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Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

CUSTOMS Appeal No. 10368 of 2015- DB

(Arising out of OIA-KDL-CUSTM-000-APP-413-422-14-15 dated 03/12/2012 passed by Commissioner of CUSTOMS-KANDLA)

Rajkamal Industrial Pvt Ltd **.....Appellant**
401, Dev Arc Ciro, Opp Big Bazar
S.G Highway, Satellite
Ahmedabad, Gujarat

VERSUS

C.C.-Kandla **.....Respondent**
Custom House,
Near Balaji Temple,
Kandla, Gujarat

WITH

(i) CUSTOMS Appeal No. 10359 of 2015- DB (Meet Bhadresh Mehta)
(ii) CUSTOMS Appeal No. 10361 of 2015- DB (Zahid Hussen)
(iii) CUSTOMS Appeal No. 10362 of 2015- DB (Bhadresh C Mehta)
(iv) CUSTOMS Appeal No. 10363 of 2015- DB (Bhadresh C Mehta)
(v) CUSTOMS Appeal No. 10364 of 2015- DB (Amit Bhardwaj)
(vi) CUSTOMS Appeal No. 10365 of 2015- DB (Meet B Mehta)
(vii) CUSTOMS Appeal No. 10366 of 2015- DB (Amit Bhardwaj)
(viii) CUSTOMS Appeal No. 10367 of 2015- DB (Bagwan Petroleum)
(ix) CUSTOMS Appeal No. 10369 of 2015- DB (Rajkamal Industrial Pvt Ltd)

APPEARANCE:
Shri Hardik Modh & Shri Amit Laddha Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR), for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10304-10313/2024

DATE OF HEARING: 08.11.2023
DATE OF DECISION: 01.02.2024

RAMESH NAIR

This group of appeals are preferred against the common impugned Order-In-Appeal KDL/COSTM/000/APP/413-422-14-15 dated 03.12.2014 passed by the Learned Commissioner (Appeals) wherein he upheld the classification of Rubber Processing Oil (RPO) under Chapter heading 27079900 of Custom Tariff Act and enhancement the value of imported RPO. The Learned Commissioner (Appeals) further upheld that the appellant mis-declared the country of origin in the bills of entry.

Consequently, the Learned Commissioner (Appeals) upheld the finding of the Adjudicating Authority and dismissed the appeal preferred by the appellant. Therefore, the present appeals.

1.2 The following four issues involved in the present appeals:-

(i) Whether the Rubber Processing Oil imported by the Appellant is classifiable under Chapter Heading No. 27101990 as classified by the Appellants or under Chapter Heading No. 27079900 as classified by the Revenue.

(ii) Whether the value of the imported RPO can be enhanced based on the consent letters given by the directors of the Appellants at the time of release of the goods, without following the due process of law as contemplated under Section 14 of the Customs Act read with Customs (Determination of Value of imported value) Rules, 2017

(iii) Whether the Appellants mis- declared the Country of Origin in the Bills of entry filed by them.

(iv) Whether the quantum of penalties and redemption fine imposed disproportionate to differential duty involved in the matter

1.3 The order of the Adjudicating Authority was based on the test report of Custom House Laboratory at Kandla. Few test reports of Custom House Laboratory, Kandla and the statements of the Director of the appellant M/s. Rajkamal Industrial Pvt Ltd and statements of CHA.

2. Shri Hardik Modh, Learned Counsel along with Shri Amit Laddha, Learned Advocate appearing on behalf of the Appellant submits that the Custom Department relied upon the Chapter Note 2 of Chapter 27 for rejecting the classification under Chapter Heading 27101990. He submits

that the revenue has wrongly classified the RPO under Chapter Heading 27079900 as the identical issue arose in the case of Shah Petroleum Ltd vs. Commissioner of Customs- 2017 (358) ELT 483 (T) wherein the Hon'ble Tribunal held that the RPO is not classifiable under Chapter Heading No 27079900 but the same is classifiable under 2713. The said judgment of the Tribunal was upheld by the Hon'ble Supreme Court reported at 2018 (360) ELT A177 (SC).

