

Customs, Excise & Service Tax Appellate Tribunal

West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No. 12206 of 2019

(Arising out of OIA-MUN-CUSTM-000-APP-008-19-20 dated 31/05/2019 passed by
Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-
AHMEDABAD)

P K Exim

B-16, 1st Floor, Sangam Tower, Old Rto Road,
Bhilwara
Rajasthan

.....Appellant

VERSUS

C.C.-Mundra

Office Of The Principal Commissionerate Of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch
Gujarat-370421

.....Respondent

APPEARANCE:

Shri HasitD Dave, Advocate for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

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

Final Order No. A/ 12326 /2021

DATE OF HEARING: 29.04.2021

DATE OF DECISION: 31.08.2021

RAMESH NAIR

The brief facts of the case are that the appellant filed bill of entry No. 8924690 dated 15.04.2015 for clearance of item declared as Lime Mortar(Slaked lime) imported from M/s Chemical ChinaCo. Limited under invoice No CC15227 dated 20.03.2015 and bill of lading no ABKUMN1500042 dated 17.03.2017. On the basis of intelligence gathered by the officers of DRI Gandhidham, they examine the goods i.e. lime Mortar/ Slaked lime (Expansive mortar) to ascertain mis-classification and misdeclaration under Panchnama dated 18.04.2015. During the course of examination the goods were found packed in the polythene bags with 4 such polythene bags placed

in one corrugated box. The boxes cracking lime mortar, 20 kgs and in polythene bags “cracking non – explosive demolition agent (lime mortar)” were found. On opening of the polythene bags, the goods were found to be in form of ash type powder. The representative samples were drawn and sent to Customs House Laboratory, Kandla under test memo no 02/2015-16 dated 20.04.22015 for testing. The Joint Director, Customs House Laboratory, Kandla vide test report No544 dated 21.04.2015 reported that the subject product is not slaked lime but is a product prepared from slaked lime having metallic additives and other than the product classifiable in chapter 25 of customs tariff. Further vide letter dated 04.06.2015 customs house laboratory kandla submitted detailed test report.

1.2 On the basis of such report it was contended that the subject imported goods have been misdeclared as Lime Mortar (Slaked Lime) and misclassified under CTH 25222000 and hence the goods were seized. The said goods were provisionally released by the Joint Commissioner Import and CH, on submission of bond of full value of the goods and revenue deposit of differential duty amount of Rs 139845/- and accordingly bill of entry no 8924690 dated 15.04.2015 was provisionally assessed. The statement of proprietor of the appellant company was recorded on 25.11.2016 and after analyzing Wikipedia and Harmonized System Notes (HSN) it was contended that the appellant have misclassified the imported Lime Mortar (Slaked Lime) under CTH 25222000 on the ground that the imported goods is processed slaked lime, hence the same is correctly classifiable under CTH

38245090 as the product is not pure calcium oxide but certain other chemicals were added in the processing of the same and further it is preparation based lime. The SCN was issued wherein it was proposed to change the classification as mentioned above and also proposed for confiscation of the goods, imposition of penalty under section 112(a) and 114 of Customs Act, demand of differential customs duty in Rs 139845/- and demand of interest under section 28A of Customs Act. Demand, Interest and Penalty in respect of Past 11 consignment was also proposed. The Appellant did not file any reply and no one appeared for the personal hearing. Hence ex-parte OIO dated 14.03.2018 was passed as under:

ORDER

- (i) I reject the claim for classification of impugned goods under CTH No. 25222000 of Customs Tariff Act, 1975 and order to re-classify the same under Customs Tariff heading 38245090 of Customs Tariff Act, 1975.
- (ii) I confiscate the goods covered under BOI No. 8924690 dated 15.04.2015 valued at Rs.8,19,740.30 under Section 111(m) of the Customs Act, 1962. Since the goods were already released provisionally on execution of Bond of Rs.8,19,740/- and Revenue Deposit of Rs.1,39,845/- vide challan no. 300 dated 05.06.2015, I impose a redemption

fine of Rs.1,20,000/- (One lakh Twenty Thousand) under the provisions of Section 125 of the Customs Act, 1962 in lieu of confiscation.

