

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL MUMBAI**

WEST ZONAL BENCH

**CUSTOMS APPEAL NO: 85912 OF 2019
WITH
CUSTOMS APPLICATION (MISC) NO: 85297 OF 2022
(on behalf of appellant)**

[Arising out of Order-in-Original CAO No: VA/24/2018-19 Adj.(I) ACC dated 28th February 2019 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Creative Newtech Ltd

B-125 Mandapeshwar Indl Premises Co-op Society Ltd,
Prem Nagar, Off SVP Road, Borivli (West),
Mumbai - 400092

...
Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Sahar, Andheri (E),
Mumbai - 400099

...*Respondent*

WITH

CUSTOMS APPEAL NO: 86856 OF 2019

[Arising out of Order-in-Original CAO No: VA/24/2018-19 Adj.(I) ACC dated 28th February 2019 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Ketan C Patel

Creative Peripherals and Distribution Ltd
B-125 Mandapeshwar Indl Premises Co-op Society Ltd,
Prem Nagar, Off SVP Road, Borivli (West),
Mumbai - 400092

... *Appellant*

versus

Commissioner of Customs (Import)

Air Cargo Complex, Sahar, Andheri (E),
Mumbai - 400099

...*Respondent*

WITH

CUSTOMS APPEAL NO: 86857 OF 2019

[Arising out of Order-in-Original CAO No: VA/24/2018-19 Adj.(I) ACC dated 28th February 2019 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Nitin K Karekar

Creative Peripherals and Distribution Ltd
B-125 Mandapeshwar Indl Premises Co-op Society Ltd,
Prem Nagar, Off SVP Road, Borivli (West),
Mumbai - 400092

... Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Sahar, Andheri (E),
Mumbai - 400099

...Respondent

WITH

CUSTOMS APPEAL NO: 86858 OF 2019

[Arising out of Order-in-Original CAO No: VA/24/2018-19 Adj.(I) ACC dated 28th February 2019 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Sainath J Shetty

Creative Peripherals and Distribution Ltd
B-125 Mandapeshwar Indl Premises Co-op Society Ltd,
Prem Nagar, Off SVP Road, Borivli (West),
Mumbai - 400092

... Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Sahar, Andheri (E),
Mumbai - 400099

...Respondent

AND

CUSTOMS APPEAL NO: 86862 OF 2019

[Arising out of Order-in-Original CAO No: VA/24/2018-19 Adj.(I) ACC dated 28th February 2019 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Prashant Bijai

Creative Peripherals and Distribution Ltd
B-125 Mandapeshwar Indl Premises Co-op Society Ltd,
Prem Nagar, Off SVP Road, Borivli (West),
Mumbai - 400092

... Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Sahar, Andheri (E),
Mumbai - 400099

...Respondent

APPEARANCE:

Shri T Viswanathan, Advocate with Ms Srinidhi Ganeshan, Advocate for the appellants

Shri D S Maan, Deputy Commissioner (AR) for the respondent

CORAM:

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

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85526-85530 /2023

DATE OF HEARING:	12/10/2022
DATE OF DECISION:	11/04/2023

PER: C J MATHEW

Impugning the order¹ of Commissioner of Customs (Import),
Air Cargo Complex (ACC), Chhatrapati Shivaji Maharaj International
Airport (CSMIA), Mumbai, M/s Creative Newtech Ltd and other
appellants challenge the adoption of rate of duty corresponding to
tariff item 8525 8090 of First Schedule to Customs Tariff Act, 1975,