2.1 Without prejudice to the aforesaid, he further submits that the appellant M/s. Rajkamal imported consignments of RPO through two bills of entry whereas the Appellant M/s. Bagwan Petroleum imported consignments of RPO through four bills of entry. Each bill of entry contains 15 containers, each container contains 80 tonnes. The investigating authority separated 10 drums randomly from each container and drew the samples from each of 10 drums. It appears from the proceeding that Kandla Custom House Laboratory sent only three test reports in respect of appellant M/s. Rajkamal Industrial and four test reports in respect of M/s. Bagwan Petroleum. It is his submission that the investigating authority ought to have sent all the samples drawn from the drums to the laboratory for testing. In failure to send all the samples for testing, the outcome of the test report is applicable to those samples which were sent for testing. It does not mean that the said test reports are applicable for all drums for which the goods were not tested. Further, each test report issued by Kandla Custom House Laboratory provides different grades of aromatic Constituents, this supports the case of the appellant that the investigating authority ought to have sent all the samples to Kandla Custom House Laboratory for examining contents of the goods. Since the investigating authority did not instruct the Kandla Custom House Laboratory to supply test reports of each of the samples drawn from the drums, results of samples are not applicable for the entire cargo. He

takes support of the case of Shalimar Paints Ltd Vs. Commissioner of Central Excise- 2001 (134) ELT 285 wherein it was held that the test report can be the basis of classification only for those products for which the goods were tested.

2.2 Without prejudice to the above, he further submits that it is an obligation upon the Laboratory to provide a method of testing. In the present case none of the reports provides the testing method and therefore, the same is not applicable. In the following cases, it is held that whenever the method of testing is relevant, the method adopted ought to be mentioned in the test report. He takes support of the following judgments:-

- UK Paints Industries vs. Collector of Customs – 1994 (74) ELT 392 (T)
- Samdur Manganeze & Iron Ores Ltd vs. Commissioner of Customs – 2004 (177) ELT 1094 (Tri.Mum)
- Samdur Manganeze & Iron Ores Ltd vs. Commissioner of Customs – 2007 (218) ELT 291 (Tri. Mum)

2.3 As regard the enhancement of the value of the goods, he submits that both the lower authorities enhanced the value based on the consent letters by the director of both the importers. It is settled law that the burden lies upon the revenue to show that the value declared by the importer is incorrect. Once, it is found that value declared by the appellant is incorrect, proper methodology as provided under Section 4 read with Customs Act read with Customs (Determination of Value of Import Goods) Rules, 2007 is to be followed for ascertaining correct value of the imported goods. The lower authorities ought to have ascertained value of the contemporaneous goods before relying upon the consent letters given by the directors of the appellant. He takes support of the following judgments:-

- Century Metals Recycling Pvt Ltd vs. Union of India – 2019 (5) TMI 1152
- Commissioner of Customs vs. Andrew Telecommunications Pvt Ltd – 2018(362) ELT 896
- Guru Rajendra Metal Alloys India Pvt Ltd vs. CC – 2020 (374) ELT 617 (T)

2.4 As regard the issue of mis-declaration of Country of Origin , he submits that both the lower authorities held that both the appellants have mis-declared the country of origin in the bills of entry as UAE whereas the goods were originated from Iran. While recording the statements of the directors of the appellants stated that the supply was made from Dubai and therefore, they mentioned the country of origin as UAE. He submits that the appellant had no deliberate intention not to declare the correct country of origin, the appellants declared country of origin based on documents received from the supplier. He takes support in case of Agarwal Industrial Corporation Ltd vs. Commissioner of Customs - 2020 (373) ELT 280(Tri. Bang) wherein the penalties under Section 112A read with Section 114AA was set aside on the premise that there was no malafide intention on the part of the importer not to declare the correct country of origin.

2.5 Without prejudice to the aforesaid, he further submits that even though if the appellant accepts the finding of both the lower authorities, penalties and redemption fine imposed on the appellants are disproportionate to the differential duty amount involved in the impugned proceedings. In case of Appellant M/s. Rajkamal, the differential amount of duty was to be paid of Rs. 7,78,683/- whereas redemption fine of Rs. 22 Lacs and total penalty approximately 47,79,422/- have been imposed against M/s. Rajkamal. In case of Bagwan Petroleum redemption fine of Rs.

35 Lacs and a total penalty approximately of Rs. 83.10 Lacs have been imposed against Appellant M/s. Bagwan and its director.

2.6 Without prejudice to the aforesaid, it is also submitted that there is no intention on the part of the appellant of the director to evade custom duty, the appellant have classified the disputed goods under Chapter Heading No. 27101990 based on valuation under same heading and the decision of Sah Petroleum Ltd (Supra) however, value ought not to have been enhanced on the basis of the Consent letters. There is no undue benefit in declaring another country of origin. Therefore, he prays that the appeals may be allowed with consequential relief.

