible action. The Appellant justifiably submits that it was statutorily impermissible for the respondents to serve the adjudication order on a "kitchen boy", who is not even a middle level officer and certainly not an authorized agent of the Appellant. The version of the Appellant that it

learnt of the passing of the adjudication order dated 30-3-2012 only when, in the course of the recovery proceedings, the Department's officials had visited its unit, is certainly believable. The fact that, firstly, the order had not been passed in the presence of the Appellant, so as to render its subsequent service a formality, and secondly, that the order came to be passed after an inordinate period of eight months should not have been ignored. This fact should not have been lost sight of by the authorities below as it has inevitably led to a miscarriage of justice. The Inspector of the Department should have meticulously followed and obeyed the mandate of the statute and tendered the Adjudication Order either on the party on whom it was intended or on its authorized agent and on one else. It is not the respondent's case that Shri Sanjay was the authorized agent. Even before us, despite several opportunities given, the respondents have failed to file their response to the Special Leave Petitions so as to controvert the asseveration of the Appellant that Shri Sanjay on whom the decision was tendered was a mere daily wager 'kitchen boy' and that the Appellant had no knowledge of the passing of the adjudication order. We are also informed that the recoveries envisaged in the Adjudication Order have already been effected."

20.2 They have also drawn our attention to the decision rendered by the Hon'ble High Court of Madras in the case of *Sri Steel Vs. Commissioner of Customs, Chennai [2020-TIOL-452-* HC-MAD-CUS which has held as follows:-

"3. Having heard the learned counsels on either side, we find that the learned Tribunal has not mentioned anything about the acknowledgment of the speed post containing Order-In-Appeal, to the Assessee. If the order would have despatched in 'Speed post with Acknowledgment Due', the Department ought to have produced the Acknowledgment Card bearing the signatures of the Assessee. The learned Tribunal only got satisfied with the fact that the Order In-Appeal was sent to the Assessee through Speed Post and has dismissed the Application for Condonation of delay, without verifying the fact that the Order In-Appeal has been received by the Assessee or not. Mere despatching of order does not imply the receipt of the same. If the Assessee would have received the order, it could have filed the Appeal in time. Therefore we are satisfied that the learned Tribunal was not justified in dismissing the Application on the ground of limitation. Time and again, the Higher Constitutional Courts direct the learned fact finding Tribunals below not to be trigger-happy to dispose or the cases for default of appearance or on mere delay. The Tribunals being the fact finding body is under a legal obligation to decide the Appeal on merits even upon hearing one of the sides and they cannot dismiss the appeals for such aforesaid reasons. Their duty to decide the case on merits is not removed for want of assistance from the side of parties before them"

21. We also find that many similar decisions were passed by the regional Benches of this Tribunal in the cases of

R.Sundararaj Vs. Commissioner of Customs, Tuticorin [2018 (363) ELT 426 (Tri. Chennai)], *Hotline Electronics Ltd. Vs. Commissioner of Service Tax, Noida [2019 (369) ELT 1579 (Tri. All.)]* and *Ultratech Cement Ltd. Vs. Commissioner of Central Excise and Service Tax, Raipur [2018 (363) ELT 165 (Tri. All.)].*

22. While appreciating the ratio of above judicial decisions and considering the appellant's submissions, we have to conclude that the provisions of Section 153 of the Customs Act, 1962 are not complied with in these appeals as proof of receipt of these orders by the appellant could not be produced by the Revenue, though entries in the dispatch register evidenced dispatch of the impugned Orders-in-Original.

23. We find that the lower appellate authority has not considered the submissions of the appellant on merits and disposed these appeals only on limitation. As such we set aside the order to remand all these appeals to the Commissioner of Customs (Appeals) for passing appropriate orders on merits after affording a reasonable opportunity of being heard to the appellant. Thus, these appeals are allowed and disposed of by way of remand.

(Order pronounced in open court on 18.08.2023)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

MK