

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. I

Customs Appeal No. 51265 of 2020

With

Customs Miscellaneous Application No. 50655 of 2022

(Arising out of Order-in-Original No. 03/COMMR/MS/JMK/ICD-PPG/2020 dated 14.08.2020 passed by the Commissioner of Customs, Delhi)

M/s JMK Energy

B-42, Bhati Mines, Main Road,
New Delhi-110074.

Appellant

VERSUS

Commissioner of Customs, Delhi

Office of Commissioner of Customs,
ICD Patparganj, Near Gazipur,
Delhi-110096.

Respondent

Appearance

Shri Puneet Agarwal & Shri Yuvraj Singh, Advocates – for the Appellant.

Shri Nagendra Yadav, Authorized Representative – for the Respondent.

CORAM : **HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT**

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 03/01/2023

DATE OF DECISION : 30/01/2023

Final Order No. 50089/2023

P.V. Subba Rao

M/s JMK Energy, New Delhi¹ filed this appeal to assail the order-in-original dated 14.08.2020² passed by the Commissioner of Customs, Patparganj, ICD, New Delhi whereby the appellant's classification of imported goods under Customs Tariff Heading³ No. 85131010 and IGST S. No. 234 of Schedule I of Notification No.

1 the appellant
2 Impugned order
3 CTH

1/2017-IGST (Rate) dated 28.06.2017 was rejected and the imported goods were held to be classifiable under CTH 85076000 and covered under S. No. 139 of IGST Schedule IV of Notification No. 1/2017-IGST (Rate) dated 28.06.2017. Differential amount of IGST of Rs. 2,25,99,024/- was ordered to be recovered under Section 28(1) of the Customs Act, 1962⁴ along with interest under Section 28AA. Penalty of Rs. 22,60,000/- was imposed under Section 112 and penalty of Rs. 1,00,000/- was imposed under Section 117 of the Act.

2. The facts of the case, in brief, are that the appellant imported goods described as "Portable Solar Home Electric Light – HANS 300 and HANS 150"⁵ under five bills of entry classifying them under CTH 85131010 and S. No. 234 of Schedule I of IGST Notification No. 1/2017. At this stage, it needs to be pointed out that a vast majority of the goods which are imported into the country are cleared on the basis of self assessment of duty by the importer under Section 17(1) while some goods are re-assessed to duty under Section 17(5). If the goods are cleared on the basis of self assessment, the bills of entry are audited after clearance and this process is commonly referred to as Post Clearance Audit.

3. CTH 85131010 reads as follows:

"85.13 – Portable electric lamps designed to function by their own source of energy (for example, dry batteries, accumulators, magnetos), other than lighting equipment of heading 85.12.

851310 - Lamps;

85131010 – Torch.....

4 Act

5 imported goods

85139000 - Parts

4. During Post Clearance Audit of the above bills of entry, it appeared that this heading was meant for torches with self contained source of the electricity whereas the imported goods were not merely torches but had several features and, therefore, were composite machines and torch or lamp was only their minor feature. They store electricity of 300 watt hours or, as the case may be, 150 watt hours. They are portable and come with an in-built solar panel and the battery can be charged by either placing the device in sun or through four other methods. These are:

- (i) Household outlet (domestic electricity);
- (ii) DC Car Charger (sold separately);
- (iii) Human Power Generator (HPG);
- (iv) Built in solar plus solar Briefcase (sold separately).

5. It was also found that in addition to the in-built LED lamps, the imported goods can be used for several other purposes such as charging mobile phones through USB ports, operating small electric devices such as computers and televisions through a 12 volt port.

6. It is undisputed that the imported goods have all these features viz., a solar panel which generates power, a battery which stores it and the LED lights. It is also undisputed that the battery can be charged through by five different ways including through the in-built solar panel. It is also undisputed that in addition to the LED lamp, the imported goods can be used for other purposes such as charging mobile phones or running computers and televisions.