3. Shri Himanshu P Shrimali, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the main issue to be decided in the present case is the classification of Rubber Processing Oil imported. The lower authorities have decided the classification under Chapter Heading No. 27079900 on the basis of a test report of Custom House Laboratory, Kandla. The basis of department's claim for classification of RPO is the chapter note 2 of chapter 27 of Customs Tariff Act which is reproduced below:

> *"2. References in heading 2710 to "petroleum oils and oils obtained from bituminous minerals" include not only petroleum oils and oils obtained from bituminous minerals but also similar oils, as well as those consisting mainly of mixed un- saturated hydrocarbons, obtained by any process, provided that the weight of the non-aromatic constituents exceeds that of the aromatic constituents.*
>
> *However, the references do not include liquid synthetic polyolefins of which less than 60% by volume distils at 300°C, after conversion to 1,013 millibars when a reduced-pressure distillation method is used (Chapter 39). "*

4.1 As per above chapter note goods of chapter 2710 should have non aromatic Constituents more than the aromatic Constituents. In the instant

case though the Custom Laboratory's test show the non aromatic Constituents less than the aromatic Constituents, the department has rejected the classification under 2710. However it is fact on record that the method specified under BIS has not been adopted. Therefore the test report on the face of it can not be accepted. Accordingly, the claim of the department to classify the RPO under 27.07 fails. Moreover, the test report submitted by the appellant from Jiochem Laboratory contradicts the test report of Customs Laboratory, Kandla for this reason also the later test report can not be accepted. The adjudicating authority has not accepted the Jiochem's report on the ground that the sample was not received in sealed cover. However the adjudicating authority could not bring any evidence that the sample was not from the impugned goods but from some other goods. Hence merely because the sample was not in sealed cover, the report of Geochem can not be discarded.

4.2 Here it is pertinent to note that in the case of Amit Petrolubes Tribunal's final order No. 12761-12762/2023 dated 15.12.2023 the fact of testing of the identical goods i.e. RPO and in the present case is same. In Amit Petrolubes supra this Tribunal passed the following order:

> *"The following issues are involved in the present appeals:*
>
> *i. Classification of Rubber Processing Oil (RPO) whether under CTH 27101990 as claimed by the appellant or under CTH 2707 99 00 as per final assessment ordered by the department.*
>
> *ii. The dispute about country of origin whether the same is Singapore or UAE where the appellant has not claimed any preferential rate of duty.*
>
> *iii. Enhancement of declared value twice, from USD 500 PMT(C &F Kandla) to USD 531.500 PMT(C & F Kandla) and therefore, further enhancement to USD 585 on the basis of the copy of invoice received from shipping agent.*
>
> *1.1 xxxxxx*
>
> *1.2 xxxxxx*

2. xxxxx

3. xxxxx

4. We have carefully considered submissions made by both the sides, and perused the rerecords. In the present appeal, issue to be decided by us in the appeal filed by M/s. Amit Petrolubes Pvt Ltd are as under :-

i. Classification of Rubber Processing Oil (RPO)

ii. Country of origin of said goods

iii. Enhancement of declared value twice.

4.1. As regards classification of Rubber Processing Oil (RPO), we find that was held by the revenue under CTH 27079900 treating the parameters of aromatic constituents is 50% i.e. more than non-aromatic constituents on the basis of test report dated 26.09.2012 issued by Customs laboratory.

4.2. The submission of the appellant is that test report of Customs laboratory, Kandla does not mention, the method adopted by customs laboratory for testing the sample. Therefore, the said test report cannot be qualified as evidence to decide the classification. We find that as against the above test report dated 26.09.2012. The Quality Certificate No. TOP 2012/COQ-148 dated 02.08.2012 provided by the supplier M/s. The Oceanic Petroleum Source Pvt Ltd., Singapore shows aromatic content as 35.8 measured by adopting ASTM D2140 method. Moreover, accredited laboratory namely Geo Chem also vide report dated 06.10.2012 reported aromatic content is 35% and since 50% shown by the custom laboratory test report which does not mention method of testing sample, preference has to be given to the Geo Chem test report dated 06.10.2012 coupled with Supplier's quality certificate according to which the aromatic content being 33.08% - 35% is less than the non-aromatic content. Therefore, in our considered view the Rubber Processing Oil (RPO) is correctly classified under CTH 27101990.

