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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10435 of 2017- DB

(Arising out of OIO-KDL-COMMR-PVRR-107-2016-17 dated 22/11/2016 passed by Principle Commissioner Customs, Excise and Service Tax-KANDLA)

Prakash Parekh **.....Appellant**
C/o Plasto Processors, Shed No. 306/307,
Sector-ii, Kasez,
Gandhidham, Gujarat

VERSUS

Commissioner of Customs -Kandla **.....Respondent**
Custom House,
Near Balaji Temple,
Kandla, Gujarat

WITH

(i) Customs Appeal No. 10436 of 2017- DB (Plasto Prosessors)
(ii) Customs Appeal No. 10437 of 2017- DB (Alfa Industries)
(iii) Customs Appeal No. 10438 of 2017- DB (Sheetal Jain)
(iv) Customs Appeal No. 10439 of 2017- DB (Anshita Trading Corporation)
(v) Customs Appeal No. 10440 of 2017- DB (Luckystar International)
(vi) Customs Appeal No. 10441 of 2017- DB (Gulab Gidwani)
(vii) Customs Appeal No. 10442 of 2017- DB (Anshita Exports)

APPEARANCE:
Shri Vikash Mehat, Consultant & Shri Rahul Gajera, Advocate for the Appellant
Shri Sanjay Kumar, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C. L. MAHAR

Final Order No. 12302-12309/2023

DATE OF HEARING: 21.06.2023
DATE OF DECISION: 17.10.2023

RAMESH NAIR

These appeals are arising out a common Order-In-Original No. KDL/COMMR/PVRR/107/2016-17 dated 27.10.2016, therefore, all appeals are taken up together for disposal.

1.1 The brief facts of the case are that M/s Lucky International, M/s Anshita Exports and M/s Plasto Processors were located in Kandla Special

Economic Zone and granted letter of Permission (LOP) for manufacturing of recycled Plastic granules/ flakes/ agglomerates/ Pallets/Bars/ Powder. The said SEZ units were also permitted to do trading of all items except restricted, prohibited, canalized items and plastics waste and scrap. In the present case, the said SEZ units sold imported 'Plastic Stickers whether or not printed, embossed or impregnated' classifiable under 39199010 of the Customs Tariff Act and supplied to M/s Alfa Industries and M/s Anshita Trading Corporation (hereinafter referred to as 'DTA unit'). The Customs officers carried out the investigation and found that the said materials were plastic waste and scrap classifiable under Heading (CTH) No. 39151909 of the Customs Tariff Act and restricted items in the policy. After the detailed investigation a show casus notice dated 07.02.2005 was issued to DTA units, SEZ Units and the partners of the SEZ units. The show cause notice also alleged the undervaluation of the goods. In adjudication vide Order-In-Original dated 31.01.2007 the adjudicating authority confirmed the demand of duty alongwith interest and also imposed penalties. He also confiscated the goods and imposed redemption fine for violation of the Exim Policy and misdeclaration in terms of value and description of goods. Being aggrieved by the above Order-In-Original appellants preferred appeals before the CESTAT and the Tribunal vide Final Order dated 25.08.2015 remanded the matter to the adjudicating authority to decide the matter afresh after considering the submission of appellants. In view of the direction of CESTAT, in de novo adjudication, Learned Commissioner vide impugned order confirmed the demand against the appellants and imposed the penalties. Being aggrieved with the impugned order appellants have filed the present appeals before this tribunal.