7. The case of the Revenue is that the imported goods should be classified as per their main function which is that of an accumulator. According to the Revenue, the in-built solar panel is only one of the five methods for charging the accumulator and the LED lamps in the goods are only one of the methods by which they can be used. Their other uses including charging mobile phones or running small electrical equipment show that the essential nature of the device is that of an accumulator. This accumulator can be charged through five different methods including in in-built solar panel and can be used for several purpose including for light through the in-built LED lamps. Accordingly, the imported goods should be classified under CTH 85076000. Further, according to the Revenue, the imported goods merit classification under S. No. 139 of Schedule IV of IGST Notification No. 1/2017 and not under S. No. 234 of Schedule I of this notification.

8. A show cause notice dated 7.2.2020 was issued to the appellant and after considering the reply submitted by the appellant the impugned order was passed.

9. In its reply, the appellant took the stand that not only are the goods are classifiable under S. No. 234 of Schedule I of the IGST notification but they are liable to be classified under CTH 85013120 and, therefore, not only was the appellant not liable to pay the IGST at higher rate but it was also eligible for refund of the excess basic customs duty paid by wrongly classifying the imported goods under 85131010. The reason for this assertion is that, according to the appellant, the main function of the imported goods is that of solar generator and neither are they solar lamps nor are they

accumulators. Having generated solar power, it has to be stored and it is being stored in the battery. The other means of charging the battery are only alternative means of charging provided in them. The imported goods are, therefore, to be classified as electric generators under 8501.

10. The prayer in the appeal before us is as follows:

- (i) Set aside the impugned OIO dated 14.08.2020 passed by the Commissioner, Customs, ICD Patparganj and other ICDs Delhi and allow the appeal in full with consequential relief to the Appellants;
- (ii) Grant refund of the excess tax paid by the appellant;
- (iii) Provide an opportunity of cross-examining Sh. Vinod Kumar Goel, the Chartered Engineer whose report is relied upon in the OIO;
- (iv) Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case;
- (v) Provide an opportunity of being heard.

11. On behalf of the appellant, the following submissions were made:

- (i) Since the imported goods are undisputedly solar power based devices they fall under S.No. 234 of Schedule-I of IGST Notification No. 1/2017. There is no dispute that they have solar panels. The AC power is only an alternative source for charging their device as a backup mechanism. S. No. 234 of

Schedule I and S. No. 139 of Schedule IV of the notification read as follows:

S. No	Chapter/Heading/sub heading/Tariff Item	Description of Goods
(1)	(2)	(3)
234	84 or 85	Following renewable energy devices & parts for their manufacture a) Bio-gas plant b) Solar Power based devices c) Solar power generating system d) Wind mills, Wind Operated Electricity Generator (WOEG) e) Waste to energy plants/devices f) Solar lantern/solar lamp g) Ocean waves/tidal waves energy devices/plants

S.No.	Chapter/Heading/sub heading/Tariff Item	Description of Goods
(1)	(2)	(3)
139	8507	Electric accumulators, including separators therefor, whether or not rectangular (including square)

(ii) There can be no doubt that solar power is a renewable source of energy and that the goods in question are based on solar power, although they have four alternative means of charging. Therefore, the imported goods are squarely covered by S. No. (b) solar power based device, (c) solar power generating system and (f) solar lantern/solar lamps under S. No. 234 of Schedule-I. Therefore, it does not matter under which heading in Chapter 84 or 85 of the Customs Tariff they fall. The benefit of S. No. 234 of Schedule-I will still be available to the appellant.

- (iii) The imported goods are not classifiable under 85076000 and are also not classifiable under S. No. 139 of Schedule IV of IGST Notification No. 1/2017. This heading covers accumulators based on lithium-ion battery which is one of the parts of the goods in dispute.
- (iv) The essential feature of the goods is generation of DC power using solar energy which can be used to charge mobiles or run other electrical appliances such as computers and televisions in addition to using the LED lights. Therefore, the essential feature of the imported goods being that of the generator, appropriate CTH is 85013120 which reads as follows:-

Tariff Item	Description	Unit	Rate of Duty	Preferential Area Rate
85013120	DC generators	U	10%	