4.3. The issue regarding classification of Rubber Processing Oil (RPO) is claimed by the appellant is supported by this Tribunal decision, in the case of Sah Petroleum Ltd v/s. Commissioner of Custom(import) JNCH, Nhava Sheva,2017 (358)ELT 483 (Tri.- Mumbai). Considering the fact in the present case and taking support of the aforesaid Tribunal Judgment which was upheld by the Hon'ble Supreme Court, we hold that the appellant's imported goods Rubber Processing Oil (RPO) is correctly classified under CTH 27101990 and not under CTH 2707 9900 as proposed by the revenue.

4.4. As regard the issue of country of origin, we find that the appellant had placed order with Oceanic Petroleum Source Pvt. Ltd, Singapore, who had shipped the goods from Malasiya. The Country of origin was shown in the invoice as UAE. The same was held as Malasiya by the lower authority, by relying on statement of Shri Hemant Shah, Director of appellant. We find that, it is submitted that the appellant has not claimed any preferential rate of duty on the basis of declaration regarding country of origin.

4.5. We are of the view that, without going into the fact that, which is the correct county of origin, since the appellant has not claimed any concession on the basis of country of origin the issue is only of aromatic content and having no revenue implication. Therefore no consequential penalty is sustainable. The very identical issue has been considered by the Tribunal in Agrawal Industrial Corporation Ltd. v/s. Commissioner Of Customs, Manglore, 2020 (373) ELT 280 (Tri.- Bangalore), whereby the Hon'ble Tribunal has set aside the redemption fine and penalty imposed under Section 112(a) and 114AA of Customs Act, 1962 on the ground that the country of origin was mis-declared in the bill of entry by taking note of the fact that the importer had not claimed any preferential rate of duty on this basis.

4.6. Considering the said decision of the Tribunal and fact of the present case, we hold that no penalty is sustained on this ground.

4.7. As regards the 3rd issue i.e. enhancement of the value of the imported goods twice, we find that once the value was enhanced from USD 500 PMT to USD 515 PMT , which was accepted by the appellant. However, the value was further enhanced to USD 585 only on the basis of one invoice bearing No. TOP SPL /CP/34 dated 09.07.2012 produced by the shipping agent.

4.8. On this basis, the assessable value is determined by adding freight @20 % and insurance @ 1.125%. We find that the appellant tendered copy of Bill of Lading No. MYPKGINIXY517631 dated 12.07.2012 for the subject goods confirming that freight was pre-paid. Therefore, when the freight is pre-paid and inclusive in the price, there is no requirement to add element of freight @20% for USD 585.

4.9. It is also observed that about the aforesaid invoice produced by the shipping line, the appellant had no knowledge and it is not also known when such invoice was produced before custom authority at the port of export. Hence, we are of the view that, it cannot be said that the same represent true and correct transaction value. Moreover, it is admitted fact that, no evidence was placed on record to show any extra payment made by the appellant over and above declared value USD 500 PMT C & F Kandla. No Contemporaneous import at USD 585 FOB Kandla was cited. Therefore, we are of the

view that, enhancement of the value from USD 531 to UD 585 is without any basis and the same is not sustainable.

4.10. We find that as regards, the issue of classification of Rubber Processing Oil, when the classification is determined on the basis of test report, the order for confiscation by alleging mis-declaration and imposing penalty are not warranted. This proposition is supported by the following judgments:-

- *Surbit Impex Ltd.-2012(283) ELT 556 (Tri.- Mumbai)*
- *Mittal International -2018 (359) ELT 527 (Tri. -Del)*
- *Jay Kay Exports -2003 (161) ELT 443 (Tri. -Kol)*

5. In view of our above observation the impugned order so far it is against the appellant is set aside and consequential penalty imposed on Shri Hemant Shah, Director is also set aside. Accordingly, the appeals are allowed with consequential relief in the above terms."

From the above judgment of this tribunal, it can be seen that in the identical fact the department's claim of classifying the RPO under 27.07 was rejected. Therefore in view of the our above discussion and with the support of the above referred judgment and particular facts of the present case, the impugned order on the issue of classification is not sustainable.