- (iii) I order to recover differential customs duty amounting to Rs.1,39,845/- under Section 28(4) of the Customs Act, 1962 for BOE No. 8924690 dated 15.04.2015 and order to appropriate Rs.1,39,845/- paid by the importer vide Challan No. 300 dated 05.06.2015.
- (iv) I impose penalty of Rs.13,000/- (Thirteen Thousand) under Section 112(a) of the Customs Act 1962.
- (v) I order to recover differential Customs Duty amounting to Rs.13,48,351/- as per para 10 above under Section 28(4) of the Customs Act 1962.
- (vi) I order to recover interest under Section 28 AA of Customs Act 1962.
- (vii) I impose penalty of Rs. 13,48,351/-(Thirteen lakh. Forty Eight Thousand Three Hundred Fifty One) upon the importer M/s. P.K. Exim under Section 114A of the Customs Act 1962. However, if the Customs duty, interest including penalty is paid by the importer within 30 days from the date of communication of this order, the amount of penalty stands reduced to 25% in terms of provisions of Section 114A of the Customs Act. 1962.
- (viii) The bond furnished by them for provisionally released of seized goods is liable to be enforced towards recovery of duty/interest/penalty.

This order is issued without prejudice to any other action which may be required to be taken against any person as per the provision of the Customs Act, 1962 or any other law for the time being in force.

1.3 Being aggrieved by OIO the appellant filed an appeal before Commissioner(Appeals) who vide impugned order in appeal No CUS-TM-000-App-008-19-20 dated 31.05.2019 upheld the OIO and appeal filed by the appellant was rejected. Therefore, the present appeal.

2. Shri Hasit Dave, Learned Counsel appearing on behalf of the appellant submits that the description of the goods, Chapter heading etc has been declared by the appellant based on the Bill of lading, commercial invoice of the supplier party. Therefore, there is no misdeclaration on the part of the appellant. He further submits that the entire case is based on the test report which is under serious doubt. He submits that the content of the test report

is contrary to each other therefore, the test report cannot be relied upon. The goods Lime Mortar (Slaked Lime etc) is naturally occurred goods and hence must be classified only under the chapter heading 25222000. Therefore, it cannot be termed as preparation, instead the oxide are present as impurities which always part and parcel of the naturally occurred goods.

2.1 He further submits that there is no benchmark or formula specified for the product slaked lime (Lime Mortar) to specify them as preparation. The test report cannot be relied upon since the same were issued under the influence of inquiry of SIIB section of customs house itself. The opinion of CHL Kandla being absolutely wrong cannot be based for re – classification. The opinion is against the explanatory notes to Chapter 25 therefore, the opinion is wrong to the extent it state the imported goods as preparation and not naturally occurred goods. He submits that chapter 2522 clearly state that the slaked lime (impure calcium oxide) pertains to chapter 2522 itself. The imported goods cannot be classified under chapter 382450 since as per the chapter sub heading of 382450 the product must be binding preparation while the goods under consideration is reported as expanding nature. As regard the demand of Differential duty in respect of 11 Bills of Entry it is also bad in law as hit by limitation since all the bills of Entry were finally assessed Bills of entry. The finally assessed bills of entry are considered as order and therefore, the same cannot be reviewed by issuing SCN after expiry of two Years.

2.2 He further submits that in case of classification dispute the extended period cannot be invoked. The test report in respect of one particular consignment cannot be applied to another consignment. He submits that

since there is no misdeclaration or classification of goods the imported goods are not liable for confiscation under section 111(m) of Customs Act. Consequently, penalty is also not imposable under section 112(a) of the customs Act, 1962. He submits that as per the chapter note 1 of chapter 2522 which covers mineral products only in crude state or washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallization) but not products that have been roasted, calcined obtained by mixing or subjected to processing beyond that mentioned in each heading. He submits that the Slaked Lime (Lime Mortar) is naturally occurred goods and definitely pertains to the chapter heading 25222000 only. Merely reading the chapter note is misleading as the explanatory note to the chapter heading prevails the chapter note. He submits that to know the exact classification of the goods pertains to chapter 2522, it is necessary to look into the explanatory notes to the chapter 2522 also. As per the plain reading of the explanatory notes the goods are slaked lime found a specific entry at the 2522.20 after the sub heading related to the quick lime. Even though the quick lime is obtained through calcining process that when water is combined with the quick lime it giving considerable heat and producing slaked lime. This slaked lime is also found entry at the chapter sub heading 2522000. The quick lime and slaked lime are impure calcium oxide in nature and chemically known as calcium hydroxide. He submits that on comparison of chapter note 1 and explanatory note to HSN, it can be said that the quick lime and slaked lime are mineral products and must be classified under the chapter sub heading 2522. Even