¹ [order-in-original no. CC-VA/24/2018-19 Adj (I) ACC dated 28th February 2019]

with consequent denial of notification no. 12/2012-Cus dated 17th March 2012 (at serial no 428A) and notification no 50/2017-Cus dated 30th June 2017 (at serial no 502), for reassessment of 'cameras' to duties of customs of ₹ 461,38,438 to recover ₹ 1,86,19,246 as duty short-paid under section 28 of Customs Act, 1962, along with applicable interest under section 28 AA of Customs Act, 1962, in 24 bills of entry filed between October 2016 and August 2017 on import of goods declared to be valued at ₹ 15,36,69,611 besides confiscating the said goods under section 111 (m) of Customs Act, 1962 though without imposition of any redemption fine. Another consignment, under import, declared in bill of entry no. 3308840/20.09.2017 to be valued at ₹ 1,07,13,145 was held as liable for confiscation under section 111 (m) of Customs Act, 1962 but permitted to be redeemed on payment fine of ₹ 20,00,000 and differential duty of ₹ 44,14,567. Penalty of ₹ 4,61,38,438 imposed on the importer under section 114A of Customs Act, 1962 and penalties of ₹ 10,00,000 each under section 112 of Customs Act, 1962 was imposed on S/Shri Ketan C Patel, Sainath J Shetty, Nitin K Karekar and Prashant Bijai as well as ₹ 4,50,00,000 each under section 114AA of Customs Act, 1962 on S/Shri Ketan C Patel, Sainath J Shetty, Nitin K Karekar and Prashant Bijai are also under challenge in these five appeals.

2. The goods imported in these consignments comprise two

models, viz., Hero 5 Session and Hero 5 Black, of, what are generically known as 'action cameras', GoPro brand and the dispute has arisen over conformity with the description as 'digital still image video camera' in notification no. 12/2012-Cus dated 17th March 2012 and notification no. 50/2017-Cus dated 30th June 2017 entitling the appellant to 'duty-free' import; the former, till amended on 30th April 2015, included *Explanation* below the said description that was also not carried forward into the successor notification. According to Learned Counsel for the appellants, the impugned goods capture images - still and moving - and, using digital technology, store signals on semi-conductor media for viewing on the LCD screen of the camera and other devices. It is contended by him that the adjudicating authority decided that tariff item 8525 8090 of First Schedule to Customs Tariff Act, 1975 corresponding to the description 'other' in heading 8525 of First Schedule to Customs Tariff Act, 1975 and inappropriately so. He contends that the description corresponding to tariff item 8525 8020 of First Schedule to Central Excise Tariff Act, 1975 adopted by them covers all types, and varieties, of digital cameras capable of capturing still and video images. Furthermore, by referring to the tariff item in the entry corresponding to 'digital still image video camera' in the impugned notification, he contends that the legislative intent of including all digital video cameras within the said tariff item should be fairly obvious. He placed reliance on the

decision of the Tribunal in *Sony India Pvt Ltd v. Commissioner of Customs* [2018 (362) ELT 637 (Tri)] which upheld classification of similar cameras against tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975 even while holding against the appellant on eligibility for a notification, other than the one relevant to this dispute, claimed by them.

3. It is further contended by him that the adjudicating authority had been persuaded by *Explanation* below ‘digital still image video camera’ in notification no. 25/2005-Cus dated 1st March 2005 which had not been claimed by the appellant for availment. At the same time, he contended that circular no. 334/5/2015-TRU dated 30th April 2015 of Central Board of Excise & Customs (CBEC), intended to clarify the scope of exemption notification claimed by them after exclusion of the explanation therein, allows every kind of camera conforming to the description without being qualified by any specification as it did till then. It was also contended that circular no. 32/2007-Cus dated 10th September 2007 of Central Board of Excise & Customs (CBEC), intended to clarify the goods covered by notification no. 25/2005-Cus dated 1st March 2005 (at serial no. 13), and not claimed by them, had been wrongly relied upon in the impugned order. Citing the judgement of the Hon’ble Supreme Court in *Tata Teleservices Ltd v. Commissioner of Customs* [2006 (194) ELT 11 (SC)] holding that circular cannot impose restriction or limitation not

included in a notification and on the decision of the Hon'ble High Court of Gujarat in *Inter Continental (India) v. Union of India* [2003 *ELT* (154) 37 (Guj)] upheld by the Hon'ble Supreme Court, he argued that application of non-existent specifications is improper.