4.3 Without prejudice to our above finding, we note that the appellants also raised a contention that the test report is applicable in respect of the number of samples tested, it is the submission of the appellant that in respect of appellant M/s. Rajkamal, the test report was issued by Kandla Custom House Laboratory only in respect of three samples and in case of Appellant M/s. Bagwan Petroleum, test report of four samples were issued. The appellant vehemently argued that the department's claim of classification at the most shall apply only in respect of the numbers of samples tested. We find that this issue has been considered in the case of Shalimar Paints (Supra) wherein the Tribunal has passed the following order:-

"7. The first grievance of the appellant is that though the classification lists in question covered about 30 products, test reports relatable to only 4 products are available and there is absolutely no material against the appellant in so far as the remaining 26 products are concerned. He submits that presuming though denying that the test reports of CRCL are correct, the same can be made the basis for classifying only those products to which the test report relates. The same cannot be made applicable to the other items for which no samples were either drawn or if samples were drawn, there is no test report. For this proposition he relied upon the Tribunal's decision in the case of S.D. Kemexc Indus. v. CCE - 1995 (75) E.L.T. 377. In the said decision assessee was manufacturing 22 different types of chemicals. The Department drew samples only from two types of chemicals. It was held that test reports can be made applicable only for the two products for which the samples were drawn and not to the rest of the products. Following the ratio of the above decision we fully agree with the contention of the ld. adv. that the test reports, if at all could be made applicable only to the 4 items in question to which it belonged to. The balance 26 products would be classified under Heading 27.15 on the basis of the declarations made by the appellant which is based upon their technical literature as well as the production records and for which the Revenue has not adduced any evidence to shift the classification to heading 32.10.

8. As regards the 4 products we find that the impugned orders are based upon the second test report of CRCL and the fact that the appellants were classifying their products under Erstwhile Heading 14 prior to 28-2-1986 which belonged to paints and varnishes. The appellants' contention is that the Erstwhile Tariff Item No. 11(4) did not mention about the Bituminous mixtures and the same were specifically mentioned under Erstwhile Tariff Item No. 14(2)(ii) which specifically covered Bituminous and Coal tar blacks. However, w.e.f. 28-2-1986 the entire tariff structure was changed and the Bituminous Mixtures came to be specifically mentioned under sub-heading on 27.15. For better appreciation of the appellants' contention we reproduce below the relevant Erstwhile Tariff entries as also the present tariff entries under disputes :

ERSTWHILE TARIFF

Item 11. Coal (excluding lignite) and coke, all sorts, including calcined petroleum coke, asphalt, bitumen and tar-

4. Asphalt and bitumen (including cutback bitumen and asphalt) natural or produced from petroleum or shale

Item 14. Pigments, colours, paints, enamels varnishes, blacks and cellulose lacquers -

(II) Varnishes and blacks

(III) Bituminous and coal tar blacks

CENTRAL EXCISE TARIFF ACT, 1985

27.15 Bituminous mixtures (including emulsions, suspensions and solutions) based on the natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (for example, bituminous mastics, cutbacks)

- Cut-back bitumen or asphalt

32.10 Other paints and varnishes (including emamels, lacquers and distempers), prepared water pigments of a kind used for finishing leather.

9. A comparative reading of the above entries supports the appellants' contention that the goods were being classified by them under Erstwhile Tariff Item 14 because the same specifically cover the Bitumen and coal tar blacks. Under the new tariff Bituminous mixtures came to be classified under Heading 27.15 and there was no mention of the same under Heading 32.10. We agree with the ld. Counsel that there is no estoppel under the law and their claim for classification under Heading 27.15 cannot be rejected on the ground that under the Erstwhile Tariff the goods were being classified under item relatable to paints, varnishes etc. especially when the entire tariff structure has been changed and the classification under the new Tariff Act is required to be made in the light of interpretative rules, chapter notes and section notes with guidance from explanatory notes in Harmonised commodity description and coding system. In this matter the appellant has referred to a number of decisions. It is seen that there is no dispute about the said legal position that in the matter of classification there cannot be any res judicata and assessee can always claim change in classification of the goods.

10. The appellants' claim for classifying the goods in question under heading 27.15 which covers Bituminous mixtures (including emulsions suspensions and solutions) based from natural Asphalt, Natural Bitumen, Petroleum Bitumen, mineral tar or mineral tar pitch, is based upon their production records. The appellants are diluting the asphalt, Bitumen etc. in solvents for manufacture of the said goods. There was no allegation whatsoever that the appellant's products records are not correct or their manufacturing process has not been represented correctly to the Revenue. Even as per the first report of the chemical examiner in respect of 4 items, the same is to the effect that sample consisted of black coloured free flowing liquid compound of Bitumen in solvents. As such even according to the said report no other material was used for the manufacture of the goods in question. As such it makes it clear that the products manufactured by the appellants composed of nothing other than black Bitumen and solvents. The factual position stressed by the appellant to this effect before the Asstt. Commissioner has not been disputed or rebutted by the Revenue. As such we find that the goods in question are more appropriately classifiable under Heading 27.15.