though the quick lime is passed through the calcining process but the structure of the basic mineral lime has not changed. Therefore, the addition of water also has the same calcining process but the structure of the basic mineral lime has not been changed. Therefore, the addition of water also has the same effect therefore the slaked lime is also classifiable under chapter heading 2522 only. In this regard he placed reliance on the Hon'ble Supreme Court Judgment in the case of CCE vs 20 Microns Ltd reported at 2015 (324) ELT14 (SC) wherein it was held that even though the china clay was calcined the same was included under sub heading 2505.10.

2.3 As regard test report he submits that as the test report issued by CHL Kandla it contains self contrary result. In the said report it is stated that the impugned goods is a preparation but failed to establish under what formula/ process the said preparation is prepared. The test report is also failed to state that the actual percentage of metallic additive in the said formula. There is no benchmark was shown as to how the imported goods become preparation based on certain formula. The formula was even not given in the said test report though the test report stated that the goods is the preparation however, no explanation was given why the same is preparation. The test report in this context is not reliable. He submits that even as per the test report the percentage of slaked lime is 82.8% therefore, the imported goods are not preparation as stated by the chemical examiner in his report.

2.4 He submits that as regard the finding in the impugned order that as per the test report the preparation is based on different ingredients may include processes like calcination, hydration, roasting/drying followed by

other reactive ingredients . The product is specially designed for application like demolition of rocks, concrete- structure-fracture etc. He submits that the slaked lime has natural property of expansion. Therefore, these are also called as lime mortar in trade parlance. The mortar means some kind of paste (Powder + water) which are poured in the tinybores at the surface of rocks so as to get the crack line therein to obtain the whole block there from. Since the goods have natural property of expansion therefore, it is used for developing cracks in rocks found in mines. The explanatory notes also support the contention of the appellant. He submits that even though the quicklime is obtained by the process of calcinations and then by hydration process, slaked lime is obtained but by the virtue of the Explanatory notes this process does not changethe basicstructure of lime. Therefore, being naturally occurred product classification declared under 25222000 is correct and legal. He submits that even the nature of quick lime is such that it can absorb moisture from atmosphere also and convert into slaked lime immediately. In this regard he referred to WWW.Wildturmeric.net giving the process of slaked lime. He submits that this shows that the test report isprepared under the pressure of inquiry officer therefore; the basic ingredient/ impurities werementioned as mixing of various goods. It is also reported under duress in the testreport that the prepared goods hasexpansive property despite the fact that the naturally occurred lime also has the same property. It does not require mixing for expansion atall. It will expand as and when mix with water even at random quantity.

2.5 He, without prejudice, to his submission made here in and above, further submits that the goods cannot be classified under Chapter 38245090. Learned Commissioner has considered the goods is a "Preparation". The natural impurities of the imported goods cannot be rendered the goods under the definition of preparation therefore, the test report is wrong in the context it stated that the slaked lime is also a part of this preparation. The good is qualified as "Slaked Lime" as major portion of the goods is evenly reported as CaCO_3 . Therefore, the imported goods is nothing but slaked lime (Lime Mortar) as declared by the appellant. It is impure state of Calcium Oxide.

2.6 He submits that the description of goods slaked lime is clearly classified under the chapter heading 2522. Even the entry in the tariff is clear enough and without confusion. He further submits that as per the Chapter note 3 of the chapter 38 clearly stated that the heading 3824 includes only those goods which are not to be classified in any other heading. Therefore, the chapter heading 3824 is considered as residual chapter. Since the goods is slaked lime and clearly classifiable under the chapter 2522, residual chapter heading cannot be applicable in the present case.

2.7 The chapter 3824 is specifically meant for "Prepared Binders" only whereas admittedly the goods under question having expanding characteristics which is clearly different from binders hence cannot be classified under chapter 38245090. This again shows that the test report is prepared under duress of inquiry officer and therefore, it cannot be relied upon.