2. Shri Vikas Mehta Learned Consultant with Shri Rahul Gajera Learned Advocate appearing on behalf of the appellants submits that the impugned order passed by the Learned Commissioner is incorrect, illegal and bad in law. In fact the finding of the Customs Laboratory, Kandla and the CIPET Laboratory are vastly differing opinions. It must be stated herein that while on one hand the Customs Laboratory, Kandla has opined that the sample of the imported goods were Plastics Waste /Scrap and not conforming to the description/classification as provided in the Bills of Entry, but on the other hand the CIPET has opined that the sample sent for testing conform to the classification provided and the sample were not hazardous in nature. Thus essentially what CIPET has concluded is that the sample sent for testing were in fact Plastic Stickers conforming to the classification in the Bills of

Entry as submitted by the importers, which incidentally negates the contention of the Ld. Adjudicating authority that the goods in question were mis-declared. Despite this the Learned Adjudicating authority vide impugned order confirmed the demand of duty and penalty which is legally not sustainable.

2.1 He also submits that in the present matter department vide Communication dated 27/08/2004 & 12/11/2004 sent request to the CIPET and the Customs Laboratory, respectively, to analyze the sample drawn from the confiscated goods of the appellants herein. The question framed by the revenue were sent to both the aforesaid Laboratories were nearly identical on the aspect of Composition of the goods and whether the goods are Plastic Stickers or not and whether the goods conform to the classification as declared by the importers and whether the goods are free from any toxic/hazardous substances. Finding of the respective laboratories have to be appreciated in context to the queries put to them. While the report of the Customs Laboratory, Kandla is not in favour of the present appellants, the same cannot be seen in isolation and in fact the report of CIPET has primacy in this regard. It is settled law that in such scenarios the report of the CIPET has to be given due consideration as the CIPET is a specialized laboratory which specializes in dealing with various form of plastics and thus the opinion of the CIPET with regard to Plastic Materials is incontrovertible. He placed reliance on the decisions of Hon'ble Gujarat High Court in the case of Union of India Vs. Oswal Agricomm Pvt. Ltd. -2011(268)ELT 21 (Guj.).

2.2 He further submits that the Learned Adjudicating authority has gravelly erred in stating that the CIPET report and the report by the Customs Laboratory state the same thing and that both Report incriminate the present appellants. In fact the said conclusion of Ld. Adjudicating authority has failed to take into account the fact that the CIPET Report is completely at variance from the report by the Customs Lab.

2.3 He also submits that in relation to aspect of Composition of the sample, the Customs Lab has opined that the same are *'high density polyethylene, low density polyethylene, polystyrenes, polyurethane, polystyrenes laminated with polyethylene film'* and in complete contrast to this the CIPET was of the opinion that the sample were that it was "*Low density Polyethylene and/or Poly Propylene, from waste generated by*

various processing operations". Thus clearly and unambiguously it can easily be discerned that the very nature of the sample has been differed on by the CIPET and the Customs Laboratory, Kandla. Thus in light of such a crucial variance it is indeed puzzling as to how the Ld. Adjudicating authority could possibly have held that both test reports have come to identical finding.

2.4 He argued that on the aspect of Classification also the Ld. Adjudicating Officers has failed to appreciate that while the CIPET has observed that the sample conform to the Classification submitted by the Importer in the Bills of Entry, on the other hand the Customs Laboratory, Kandla has opined that 'It is not sticker or any of the items covered by the CTH 3919'. Furthermore, most importantly while the Customs Laboratory has not given any finding with regard to the Toxic hazard posed by the sample, the CIPET however has given a clear finding in this regard by stating that "…….free from any kind of Toxic/Non Toxic contamination and has not been to any previous use". Thus clearly the CIPET had in its findings set out 3 major aspects that the samples of the goods confiscated have not been mis-declared and can in fact be classified under CTH 3919, that the samples were of a different composition (Low density Polyethylene) that stated by Customs Laboratory and that the samples were free from any toxic contamination. Considering the aforesaid facts there is no ground for the Ld. Adjudicating authority to come to the conclusion that the CIPET Report confirms the report by the Customs Laboratory. It would appear herein that such a conclusion has been drawn by the Ld. Adjudicating authority simply with a view to confirm the demand of duty and penalty against the present appellants.