- (v) Revenue has mis-construed the imported goods as accumulators. Their main function of the product is that of solar power generation and storage of the power so generated is incidental to the generation.
- (vi) The adjudicating authority has relied on the Chartered Engineer’s opinion which is not correct and no opportunity for cross-examination has been given to the appellant and the statement of the Chartered Engineer could not have been used

without following procedure prescribed under

Section 138B of the Act which reads as follows:

"138B. Relevancy of statements under certain circumstances.— (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

On specifically being asked by the Bench if the appellant had sought cross-examination of the Chartered Engineer, learned counsel confirmed that no such request was made before the adjudicating authority;

- (vii) Since the imported goods are classifiable under 85013120 the basic customs duty payable was only @ 7.5% as per Notification No. 50/2017-Cus. (S. No. 486). Therefore, the excess basic customs duty paid may be refunded to the appellant.

- (viii) No penalties could be imposed upon the appellant as the dispute is only due to the difference of opinion between the Revenue and the appellant.
- (ix) No interest can be charged by the differential duty itself is not sustainable.

12. On behalf of the Revenue, learned authorized representative made the following submissions:

- (i) The impugned order in original is correct and proper and it was passed after obtaining expert opinion of the Chartered Engineer and examining the literature of the imported goods on the website of the appellant which shows the nature of the imported goods.
- (ii) They are meant to store power, generate electricity with in-built solar panel and provide light through LED lamps. The power can be sourced through five different means for storage including through the in-built solar panels. The usage of the power so produced is through the LED lights and also through the USB ports and 12 volt socket. The power so stored can be used not only for light but also to run several electrical appliances. Thus, the heart of the imported goods is the accumulator and the solar panel which generates the electricity and the LED lights which emit light are not the main features. In case of composite machines, classification under

Customs Tariff Heading should be done as per that portion of the machine which gives it the essential characteristics. In the imported goods, the solar panel is only one of the five means of charging and the light is one of several uses to which they can be put to. They are also sold based on capacity of storage of electricity of 300 watt hours or, as the case may be, 150 Watt hours. Therefore, the imported goods cannot be classified as solar lamps as the appellant had initially done nor classified as solar generators as the appellant now claims. They are correctly classifiable as accumulators under CTH 8507;

- (iii) Consequently the appropriate heading under which they should be classified under the IGST Notification 139 of Schedule-IV;
- (iv) The differential IGST must, therefore, be recovered from the appellant and the entire demand was within the normal period of limitation and extended period of limitation was not invoked;
- (v) The imposition of penalties under Section 112 and 117 is correct and proper.

13. We have considered the submissions made by both sides and perused the records before us. The issues to be decided are:

- (i) What is the nature of the imported goods imported and are they classifiable under CTH 85131010 as torch as claimed by the appellant in the bills of entry

or under CTH 85076000 as accumulator as held in the impugned order or under 85013120 as now claimed by the appellant?

- (ii) Are the imported goods covered by S. No. 234 of Schedule-I or S. No. 139 of Schedule IV of the IGST notification?
- (iii) Is any differential IGST with interest recoverable as held in the impugned order?
- (iv) Alternatively, is any differential customs duty refundable to the appellant?
- (v) Can be penalties under Section 112 and under Section 117 be sustained?

14. Learned counsel for the appellant and learned authorized representative took us through the functions of the imported goods in detail and how they were being sold. The goods in question are called "HANS power pack 300" and "HANS power pack 150" depending upon the capacity. They can be charged through following five methods:

- 1) Household outlet (Domestic electricity);
- 2) DC Car Charger (sold separately);
- 3) Human Power Generator (HPG);
- 4) Built in Solar;
- 5) Built in solar plus Solar Briefcase (sold separately).

15. They have inbuilt solar panels which can charge them. There are LED lights in them and in addition to the light they can be used

to run small electric devices such as computers and televisions. They have long lasting lithium-ion batteries. Their description goods as recorded in the impugned order are not disputed. These are as follows:

"The premier power plant-without an electric bill.

A single charge provides:-300 hours of light (Maximum) and 30 Mobile phone charges (Maximum)

Can power larger electrical devices such as computers and televisions.