2.8 He submits that it is settled law that the test report of current consignment cannot be applied on the previous consignment . He placed reliance on the following judgments:

- SHALIMAR PAINTS LIMITED – 2001(134) ELT 285 (Tri- Kolkata) upheld by the Hon'ble Supreme Court -2002(145)ELT A242
- STELLA INDUSTRIES PVT LTD- 2017(357)ELT 197(Tri- Del)
- MARKS MARKETING PVT.LTD- 2017(346) ELT 144 (Tri.-Del)
- A.R TRADING COMPANY -2020(372) ELT 388 (Tri.- Bang)

2.9 He further submits that bill of entry which are finally assessed attained finality where the appeal was not filed. He placed reliance on the following judgments:

- M/S P G ELECTROPLAST LTD- 2019-TIOL-2241-CESTAT-ALL
- PRIYA BLUE INDUSTRIES LTD- 2004 (172) ELT 145 (SC)

2.10 In view of his submission he prays for allowing the appeal on merit as well as on immitation.

3. Shri Vinod Lukose, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order. He also filed a detailed submission on 26.04.2021 which is taken on record.

4. We have carefully considered the submission made by both the sides and perused the records. The issue in dispute in this case is that whether the classification of goods declared as Lime Mortar (Slaked Lime) is under 25222000 or 38245090. The entire case of the department is simply based on the test report of the product conducted by Customs House Laboratory, Kandla and opinion given by the testing authority. It is observed that the

same goods was earlier tested when imported in 2013. When the following test report was given on the basis of which goods were cleared under CTH-25222000. *“The sample is in the form of greyish powder is composed mainly of calcium oxide together oxides of Iron, Aluminium and silicious matter. CaO contain 82.8%. It has expanding property.”*

4.1 From the above report it is clear that the product is composed mainly of calcium oxide and very minimal portion is of Iron, Aluminium and siliceous matter. The calcium oxide contains 82.8%. With this report it cannot be said that the product is a preparation with additives. For the live consignment which was seized by CHL, Kandla issued report in questionnaire form and their opinion. In the opinion given by the CHL, Kandla it is mentioned that the product is a preparation based on different ingredients may include different process like processes like calcination, hydration, roasting/drying followed by other reactive ingredients. This is only an assumption because the testing authority has not specified the process of preparation and whether in the said process any foreign material has been included. Admittedly as per the test report the goods is mainly composed of Calcium oxide. The other small portion of contents are iron, aluminium and silicious matters which obviously exists in any natural mineral product therefore, it is not established that the slaked lime is not a naturally occurred product but a preparation as contented by the revenue. Therefore, merely on the basis of the test report which is contrary to the opinion cannot be accepted. The relevant explanatory note to chapter 2522 is necessary to be gone through to arrive at conclusion which is reproduced below:

25.22 - Quicklime, slaked lime and hydraulic lime, other than calcium oxide and hydroxide of heading 28.25.

2522.10 - Quicklime

2522.20 - Slaked lime

2522.30 - Hydraulic lime

Quicklime (an impure calcium oxide) is obtained by calcining limestone containing very little or no clay. It combines very rapidly with water, giving off considerable heat and producing slaked lime (calcium hydroxide). **Slaked lime** is usually employed for soil improvement or in the sugar industry.

Hydraulic lime is obtained by low temperature calcination of limestone containing sufficient clay (although usually less than 20 %) to ensure that the product sets under water. Hydraulic lime differs from natural cement in that it still contains appreciable amounts of uncombined quicklime, which may be slaked with water.

The heading excludes purified calcium oxide and calcium hydroxide (heading 28.25).

From the plain reading of above explanatory note it is clear that the goods Slaked lime found a specific entry at 25222000 after the sub- heading related to Quick lime even though the quick lime is obtained through calcining process the same is classified under chapter 2522. Similarly, Slaked lime is produced when the water is combined with the quick lime it giving off considerable heat and producing slaked lime. This slaked lime is also found entry at the chapter sub heading 25222000. The quick lime and slaked lime are impure calcium oxide in nature and chemically known as calcium hydroxide.