11. Shri Bagaria has also taken us to the definition of cut-back as appearing in various dictionaries. For better appreciation we reproduce the same :-

Glossary of Terms - M/s. Burmah Shell Storage & Distribution Co. of India Ltd.

"Cutback : Bitumen, the viscosity of which has been reduced by volatile diluent".

Organic Coating Technology volume II - by Henry Fleming Payne.

"Solutions of bitumen in solvent without fillers."

12. The aforesaid tests of cut-back Bitumen are satisfied in the appellants' case as they were manufacturing the same by reducing the viscosity of volatile diluents.

13. On the other hand we find that Heading no. 32.10 covers other paints and varnishes and is nowhere near to Bituminous mixtures or cut-back Bitumen. The various definitions of paints and varnishes appearing in ISI and referred to by ld. adv. only go to show that there can be Bituminous paints which are paints based essentially on Bituminous ingredients and there can be Bituminous varnishes based on Bituminous/asphalt ingredients. But such paints and varnishes based on Bituminous ingredients have to be first paints and varnishes which are essentially based on resins.

14. Now the question arises as to whether the test report of CRCL (New Delhi) can be pressed into service for supporting the Revenue's contention. The goods were first chemically examined by the departmental chemical examiner, Calcutta according to which the samples were black coloured free flowing liquid compound of Bitumen in

solvents. Admittedly no other constituent, whatsoever, was found by the examiner in the said samples. The said report in fact favoured the appellants inasmuch as the goods consisting of only Bitumen and solvents and nothing but Bitumen, are classifiable under heading 27.15. As for the report of CRCL is concerned, the appellants have challenged the same on various grounds and have questioned the correctness and authenticity of the same. In their written submissions filed during the course of hearing the appellants have submitted as under in respect of the said report of the CRCL :-

> *"(i) The said samples were sent to CRCL on 8.12.88 and were registered at CRCL on 9-3-1989, that is, after about 4 months. Nothing is known as to what happened to the samples during the said period of 4 months.*
>
> *(ii) For a period of about 1 year 3 months since sending of the said samples on 8-12-1988 CRCL remained totally inactive in the matter. The purported test reports of the three samples were given by CRCL in its letter dated 7-2-1990. Nothing is known as to what happened to the samples during the said long period of more than one year and as to why the testing was not conducted during the said long period or as to in which condition the samples were kept during the said period.*
>
> *(iii) There is every possibility that the samples of the appellant's said three products were mixed up with some other samples. This is clear from the fact that in the purported reports of CRCL, in respect of two samples it was alleged that the same also composed of epoxy resin. This was simply impossible inasmuch as no epoxy resin was ever used at the appellant's factory in manufacture of the said goods. In fact, no such allegation about use of any epoxy resin was made either in the show cause notice or in the reports of Departmental Chemical Examiner, Calcutta. On the other hand, the Departmental Chemical Examiner, Calcutta had clearly stated in his reports that the samples only consisted of free flowing liquid compound of bitumen in solvents. Thus, when there was no presence of epoxy resin in the samples at the time of testing thereof by the Departmental Chemical Examiner at Calcutta, the same very samples could never contain epoxy resin when tested after about more than one year and particularly when the appellant never used any epoxy resin in manufacture of the said goods and when this position was also quite clear from its production records.*
>
> *(iv) With regard to the purported observation of CRCL in respect of two of the said three samples to the effect that the same were other than cut back asphalt, it is submitted that the said purported observation/ allegation/ finding is totally misconceived, baseless and incorrect. Firstly, no such allegation was made even by the Departmental Chemical Examiner, Calcutta. Secondly, absolutely no reason whatsoever has been indicated by CRCL for making the said allegation and the said allegation is totally baseless. Thirdly and even otherwise, CRCL was only required to give the composition of the goods and it was beyond its jurisdiction of authority to comment on the classification thereof. The wholly arbitrary nature of the said purported report given by CRCL would also be evident inter alia from this that CRCL has not even given the composition of the goods as found by it which is primary job of any testing authority.*
>
> *(v) In support of the aforesaid submissions the appellant relies on the following decisions:"*

15. After going through the above points raised by the appellants we fully agree with them. There was no mention of presence of any epoxy resin in the first report of the chemical examiner. The appellants' production records also do not show that any resin has been used by them. This was also not the case of the Revenue in the show cause notice. The appellants' request for giving composition of the goods was also turned

down. In these circumstances there remains no doubt that such a report given by CRCL after a period of one year and three months of drawing of the sample cannot be given much evidenciary value, especially when the same is contrary to the earlier report and the other entire facts on record. If the said report is taken out of consideration nothing remains on record to tilt the case in favour of the Revenue.