2.5 He also submits that a bare perusal of the letter dated 25.02.2005 by the Ld. Development Commissioner would show that the said officers has raised several pertinent concerns about whether the materials in question are in fact prohibited from DTA Clearances or not. In fact the said letter also raises several questions as to the varying and non-cohesive Stands being taken by various Commissionerates in regard to the Clearance to DTA of Plastic Stickers and /Or Plastic Scrap /Waste and the said letter also requested the CBEC should clarify this issue so as to established a cohesive practice with regard to situations as enumerated in the said communication. The aforesaid letter clearly shows the confusion that exists in the respondent department with regard to the policy and interpretation of provisions with respect to Plastic Stickers and Plastics Scrap/ Waste. This in fact goes on to show that the utter confidence by which the department has proceeded with

against the present appellants is in fact based on conjectures and suppositions. This is patently manifested in the fact that while the Customs Laboratory declared the confiscated goods to be Plastics Scrap, the CIPET on the other hand declared that confiscated goods were in fact plastics stickers and not plastic waste. Moreover the report by the CIPET also established that the goods in question were not hazardous in nature which in turn contradicts the report of the Customs Laboratory.

2.6 He also submits that the confiscated goods are not in existence as the same had been completely destroyed in a fire in the concerned warehouse. In the letter dated 25.02.2005 the Learned Development Commissioner does raise this aspect by stating that the law in this regard seems to be that once confiscated goods are destroyed by any circumstance beyond the control of the parties, then any duty demand and other leviable charges would naturally abate on the destruction of such goods. Ld. Adjudicating authority in his decisions has not once referred to this crucial fact that the goods in questions are not in existence any longer which by itself would suggest that Ld. Adjudicating authority has causally brushed aside this issue which otherwise has a definite bearing on issue being decided in the impugned order.

2.7 He also submits that Respondent department had initially requested the CIPET to analyze the sample drawn from the confiscated goods vide communication dated 27.08.2004 and subsequently on 05.10.2004. The CIPET had communicated its report to the respondent department. As opposed to this the department had requested the Customs Laboratory to analyze the sample drawn from the confiscated goods vide communication dated 12.11.2004 which in other words was after the CIPET report had been received by the respondent herein. Department had in its possession the CIPET report in October –November 2011, then there should ideally not have been any reason or requirement for the respondent department to have sought for the opinion of the Customs Laboratory, Kandla, more so when CIPET is the organization that has been designated solely and specifically for such purpose as per policy which also finds mention in para 27(2) of the Handbook of Procedure (Vol-I), 1992-97 which is part of the EXIM Policy on Importation of Plastic Scrap/ Waste. When the aforesaid policy clearly envisages and appoints the CIPET as the requisite authority to be entrusted with the analysis of such plastic materials the department herein were not at all required to send the sample to the Customs Laboratory for separate

testing more so when the report of the CIPET had already been handed to the department.

3. On the other hand, Shri Sanjay Kumar Learned Superintendent (AR) opposed the contention of the appellants and reiterates the finding of impugned order.

4. We have considered the submissions made by both the sides and perused the records.

4.1 The following issues are to be decided by us in this appeal:

1) Whether the goods cleared from SEZ is plastic stickers and classifiable under 39 19 as declared by the appellant or classifiable under Customs Tariff Heading 39 15 as plastic waste and scrap claimed by the Revenue.
2) Whether valuation of the aforesaid goods is correct or otherwise and enhancement of the value by the Customs Authority is right or wrong.