4.2 As per Chapter note 1 of Chapter 2522 which covers mineral product only in crude state or washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallization) but not products that have been roasted, calcined obtained by mixing or subjected to processing beyond that mentioned in each

heading. On comparison of chapter note 1 and explanatory note to HSN, it can be said that the quick lime and slaked lime are mineral products. The department's entire reliance is on that the goods have undergone the process of calcining. We find that even though the quick lime is passed through the calcining process but the structure of basic mineral lime has not changed. The addition of water also has the same effect. It cannot be said that the slaked lime in the present case is not a naturally occurred product. The identical issue has been considered by the Hon'ble Supreme Court in the case of 20 Microns Limited (Supra) wherein it was held as under:

“8. The arguments before us advanced by Mr. Yashank Adhyaru, learned senior counsel appearing for the Revenue, remained the same which were the basis of passing the Order-in-Original predicated on the submissions made in the Show Cause Notice as already noticed above. In the nutshell, it was emphasised that since the product-clay was calcined, as per Chapter Note 2, that is already reproduced above, it could not be included in Chapter Heading 25.05.

9. The aforesaid contention is rejected by the CESTAT, and in our opinion, rightly so. In order to appreciate the reasons given by the CESTAT, we may have to address the history of Chapter 25, i.e., the provision which prevailed before the provision in question came into existence in 1990. Before the new provision was introduced in 1990, the same Chapter 25 which dealt with these very products contained different Head Note 2. This provision which remained in operation from 1986-1990 is -

“2. Heading Nos. 25.01, 25.03 and 25.05 cover only products which have been washed (even with chemical substances, eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, or concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products that have been roasted, calcined or obtained by mixing.”

10. In the aforesaid Note, after mentioning the products, there is again an exclusion clause which excludes the products that have been roasted, calcined or obtained by mixing. Calcination was excluded there as well. However, when this Head Note is contrasted with Head Note 2 which was introduced in the year 1990, we find significant addition of words in the beginning of the said Note which are “except where the context otherwise requires”. Therefore, the exclusion of calcination would not apply in respect of those products where the context otherwise includes calcination. Chapter Heading 25.05 which has already been reproduced above mentions under Entry 2505.10 “Kaolin and other kaolinic clays, whether or not calcined”. It is not in dispute that the china clay otherwise is known as Kaolin as well and the process of Kaolin is same as that of china clay. Here the Kaolin is included under Entry 2505.10, i.e., under Chapter Heading 25.05, even when it is calcined. Therefore, it follows from the above that the context here requires such a product to remain included under Chapter 25.05 even when it is calcined. We find that the amended/new provision in the form of Chapter Note 2 as well as Entry 25.05 was made to bring it in tune with HSN Notes which have been produced for our perusal.

11. Chapter Note 1 of Chapter 25 of HSN Notes, which deals with mineral products is as under : -

“1. Except where their context or Note 4 to this Chapter otherwise requires, the headings of this Chapter cover only product which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.”

12. Likewise, Chapter Heading 25.07 of HSN Notes which deals with Kaolin and other Kaolinic clays specifically mentions “whether or not calcined” as is clear from the reading of the same and we reproduce it hereunder : -

“25.07 - Kaolin and other Kaolinic Clays, whether or not calcined.

This heading covers kaolin and other kaolinic clays, the main constituents of which are kaolin minerals such as kaolinite, dickite and nacrite, anauxite, and halloysite. Such clays remain in the heading even when calcined.

Kaolin, also known as China clay, is a high grade, white or nearly white clay used in the porcelain and paper-making industries. Kaolin-bearing sands are excluded (Heading 25.05).”

13. From the aforesaid discussion, it becomes clear that merely because the product of assessee, i.e., China Clay is calcined, it would not put it out of Chapter Heading 25.05.

14. We, thus, find order of the CESTAT without any blemish and are of the opinion that there is no merit in the instant appeal which is, accordingly, dismissed.”

From the above judgment it is clear that even if natural goods undergoes the process of calcining it cannot be classified as mixture of natural product under sub heading 3824. The Hon'ble Supreme held classification under 2505 only because of calcinations it does not go outside the scope. In view of the above judgment it is clear that even if it is accepted though not established that the product in question is processed by calcining it merits classification as natural product under 25222000.

4.3 We have also gone through the website www.wildturmeric.net wherein the slaked lime was explained which is reproduced below:

“When quick lime reacts with water it forms slaked lime. Many confuse slaked lime with quick lime, slaked lime is calcium hydroxide and quick lime is calcium oxide and both are known by the same common name as lime. It is also called slaked lime.”

From the above it is clear that the quick lime when reacts with water it forms slaked lime and the slaked lime is calcium hydroxide. Accordingly, it is clear that the goods in question is slaked lime under chapter heading 2522.