4. Learned Counsel contended that the decision of the Tribunal in *Creative Peripherals & Distribution Ltd v. Commissioner of Customs, ACC, Mumbai* [2020 (374) *ELT* 794 (Tri-Mumbai)] upholding the classification of GoPro 'action camera' against tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975, and accepted by the customs authorities, as well as a decision² of Commissioner of Customs (Appeal), Bangalore and ruling³ of the Authority on Advance Ruling, New Delhi in *re Canon India Pvt Ltd* suffices to put an end to the controversy over classification of cameras, capable of capturing both images and videos, as 'digital camera' in tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975.

5. Before proceeding to take note of the submissions of Learned Authorised Representative, it would be appropriate to delineate the contours of the dispute. Inevitably, it is all about the eligibility to claim exemption in notification issued under section 25 of Customs Act, 1962 which, in this case, is notification no. 12/2012-Cus dated 17th March 2012 and notification no. 50/2017-Cus dated 30th June

² [order-in-appeal no. 525/2021 dated 11th November 2021]

³ [advance ruling no. CAAR/Del/Canon/12/2022 dated 19th September 2022]

2017 extending 'nil' rate of duty to 'digital still image video cameras' covered by tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975 on the claim of the appellants that the imported cameras answer to this description, and the corresponding tariff item, as per their declaration in the bills of entry. Within heading 8525 of First Schedule to Customs Tariff Act, 1975 and included in subheading 8525 80 corresponding to 'television cameras, digital cameras and video camera recorders' in First Schedule to Customs Tariff Act, 1975 is the specific description of 'digital cameras' corresponding to tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975. In the light of this claim, it falls to customs authorities to justify a more specific heading appropriate to the goods and, in the event of the heading not being in dispute, a more appropriate sub-heading and, in the event of that to also not being in dispute, more appropriate tariff item as prescribed in rule 6 of General Rules for the Interpretation of the Import Tariff in Customs Tariff Act, 1975, as held by the Hon'ble Supreme Court in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh* [2006 (197) ELT 324 (SC)] thus

'29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claimed by the assessee, the Department has to produce proper evidence and discharge the burden of proof. In the

present case the said burden has not been discharged at all by the Revenue.....'

and in *Hindustan Ferodo Ltd v. Commissioner of Central Excise, Bombay [(1997) 2 SCC 677]* that

'It is not in dispute before us as it cannot be, that owners of establishing that the said drinks fell within Item No. 22 lay on the Revenue. Revenue has led no evidence. The onus was not discharged, therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellant, the appeal should nevertheless have been allowed.'

and, in the event of feeling so to do, to justify denial of the said exemption notification which is restricted to a certain category of 'digital cameras' of the range enumerated in the tariff item adopted by the appellant. Specifically, Learned Authorized Representative would have to justify the proposal in the show cause notice, and conformed by the adjudicating authority, that the description corresponding to tariff item 8525 8090 in First Schedule to Customs Tariff Act, 1975 is most suited to the impugned goods and, as the denial of notification is on grounds of non-fitment within tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975 referred to at serial no. 428A in notification 12/2012-Cus dated 17th March 2012 and at serial no 502 in notification no. 50/2`017-Cus dated 30th June 2017, there can be justification offered for exclusion from 'digital still image video cameras' that may be entertained in this appeal for that

would be an alternative proposition to the definitive finding on re-classification which an adjudication order could not have chosen to dither over except at the cost of certainty that is expected of adjudicatory disposition. Sauce for the goose is not always sauce for the gander.