Can be charged five ways:-

- (i) HANS Solar Briefcase (sold separately)
- (ii) HANS Free Electric Bike (sold separately)
- (iii) Human Power Generator (HPG)
- (iv) Built in solar panel (included)
- (v) AC Charging cord (included)

Long – lasting lithium battery

Light weight (4 kg) and portable.

Rugged, durable construction.

12 years warranty.

- "1) USB Port - SV up to 2.4 A
- 2) 12V Car Port -11.5-16.8V (11A max)
- 3) 3x1W&1x2w lights - 300 hours max
- 4) AC Charger (3A.50W) - 7-8 hours
- 5) Solar - 66 hrs (4.5w integrated solar panel) 7-10 hrs (Integrated-60W optional solar Briefcase)
- 6) Lifecycles - 1000 Cycles to 80%
- 6) Rated Capacity - 1000-Cycles to 80%
- 7) Cell Type - Lithium-ion

16. The three competing entries for classification under the Customs Tariff are:

85131010 - Torch

85076000 - Lithium-ion accumulator

85013120 - DC Generators

17. In other words, as per the original classification in the bills of entry etc., the imported goods in question are solar lamps. If Revenue's contention is accepted they are accumulators and if the submission by the appellant is accepted they are DC generators. Each of these three features – the lamp, the accumulator and the generator-explains part of the imported goods. Section Notes 3 and 4 of Section XVI covering the chapters 84 and 85 read as follows:

"Note 3 : Unless the context otherwise requires, composite machinery consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Note 4 : Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by any of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate for that function."

18. The imported goods in question are designed for the purpose of performing several complementary or alternative functions viz. (a) generation of electricity solar energy; (b) storing the electricity so generated or collected through four other different means; and (c) supplying electricity to the in-built LEDs as well as for charging mobiles and running electrical devices. The question which arises is which of these is the principal function. Evidently, their heart is the storage which can be done by five different means, one of which is charging using in-built solar panel. The power so generated can be used for several purposes and not only for using the LED lamps built into it the goods. Thus, they have multiple inputs and multiple output options. The imported goods can be

used regardless of which input source is used or what the output purposes are but they cannot be used without the accumulator. Therefore, in our considered view, they deserve to be classified as accumulators under CTH 8507.

19. The next question is whether the classification of the imported goods under IGST. S. No. 234 of Schedule I of the IGST Notification 1/2017 covers solar power based devices is correct. We find that the notification does not place any restriction of the Customs Tariff Heading and it applies so long as such devices fall under Chapter 84 or 85 of the Customs Tariff. Evidently, the goods falling under 8507 would also be entitled to classification under Schedule I at S. No. 234 if they are solar power based. There can be no manner of doubt that they are solar power based. The reason this classification was not accepted by the adjudicating authority is that they are not SOLELY based on solar power and other power can also be used charged the devices. In our considered view, the adjudicating authority has erred in coming to this conclusion because the Notification does not say "devices based solely on solar power" but says "solar based devices". It does not in any way forbid the alternative sources of power to support them. Simply because there are four other alternative means through which they can be charged, it does not mean that the imported goods are not solar power based devices. Therefore, the imported goods merit classification under 234 of Schedule I of Notification 1/2017. Consequently, the demand for IGST differential duty along with interest cannot be sustained.

20. As we have held that the essential nature of the imported goods to be that of accumulators, the appellant's contention that they should be classified under CTH 85013120 as DC generators cannot be accepted and consequently no refund of customs duty is admissible to the appellant.

21. As we have found that the demand for differential IGST itself is not sustainable, the question of interest or imposition of penalty under Section 112 or 117 also do not arise.

22. In view of the above, the impugned order confirming the demand for differential IGST along with interest under Section 112 & 117 on the appellant is set aside and the appeal is allowed to this extent.

23. The miscellaneous application filed by the appellant is also disposed of.

(Pronounced in open Court on 30.01.2023)

(Justice Dilip Gupta)
President

(P.V. Subba Rao)
Member (Technical)

RM