4.4 It is also found that chapter subheading 38245090 where under classification proposed by the department is a residual entry whereunder only those goods are to be classified which are not classifiable in any other heading. In this regard the relevant chapter note 3 to chapter 38 is reproduced below:

“3. Heading 3824 includes the following goods which are not to be classified in any other heading of this Schedule:
(a) cultured crystals (other than optical elements) weighing not less than 2.5 g each, of magnesium oxide or of the halides of the alkali or alkaline-earth metals;
(b) fusel oil; Dippel’s oil;
(c) ink removers put up in packings for retail sale;
(d) Stencil correctors, other correcting fluids and correction tapes (other than those of heading 9612); put up in packings for retail sale; and:
(e) ceramic firing testers, fusible(for example, seger cones).”

It can be seen from the above that the goods slaked lime shall not cover in the above goods.

4.5 In the present case the slaked lime has a clear tariff entry under the sub heading 25222000 therefore by any stretch of imagination the said goods cannot be classified under chapter sub heading 38245090. For ease of reference we reproduce the tariff entry of chapter 3824 as under:

*"PREPARED BINDERS FOR FOUNDRY MOULDS OR CORES;
CHEMICAL PRODUCTS AND PREPARATIONS OF THE
CHEMICAL OR ALLIED INDUSTRIES (INCLUDING THOSE
CONSISTING OF MIXTURES OF NATURL PRODUCTS), NOT
ELSEWHERE SPECIFIED OR INCLUDED."*

From the plain reading of the entry it is clear that the goods of 3824 is prepared binders whereas in the present case the goods does not have binding characteristic as the test report itself stated that the goods has expanding property. For this reason also goods in question being not a prepared binder cannot be classified under chapter 3824. The slaked lime has application for cracking the stone which is possible only due to its expanding property. As regard products consisting of mixtures of natural products, we already opined above that the slaked lime is naturally occurred goods with small portion of other silicious matters but there is no evidence that other substances were manually added in the slaked lime .Therefore, the goods cannot be classified under chapter 38245090. It is a settled position that if the goods are not classifiable under the chapter heading proposed by the revenue thereafter whether the goods is classified under the chapter heading claimed by the assessee is correct or not, the case of the department will fail. This gets support from the following judgments:

- PEPSICO HOLDINGS PVT.LTD.- 2019(25) GSTL 271 (Tri.-Mum)

"8. In the light of the above, we cannot decide on a classification that has not been pleaded before us. Once the classification proposed by Revenue is found to be inappropriate, that claimed, while clearing the goods, will sustain even if it may appear to be inappropriate. We

cannot also, in our appellate capacity, direct or accord the latitude for invoking Section 11A of Central Excise Act, 1944 by obliteration of the proceedings leading to the impugned order. The mandate of the law pertaining to recovery of duties not paid or short-paid will have to be followed to the letter."

The above decision of the tribunal is based on the view taken by the Hon'ble Supreme Court in the case of WARNER HINDUSTAN LIMITED –(1999) 6 SCC 762 wherein the Hon'ble Supreme Court has held as under:

"In our opinion, the tribunal was quite wrong in these circumstances in allowing the appeal of the Excise Authorities and classifying the mint tablets as items of confectionary under Heading 17.04. The correct course for the tribunal to have followed was to have dismissed the appeal of the Excise Authorities making it clear that it was open to the Excise Authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionary. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before authorities below."

In view of the above settled law, irrespective whether the classification claimed by the appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain.

4.6 As per above our view, we hold that revenue could not establish beyond doubt that the goods in question i.e. slaked lime (Lime Mortar) is classifiable under 38245090. Consequently, the goods are correctively classifiable under Chapter sub heading 25222000.

4.7 Without prejudice of our abovefinding we also find that the test report in respect of the goods imported under bill of entry No 8924690 dated 15.04.2015 was made applicable in respect of previous consignment which is not permissible under the law as held in various judgments. Some of the judgment cited below with its relevant paragraphs:

- SHALIMAR PAINTS LIMITED – 2001(134) ELT 285 (Tri- Kolkata)

“7. The first grievance of the appellant is that though the classification lists in question covered about 30 products, test reports relating 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. Kemex 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 Id. 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.”