4.2 As regard the issue of classification, we find that the appellant have cleared the plastic stickers and declared the same under CTH 39 19 9010 of the Customs Tariff Act. The dispute arose on the nature of the product for which the tests were conducted one by CIPET and other by customs laboratory. In the first Adjudication order the Adjudicating Authority relied upon the report of customs laboratory and confirmed the demand holding that the goods classifiable under 39 15 1909 as plastic waste and scrap which is prohibited/restricted goods. Thereafter, on the appeal, the Tribunal has remanded the matter vide final order No. A/11348-11355/2015 dated 25.08.2015, wherein the following order was passed:

> *"These appeals are arise out of a common order and therefore al are taken up together for disposal.*
>
> *2. The relevant facts of the case in brief are that M/s Lucky International, M/s Anshita Export and M/s Plasto Processors were located in KASEZ and granted letter of permission (LOP) for manufacturing of recycled plastic granules/Flacks/Agglomerates /Pallets/Barrs/Powder. The said SEZ units were also permitted to do trading of all items except restricted, prohibited, canalised items and plastic waste & scrap. IN the present case, the said SEZ units sold imported "plastic stickers whether or not printed, embossed or impregnated" classifiable under 39199010 of the Customs Tariff Act, 1975 and*

supplied to M/s Alfa Industries and M/s Anshita Trading Corporation (Hereinafter referred to as DTA Units). The customs officers made the investigation and found that the said material were plastic waste & scrap classifiable under heading (CTH No.) 39151909 of the Customs Tariff Act, and restricted items in policy. A SCN dated 17.02.2005 was issued to DTA units, SEZ units the partners of the SEZ units. There is also allegation of undervaluation of the goods, By the impugned order the adjudicating authority confirmed the demand of duty alongwith interest and also imposed penalties. It is also confiscated the goods and imposed redemption fine for violation of the policy and mis declaration in terms of value and description of goods.

3. After hearing both the sides and on perusal of the records, we find that the main contention of the Ld Advocate on behalf of the appellants is that the goods received from the SEZ units are tallying with the report of Central Institute of Plastic Engineering and Technology (CIPET), Ministry of Chemical & Fertilisers, Government of India. It is submitted that the Customs Authority, subsequently on the basis of the report of Customs Laboratories changed the classification of the goods. The Ld Advocate referred upon the decision of the Hon'ble Gujarat High Court in the case of UOI vs Oswal Agricomm P. Ltd. 2001 (268) ELT 21 (GUJ).

4. The Ld authorised representative o behalf of the revenue reiterates the finding of the adjudicating authority. He submits that the customs officers during the investigation detected that the appellants cleared the goods by mis declaration and undervaluation. It is supported by the report of the Customs Laboratory. He further submits that the report of customs laboratory is applicable in the present case.

5. We find from the records that by letter dated 27.08.2004, the Development Commissioner KASEZ, Gandhidham forwarded samples for testing of Plastic Stickers and Chemical Analysis to the Director of the CIPET Extension Centre (Ahmedabad). The Deputy Commissioner, Customs Kandla, KASEZ by letter dated 17.11.2004 forwarded the test report of CIPET to the Deputy Commissioner (SIIB), Custom House, Gandhidham.

6. It is seen that in the test report, CIPET observed that the sample is "cut pieces of clear film with paper stickers". The Adjudicating authority proceeded on the basis of report of the Customs Laboratory. We find that the Hon'ble Gujarat High Court in the case of Oswal Agreecomm P Ltd. (Supra) on the identical situation observed that report of CIPET, Ahmedabad cannot be ignored. In that case, the issue before the Hon'ble High Court is whether test report submitted by the Custom House laboratory Kandla has any overriding effect on the reports submitted by the CIPET, Ahmedabad and Chennai. The Hon'ble High Court observed as under:

42. We have also noticed Clause (vii) of Public Notice No. 392(PN)/92-97, dated 1-1-1997, which relates to clearance of imported plastic waste/ scrap. Therein it has been specified that "the customs authority shall for this purpose draw a sample and send the same to the nearest laboratory/office of the Central Institute of Plastic Engineering & Technology (CIPET) with a view to having the same analyzed and verified that such imported consignment are in conformity with the description/definition as given in sub-para (i) and (ii) above. The guidelines being specific and unambiguous that the sample should be sent to the nearest laboratory or office of the CIPET", we hold that the appellant had no business to send the same sample to its own laboratory viz. Customs House Laboratory, Kandla, that too after obtaining the reports from CIPET, Ahmedabad.