16. The appellants have also referred to the HSN explanatory notes in support of their contention that Bitumen mixtures are properly classifiable under Heading 27.15. The use of the expression "includes" in the explanatory notes under Heading 27.15 only shows that the list is exhaustive and cannot be limited to the very view mentioned therein. Clause (d) below Heading 27.15 in respect of excluded category of items also supports them. The said clause (d) is reproduced below :-

> *"Bituminous paints and varnishes (heading 32.10), which differ from certain mixtures of this heading by, for example, the greater fineness of the fillers (if used), the possible presence of one or more film producing agents (other than asphalt, bitumen, tar or pitch), the ability to dry on exposure to air in the manner of paints or varnishes and the thinness and hardness of the film formed"*

The appellants have submitted that from the aforesaid clause, the following specialities or distinguishing features of Bituminous paints and varnishes falling under Heading 32.10 emerges :-

> *(i) Bituminous paints and varnishes have got greater fitness of the fillers. In the appellant's products in question, no fillers were used.*
>
> *(ii) Bituminous paints and varnishes have got the presence of one or more film producing agents (other than asphalt, bitumen, tar or pitch). In the present case this condition or ingredient is not at all satisfied. The goods in question are made simply by using bitumen, asphalt tar or pitch etc. and diluting the same in solvents. No other film producing agent is used in manufacture of the said goods.*
>
> *iii) The said bituminous mixtures/cut-backs manufactured at the appellant's factory have got much longer drying time which is in no manner similar to paints or varnishes which dry much faster.*

We agree with the above submission of the ld. adv. that HSN explanatory notes also support their case. As a result and in view of the foregoing we hold that all the 30 items manufactured by the appellants are properly classifiable under Heading 27.15. Accordingly, we set aside the impugned order and allow the appeal."

4.4 In view of the above, it is settled that the test report can be applied only in respect of the samples tested. Since in the present case tests of all the goods were not carried out, the claim of the classification of the department is applicable only in respect of goods contained in the containers from which the samples were drawn and not for the other containers and we hold so.

4.5 As regard enhancement of the valuation, we find that the enhancement was made merely on the consent letters given by the directors of the appellant. In our view on hear say from director valuation cannot be decided if there is any doubt on the valuation, the due process of law as contemplated under Section 14 of the Customs Act read with Customs (Determination of Value of imported value) Rules, 2017 must be complied with. However, in the present case neither any contemporaneous value was adopted nor any method as prescribed under Section 14 read with Custom Valuation Rules, 2007 was followed. Therefore, merely on the basis of statements of director valuation cannot be enhanced. Therefore, the enhancement of the value is not sustainable in the facts of the present case. This issue has been considered in the case of Guru Rajendra Metal Alloy wherein the tribunal held that only on the basis of the consent letters of the importer enhancement of valuation cannot be made. The case of Guru Rajendra supra is based on the Hon'ble Supreme Court judgment in the case of Century Metal Recycling Pvt. Ltd. Vs. Union Of India reported at 2019(367) ELT 3 (SC). Therefore, as per settled law on the facts of the present case, the enhancement of the value by the lower authorities is without any legal basis. Hence, the same will not sustain and accordingly, the enhancement of the value done by the Revenue is set aside.

4.6 As regard the issue of mis-declaration of Country of Origin in the bills of entry filed by the appellant, we find that firstly the appellant have not been benefited by the incorrect declaration of country of origin, if any. Moreover, it is not the appellant who has wrongly mentioned the country of origin certificate. Therefore, if there is a mis-declaration of country of origin the appellant being not the party to make any incorrect declaration cannot be held responsible and no consequential penalty can be imposed on the appellant. This identical issue has been considered by this Tribunal

in the case of Agarwal Industrial (Supra) wherein the Tribunal has passed the following judgment:-