6. For disturbing the classification claimed in the bill of entry, the customs authorities have drawn upon the declaration in bills of entry filed, by other distributors of the same overseas supplier, at Bengaluru and Chennai, adopting tariff item 8525 8090 without claim of any exemption and the categorisation of ‘action cameras’ manufactured by Sony, Nikon and Garmin in their websites as video camera along with other camcorder. Emphasis was placed by the adjudicating authority on circular no. 32/2007-Cus dated 10th September 2007 that assigned primacy to function as ‘digital camera’ with added feature of capability of taking ‘moving images’ for a limited time. The *Explanation*, elaborating upon ‘digital still image video camera’ in terms of minimum resolution, frame per second and maximum time within storage capacity, in notification no. 15/2012-Cus dated 17th March 2012, was held by the adjudicating authority to be applicable to gauge the meaning of the expression in any other notification too. Furthermore, note 3 in section XVI of First Schedule to Customs Tariff Act, 1975 determining classification of ‘composite machines’ in terms of the component or machine performing the principal

function was taken by the adjudicating authority as mandatory guidance to hold that the recording of video being the principal function of the impugned goods with capacity to take 'still image' rendered it beyond the scope of conformity with the description in the notification claimed in those bills of entry.

7. It was also held in the impugned order that 'equipment type approval (ETA)', issued by Wireless Planning and Coordination wing of Ministry of Communications, mandated for import of any wireless device has described it as 'video camera' and the absence of HSN code in invoices issued to other dealers of the same product indicated their intention all too well and the acceptance of classification determined by the customs authorities in an import effected by the appellant at Nhava Sheva evidence articulates deliberate intent to misdeclare the classification for claiming exemption from duty.

8. Learned Authorised Representative has made several submissions on the technical specification of 'digital still image video camera' specified in the notification claimed in the bill of entry for entitlement to 'duty-free' import and which, being more restricted than the description corresponding to the classification claimed in the bill of entry, is not relevant to the denial of exemption by disturbing the very same classification as well as his opinion on the deficiencies in the order of the Tribunal cited by Learned Counsel in support of the

classification claimed by them; we are unable to fathom if those grounds drawn from grounds for appeal, if any, filed therefrom by Revenue on direction of the only authority under Customs Act, 1962 competent to direct challenge to orders of the Tribunal, *viz.*, Committee of Chief Commissioners of Customs or stemming from his privilege at the bar which, nonetheless, does not fall to his lot as representative of respondent in this appeal. We have, *supra*, set out the framework within which submissions made on behalf of Revenue may be taken into consideration as respondent herein and limited only to the appropriateness of the substituted classification. That is how the goose has been cooked and so must be eaten.

9. Positing another ground in support of the adopted classification, Learned Authorised Representative submits that ‘statutory definition’ should be of the foremost consideration but his citing of the *Explanation* contained below the description ‘digital still image video camera’ can only be of subsidiary consideration upon acceptance that the tariff item corresponding to the said description in the notification is applicable to the impugned goods. It is not open to customs authorities to rely upon a notification to determine a classification which rightly falls within the scope of General Rules for the Interpretation of Import Tariff in Customs Tariff Act, 1975; any exemption from duties emerges from the power conferred upon Central Government under section 25 of Customs Act, 1962 to issue

notification which, relegated to subordinate legislation, cannot be claimed to have primacy over enactment of Parliament. The attempt of Learned Authorised Representative to revert, time and again, to the specifications in the erstwhile *Explanation* below the impugned entry in the notification claimed by the appellant at the time of import does not sit well with the onus to be discharged by customs authorities in conformity with the decisions of the Hon'ble Supreme Court *supra*.

10. Learned Authorised Representative submits that the impugned goods, being 'action camera', are special purpose cameras that are not consistent, and conforming to principle of ejusdem generis, with the articles enumerated in tariff item 8525 8020 or 8525 8030 of First Schedule to Customs Tariff Act, 1975 and, therefore, to be appropriately placed within the description 'others' corresponding to tariff item 8525 8090 of First Schedule to Customs Tariff Act, 1975. In the absence of discharge of the onus referred to *supra*, not by picking holes in the classification claimed by importers but by establishing the correctness of the classification adopted by the customs authorities, reliance placed upon the material from the website of the manufacturer, the deliberations of the European commission or the proposal of the European Union at the negotiations on the 'Information Technology Agreement (ITA 1) will not have any effect on the resolution of this dispute here.