44. We, therefore, hold that the competent authority of the customs departments cannot take any action against the writ petitioners on the basis of the report submitted by the Customs House Laboratory, Kandla though it has power to take such action, as permissible under the law, if any irregularity is found pursuant to the report submitted by the CIPET, Ahmedabad or the CIPET, Chennai.

7. We find that the Hon'ble High Court had given a clear direction to consider the report of the CIPET. In the present case, the adjudicating authority had not give any finding on the report of CIPET. In our considered view, the CIPET report is required to be considered, before going to the Customs House Laboratory Report. Hence the impugned order cannot be sustained on this ground alone.

8. In view of the above discussions, we set aside the impugned order and the matter is remanded to the adjudicating authority to decide afresh after considering the submissions of the appellants and to pass order in accordance with law. All the appeals filed by the appellants are allowed by way of remand."

From the above order, it is observed that the Tribunal relying on the judgment of Hon'ble Gujarat High court in the case of Oswal Agreecom Pvt. Ltd (supra), observed that CIPET report must be considered.

4.3 On the remand proceeding the Learned Adjudicating Authority has once again confirmed the demand relying on the CIPET test report. The said test report, for the ease of the reference, is reproduced below:

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CIPA / QF / 5.10.1

सेन्ट्रल इन्स्टीट्यूट ऑफ प्लास्टिक्स
इन्जीनियरिंग एण्ड टेक्नोलॉजी
(रसायन एवं उर्वरक मंत्रालय, भारत सरकार)
प्लॉट नंबर-६३०, फेज ४, जी.आइ.डी.सी., वटवा,
अहमदाबाद -३८२ ४४५.
दूरभाष : 25830569, 25835219, 25834402
फेक्स : (079) 25835236
ईमेल : cipetad1@sancharnet.in

CENTRAL INSTITUTE OF PLASTICS
ENGINEERING AND TECHNOLOGY
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E.mail : cipetad1@sancharnet.in

ISO 9001 UKAS

ANNEXURE 'D' COLLY

PLASTICS TESTING CENTRE

Issued to :

TEST CE FICATE

S. L. No. 4985

The Development Commissioner of Customs
Kandla Special Economic Zone
Gandhidham
KUTCH - 370 230

Test Report No. : 1416 176

Dated : 05.10.2004

Your Ref. No. KSEZ/CUS/MISC/2004-05/361

Test Report as per standard : As per Part C

Dated : 27.08.2004

1356
11.10.4
1980

PART A
PARTICULARS OF SAMPLE SUBMITTED

a) Name of Sample	:	PLASTIC STICKERS
b) Grade / variety / type / size / class	:	NA
c) Declared value, if any	:	NA
d) Code No.	:	NA
e) Batch No. and Date of Manufacture	:	B.E. No.KSEZ/03189 dtd :21.08.2004
f) Quantity	:	ONE PKT.
g) Mode of Packing	:	CLOTH COVER
h) Sealed or not	:	SEALED
i) Any other information	:	NA

PART B
SUPPLEMENTARY INFORMATION

a) Reference to sampling procedure	:	Samples Supplied by Customs.
b) Supporting documents for the measurement taken and result derived	:	NA
c) Deviation from the test method as prescribed in relevant work Instructions, if any	:	NA

11/10

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TRUE COPY
ADVOCATE

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सेन्ट्रल इन्स्टीट्यूट ऑफ प्लास्टिक्स इन्जीनियरिंग एण्ड टेक्नोलॉजी
(रसायन एवं उर्वरक मंत्रालय, भारत सरकार)
प्लॉट नंबर-६३०, फेज ४, जी.आइ.डी.सी., वटवा,
अहमदाबाद -३८२ ४४५.
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ISO 9001

PLASTICS TESTING CENTRE

B.E. NO.KSEZ/03189 dtd : 21.08.2004 TEST REPORT NO: 1416

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PART C
TEST RESULTS

Sr.No.	Property	Standard	Unit	Results Obtained
1	Physical Examinations:	Public Notification No.392(PN)92-97 dt.1.1.1997	—	
	a) whether the consignment covers as per the description/identification			YES
	b) Form of Scrap: whether the sample is in the form of film in cut conditions, cut tape, soft waste, flakes, powder, pieces of irregular shape not exceeding the size of 3"x 3" or otherwise			Cut Pieces of Clear Film with Paper Stickers
	c) Virgin or Recycle:			Virgin Plant waste
2	Material Analysis :			
	a) Identification	CIPET Test Method	—	LDPE
	b) Filler Content	CIPET Test Method	%	NIL
	c) Melt Flow Index (190°C/2.16 Kg)	ASTM D 1238	g/10 min	0.71
	d) Density	ASTM D 792	gm/cc	0.919
	e) Melting Point	IS: 5762	°C	109-115

PART D

COMMENTS:
Based on the above results the sample is found to Low Density Polyethylene, from waste generated by various processing operations. The Waste free from any kind of Toxic/Non Toxic contamination and has not been to any previous use, as per notification No. 392 (PN)/92-97 dt. 1.1.97.

NOTE
1 The results related only to the items tested
2 The report shall not be reproduced in full/part without written approval of the laboratory.

Authorised Signatory
Page 2 of 2

प्रधान कार्यालय : सिपेट, गिंडी, चेन्नई - ६०० ०३२
Head Office : CIPET, Chennai - 600 032.

From the above test report, it is clear that the institute has clearly accepted the description declared as 'plastic stickers' in the test result in Sr.No. 1(a) and also described the goods as ' cut pieces of clear film with paper sticker' as per the said result since the goods was found as stickers, the goods should be classified in the form it was found i.e. sticker, which is correctly classifiable under 39 19 9090.

4.4 We find that in view of the Hon'ble Gujarat High Court judgment in the case of Oswal (supra) as well as the clear observation of the Tribunal in the earlier remand order now the entire reliance can be made on the CIPET report only and no reliance can be made on customs laboratory report. Therefore, in view the above clear report of the CIPET the goods cleared from appellant's SEZ is a plastic sticker and correctly classifiable under Customs Tariff Heading 39 19 9010.

4.5 As regard the second issue, whether the goods are undervalued or otherwise, we find that firstly on our above observation on the classification the value declared by the appellant are correct. Moreover, the Adjudicating

Authority has alleged that due to related person, the value cannot be declared by the appellant cannot be accepted and accordingly the same was enhanced. We find that firstly the SEZ unit and the buyer of the goods are not related merely because one is proprietor concerned and other is partnership concerned. In a partnership firm one of the proprietor is the partner, this cannot be the ground to hold that both are related person.

4.6 Moreover, there is no evidence was found to established that the appellant have undervalued the goods. Accordingly, we are of the view that the value declared by the appellant are correct being a transaction value and no addition can be made. The whole purpose of restriction is to avoid clearance of Plastic Waste and Scrap in the DTA as per the policy is that the hazardous goods should not be supplied in the DTA.

4.7 In the present case the CIPET report clearly states that the goods i.e. Plastic Stickers are not hazardous in the nature. This also strengthen the case of the appellant that the goods is neither restricted nor prohibited. Hence, the entire case of the department fails. In view of the foregoing discussion and findings, we are of the view that the goods in question are held to be plastic stickers and there is no undervaluation in respect of such goods.

5. Accordingly, the impugned order is not sustainable. Hence, the same is set aside, appeals are allowed.

(Pronounced in the open court on 17.10.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C. L. MAHAR
MEMBER (TECHNICAL)

Raksha