This case is upheld by the Hon'ble Supreme Court -2002(145)ELT A242

- STELLA INDUSTRIES PVT LTD- 2017(357)ELT 197(Tri- Del)

“9. Now we turn to the second part of the demand involving goods which have been already exported under various shipping bills. Customs duty demand of Rs. 11,58,438/- has been raised along with interest and imposition of penalty. The basis for raising such a demand is the averment by the Executive Director in his statement to the Investigating officer to the effect that in the past also they have exported identical goods as have been attempted to have been

exported in two shipping bills. On the above statement, Customs authorities have concluded that goods exported in the past also were made of alcohol content more than 70%. From the record, we also note that no sample of the goods covered by earlier consignments have been drawn by the Customs Authorities. Further, there is no reference to any test reports of such earlier samples.”

- MARKS MARKETING PVT.LTD- 2017(346) ELT 144 (Tri.-Del)

“9. We find no merit in the above statement of the Revenue. Admittedly, the change in the classification of the present import of fabrics is based upon the test result by the chemical examiner whereas it is not disputed that no such test results were carried out in respect of previous imports. The law on the issue is well settled. The test reports of the samples drawn from a particular consignment cannot be applied to the previous consignments. Merely because the deponent of the statement has agreed before the Customs that the previous consignment may be of the same composition, by itself does not establish that the previous consignments were admittedly of the same composition. The expression used by the deponent is ‘may be’ and he himself was not sure of the same fact. The composition of the fabrics may vary or change from the consignment to consignment inasmuch as there is not much difference in the wool content of the fabrics. Revenue has not given us any reason as to why the ratio of Tribunal’s decision in the case of Shalimar Paints (supra) which stands upheld by the Hon’ble Supreme Court, is not applicable to the facts of the present case. Apart from the decision of Shalimar Paints, we note that there are number of other precedent decisions holding to the same effect.”

- A.R TRADING COMPANY -2020(372) ELT 388 (Tri.- Bang)

“6.2 The Learned Counsel for the appellants submits that assuming but not accepting that the Chemical Examiner’s report 29-9-2006, the same can be applied only prospectively but not retrospectively. The Learned Counsel has relied upon catena of judgments. We find that the Tribunal in the case of Pattani Chemicals (supra) has held that test results could have only prospective application. We find that this contention is acceptable. The appellants have registered themselves with the department before 2003 itself and have surrendered the registration on the basis of the test report given by Textile Committee at the behest of the department itself. That being a case, we find that

the results of the test reports are to be applied prospectively only. Further, we find that Learned Counsel for the appellants has submits that as the department is totally aware of the activities of the appellants. The appellants have kept the department informed about their intention to claim exemption under the above said Notification vide their letters dated 12-11-2003 and 15-3-2005. The test conducted in 2003 was in favour of the appellants. It was free for the department to get another test conducted in 2005 also. This having not done, extended period cannot be invoked. Suppression of fact cannot be alleged on the basis of statements of dealers to conclude that the goods cleared in the past are also similar to the goods tested. Unless such goods are available and tested, nature of the goods cannot be established on the basis of oral submissions. Therefore, we find that the invocation of extended period is not tenable. Therefore, we find that the demand for period prior to 5-2-2006 is barred by limitation. Therefore, the classification prior to 5-2-2006 is of no help to the case. For quantification of the duty for the normal period, the case needs to be remitted to the original authority."

4.8 In view of the above settled legal position the test of one particular consignment cannot be used to override the test conducted in respect of past consignments for deciding the classification in respect of previous consignment test report of the same was not under dispute. Therefore, for this reason also the demand of duty amount, consequential penalty in respect of previous consignment is not sustainable on this ground also.

4.9 Further we find that as regard the demand in respect of 11 earlier consignments the appellant has declared the goods as per the document such as Bill of lading, Commercial invoices from the supplier party etc. The goods were tested and then the Bill of Entry were assessed finally. Therefore, in filing the Bills of Entry there is no suppression or misdeclaration on part of the appellant. Hence, the extended period could not have been invoked in

respect of 11 consignments therefore, the demand of duty in respect of goods imported under said 11 consignments is clearly hit by limitation also.

5. As per our above discussion and finding the impugned order is not sustainable. Accordingly, the same is set aside. Appeal is allowed.

(Pronounced in the open court on 31.08.2021)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Geeta