11. The appellant has claimed the benefit of notification no. 12/2012-Cus dated 17th March 2012 (at serial no 428A) for imports effected against bills of entry filed before 1st July 2017 and notification no. 50/2017-Cus dated 30th June 2017 (at serial no. 502) thereafter. The eligibility for the notification is, first and foremost, claim of classification within the description corresponding to tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975 and, thereafter, to conformity with 'digital still image video camera' describing the article to which the exemption may be allowed. It must be categorically stated, and contrary to the submissions made by Learnt Authorised Representative as well as references in the impugned order, that the technical specifications for limiting the eligibility of article for exemption had ceased to exist by the time the impugned imports were effected. Its continued inclusion in other notifications, not adduced to in the bills of entry, and in circulars elaborating such other notifications, or even the impugned notification before amendment for exclusion of the *Explanation*, are not germane to determination of eligibility for exemption of the impugned goods from duties of customs. For technical exposition, cited on behalf of Revenue as respondent in these appeals, on the specific description in the exemption notification to be tenable implies the possibility that tariff item 8525 8020 is also a likely description of the impugned goods which runs contrary to the finding in the impugned order of

tariff item 8525 8090 to be the most apt description of the impugned goods. Consequently, there is disbarment of proposition of Revenue that the impugned goods must conform to some technical specification for eligibility to the exemption notification. In the absence of such bar, the potential for being left without any appropriate tariff item is significantly so high as to render the entire exercise under section 12 of Customs Act, 1962 to be non-starter. Hence, while appreciating the diligence and erudition of Learned Authorised Representative in his grasp of details of cameras, the limitations thereof must also be placed on record.

12. On examination of heading 8525 of First Schedule to Customs Tariff Act, 1975, not disputed by either side as applicable to the impugned goods, the corresponding description

‘Transmission apparatus for radio-broadcasting television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders’

leaves little enough scope for fitment of any ‘imported goods’ as corresponding to a residual ‘others’ at the sub- heading level after

‘transmission apparatus;’

corresponding to sub- heading 8525 50,

‘transmission apparatus incorporating reception apparatus:’

corresponding to sub- heading 8525 60 and preceding

‘television cameras, digital cameras and video camera recorders’

corresponding to sub-heading to 8525 80 of First Schedule to Customs Tariff Act, 1975. Moreover, the only three elements of the last of the sub-headings are separately enumerated as three tariff items leaving no scope, in the absence of reference to any composite mix of products in the description corresponding to the heading, for a fourth within it. In the absence of a finding in the impugned order that could, possibly, place the impugned goods within such general, and residual, description of ‘others’, the responsibility of customs authorities to initiate rejection of a declared classification has not been fulfilled. The declared classification, against tariff item 8525 8020 of First Schedule to Customs Tariff Act, 1975, cannot be substituted in these circumstances. There is nothing on record to indicate that the imported goods do not conform to the description that entitles them to the benefit of exemption in the impugned notification. The rescinding of the *Explanation* therein has done away with any technical specification that may, at some in the past, have served to segregate ‘digital still image video camera’ as eligible and ineligible for the exemption.

13. The confirmation of demand under section 28 of Customs Act, 1962, therefore, has no basis in law. The confiscation under section

111(m) of Customs Act, 1962 in the impugned order is vacated along with consequential redemption fine, if any, as well as any penalties under section 112 of Customs Act, 1962, section 114A of Customs Act, 1962 and section 114AA of Customs Act, 1962.

14. Consequently, the impugned order is set aside and the appeals allowed with consequential relief, if any. Miscellaneous application seeking change of name is allowed.

(Order pronounced in the open court on 11/04/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)