> ***"6.*** *After considering the submissions of the both the parties and perusal of the material on record, I find that in the present case there is no dispute that the impugned goods i.e., bitumen is not prohibited goods either under the Customs Act or Foreign Trade Policy or any other law in force at the time of importation of goods and the Customs in the show cause notice has admitted this fact. It is also a fact that there is no prohibition of impugned goods from Iran either under the Customs Act or Foreign Trade Policy. Further, I find that the only allegation against the appellant in the present case is that in the bill of entry filed by them, they have wrongly mentioned the 'country of origin' as "UAE" whereas in fact the 'country of origin' is from Iran. After perusal of various statements made by the various persons during the course of investigation including that of the appellant, I find that nobody has spoken against the appellant that the appellant is in any way involved in the manipulation of changing the 'country of origin' documents. The appellant has filed the bill of entry and showed the 'country of origin' as "UAE" on the basis of documents supplied to him by the supplier based at UAE. Further no document has been produced by Revenue on record to show the involvement of appellant in any way in the said misdeclaration. Further, I find that in the present case the appellant has not claimed any preferential rate of duty. After examining the provisions of Section 111(d) and 111(m), I find that both the provisions are not applicable in the fact and circumstances of this case. Further, I find that no mala fides has been brought on record on the part of appellant so as to impose penalties on the appellant under Section 112(a) and Section 114AA of the Customs Act, 1962. Further, I find that in the case of Oriental Containers Limited v. Union of India (cited supra), the Hon'ble High Court of Bombay in para 9 has observed as under :*
>
> > *"9. Having heard the Counsel on both the sides, we are of the opinion that in the present case, it is admitted by the Customs authorities that the petitioners are not party to the fraud and there was no mala fide intention on the part of the petitioners in importing the Tin Plate/Waste instead of Tin Plate Prime. In fact, the petitioners have paid to the foreign supplier the price of tin plate prime and in return got tin plate waste. The petitioners have paid the customs duty payable on Tin Plate Prime. Under the circumstances, when the petitioners are innocent victims of the fraud played by the foreign supplier and the petitioners have suffered double jeopardy by paying the price and the duty payable on Tin Plate Prime, on account of the fraud committed by the foreign supplier, the petitioners could not be held to be guilty of violating any of the provisions of the Act and hence confiscation of the goods is not justified. It is pertinent to note that the rate of customs duty on Tin Plate Prime is higher than the rate of customs duty payable on Tin Plate/Waste. As soon as the petitioners came to know about the fraud played by the foreign supplier, they have taken effective steps and have cleared the goods on furnishing licenses which permit clearance of Tin Plate waste. When the petitioners had placed an order for import of tin plate prime and have paid the price for Tin Plate Prime, no fault could be found with the petitioners in furnishing Bill of Entry and licences for clearance of tin plate prime. In the present case, when the petitioner has been given a clean chit and there is no violation of the provisions of the Customs Act committed by the petitioners*

and no revenue loss is caused by wrong supply of goods by the foreign supplier, the Collector of Customs was not justified in confiscating the goods."

6.1 Further in the case of Shree Ganesh International (cited supra), the Tribunal in para 8 has held as under :

"8. We, however, agree with the Learned Advocate that the impugned goods are not liable for confiscation. It has not been denied by the Revenue that the appellants have made the declaration on the Bills of Entry on the basis of documents received by them from their foreign suppliers. The test report of the foreign supplier is dated 9-8-2003 which clearly mentions that the goods are non-texturised fabrics. They have also claimed that a similar consignment imported by them from the same supplier had earlier been cleared as non-texturised polyester fabrics which gave them the bona fide belief that the present consignment would also be of non-texturised variety. In similar situations, the Supreme Court has held in the case of Northern Plastics Ltd. (supra) that the declaration is in the nature of a claim made on the basis of belief entertained by the Appellants and therefore cannot be said to be misdeclaration under Section 111(m) of the Customs Act. It has also been held by the Tribunal in the case of Jay Kay Exports and Industries (supra) that finalisation of Tariff Heading under which the goods will fall is the ultimate job of the Customs authorities and if the Appellants have claimed wrong classification according to his limited understanding of the Customs Law, mens rea cannot be attributed to him. Accordingly, we hold that in the present matters, it cannot be claimed by the Revenue that the Appellants have deliberately misdeclared the goods with a view to avail the benefit of lesser rate of duty. We, therefore, set aside the confiscation and consequently the redemption fine imposed on them in both the appeals as well as the penalty."

7. In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore I set aside the impugned order in totality and allow the appeal of the appellant with consequential relief, if any."

4.7 From the above decision it can be seen that in the identical circumstances, this Tribunal held that for incorrect mention of country of origin, the importer cannot be penalized. Accordingly, in the present case also considering overall facts and the fact of incorrect declaration, if any, regarding country of origin in the Country of Origin Certificate, the appellant is not liable for any penalty or fine.

4.8 As regard the appeals filed by individuals as observed by us above, since the impugned order against the main appellants is not sustainable,

there is no reason to continue the personal penalty upon the individuals co-appellants.

5. In result, the impugned order is set aside. Appeals are allowed, with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 01.02.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha