

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

REGIONAL BENCH- COURT NO.3
Customs Appeal No.13125 of 2018

(Arising out of OIO-MUN-CUSTM-000-COM-15-18-19 dated 27/08/2018 passed by Commissioner of CUSTOMS-MUNDRA)

C.C.-Mundra

.....Appellant

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

VERSUS

Balkrishna Industries Ltd

.....Respondent

Bkt House, C/15, Trade, World,
Kamala Mills Compound Senapati Bapat Marg, Lower Parel
Mumbai, Maharashtra

APPEARANCE:

Shri. T.G Rathod, Additional Commissioner (AR) for the Appellant
Shri Tarun Govil, Advocate for the Respondent

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

Final Order No. A/ 12477 /2021

DATE OF HEARING: 14.07.2021
DATE OF DECISION: 29.10.2021

RAMESH NAIR

The brief facts of the case are that the respondent has registered the advance authorization licence under Notification No. 96/2009-Cus dated 11.09.2009 for import of various goods including miscellaneous Chemicals: plasticizer. The respondent had filed bills of entry against different advance authorization for import of miscellaneous chemicals by declaring the goods as Plasticizers -Shell Flavex 595 B and classifying the goods under CTH 38122090. The bills of entry were filed under DEEC Scheme by claiming the benefit of Notification No. 96/2009-Cus dated 11.09.2009 which exempts the material imported in to India against advance authorization in terms of para 4.1.3 of foreign trade policy from duty of Customs, additional duty, safeguard duty, anti dumping duty subject to condition as specified in the said notification.

1.1 The DRI has carried out investigation samples that were sent to Kandla Customs House Laboratory for testing certain parameters of the imported goods. The Customs House Laboratory, Kandla vide test report No. 06 dated 27.07.2015 submitted its report wherein only Aniline point, density, Flash point were reported with note that "the Kinematic viscosity is not in agreement with IS: 15078:2001. Petroleum based process oil for the rubber industry but vide letter dated 30.10.2015 the Joint Director, Customs House Laboratory Kandla reported in respect of "Shell Flavex oil 595 B" as under:-

"It is stated that the analytical parameters such as

1 Viscosity Gravity Constant (VGC)-0.916

2 Composition by Gel-Clay analysis

Polar Compound =25%

Saturated Hydrocarbon =20%

Aromatic Content=55%

given in technical data sheet for Shell Flavex oil 595 B is in agreement with value mentioned in the standard specification of DIN 51378 for VGC and Composition by gel/clay agreement with ASTM D2226/93 "Classification and characterization oil for rubber compound" type 101 used in extending, process of styrene, butadine rubber i.e. Rubber process oil". The investigation further did internet search in the supply of company WWW.Shell. Com/process oils also check data sheet of Shell Flavex oil 595 B.

1.2 The SCN was issued on 30.08.2017 wherein it was contended that the goods imported by the respondent in the name of Plasticizer classifying under CTH 38122090 was misdeclared and the goods Shell Flavex oil 595 B is rubber process oil and correctly classifiable under 27079900. Consequently it was further contended since the goods were misdeclared as plasticizers under the advance authorization as well as in the bills of entry the respondent is not entitled for exemption notification-96/2009-Cust dated

11.09.2009. The SCN proposed to reject the classification claimed by the respondent under CTH 38122090 and to classify the same under 27079900 of Customs Tariff Act, 1975 and to reassess bill of entry accordingly under Section 18 of Customs act, 1962. It was also proposed to deny the exemption Notification No.96/2009-Cus dated 11.09.2009 consequently the differential customs duty was also proposed to be demanded under section 28(4) of Customs Act, 1962 read with provision of section 18 (2) of Customs Act, 1962. Interest as applicable on the differential duty was also proposed to be recovered under Customs Act, 1962. 56, 11,160 Kgs Shell Flavex oil 595 B imported by the respondent are declared as plasticizers was proposed to be confiscated as per section 111(m) and 111(o) of the Customs Act, 1962. LUT/BOND furnished by the respondent at the time registration of licence was proposed to be enforced as per section 143 of the Customs Act, 1962. It was also proposed to impose a penalty on respondents under section 112 (a) and / or 114A of the Customs Act, 1962. The Adjudicating authorities vide the impugned order dated 27.08.2018 passed the following order:-

ORDER

"(i) I order that the impugned goods i.e. "Shell Flavex Oil 595", which is a process Oil having high aromatic content and suitable for providing adequate solubility of rubber ingredient during the tyre manufacturing process is correctly classifiable under CTH 27079900 being similar products in which the weight of aromatic constituents exceeds that of non- aromatic constituents".

(ii) I hereby drop the proceedings regarding demand of duty, interest, penalty and confiscation as initiated vide show Cause Notice F.No VIII/48-607/Misc/IMP/Gr.VII/MCH/14-15 dated 30.08.2017."

1.3 Being aggrieved by the order-In-Original revenue filed the present appeal.

2. Shri T.G Rathod, Learned Additional Commissioner (AR) appearing on behalf of the revenue reiterates the grounds of the appeal. He submits that the advance authorizations were issued showing description of import goods as "Miscellaneous Chemicals: Plasticizers". However, on investigation on the basis of test report issued by the Custom Lab at Kandla it was revealed that goods were Rubber Process Oil. He submits that the Exemption notification No 96/2009-Cus dated 11.09.2009 granted conditional exemption as per condition No.(iii) of the notification provided that the material imported correspond to the description and either specifications where applicable mentioned in the authorization and the value and quantity thereof are within the limits specified in the said authorization. Since goods were not found corresponding to the description mentioned in the authorization, the exemption cannot be extended in respect of condition that there was misdeclaration. He submits that the rubber process oil was misdeclared as plasticizers and in support of such misdeclaration and to suppress actual description, the goods were misclassified under chapter 38, this amounts to willful and deliberate misdeclaration and suppression of factual description of the goods. Accordingly the respondent is not entitled for exemption notification. He placed reliance on the following judgments.

- Commissioner of Customs (Import, Mumbai vs. Dilip kumar & Co.- 2018 (361) ELT577 (SC)
- Sriram Mills vs. Union of India - 2000 (123) ELT 448 (AP)
- Kamath packaging Ltd vs. Union of India- 1991 (55) ELT 304 (kar.)
- Sheshank Sea Foods Pvt. Ltd vs. Union of India - 1996 (88) ELT 626

2.1 He submits that as regard the reliance made by the respondent in the case of the Mysore Electrical Industries- 2006 (204) ELT 517 (SC), the said case pertains to determination of Classification of product and the

department change its stand at a later stage and it was to have prospective effect. However, in the instant case, factual description and accordingly classification was misdeclared by the respondent so the ratio of judgment is not applicable to the instant case. As regard the respondent's contention that the Advance Authorization, it is submitted that since the imported goods were not covered in the Advance Authorization, the exemption was not available. As per condition of the notification, the exemption was available only to goods which were in the Authorization. In respect of contention the non-observance of condition of the notification was sanctioned. He submits that it was erroneous assessment of the goods not covered in the authorization and it cannot be construed as sanction of non-observance of condition. The issue can be raised by the department only after observing the fraud on detailed investigation hence the submission that as the department finally assessed the goods they continued the import is not legally tenable.

3. Shri Tarun Govil, Learned counsel appearing on behalf of the respondent submits that the import goods i.e. Shell Flavex Oil 595 have been used by the respondent in the tyre manufacturing process as a plasticizer even if the same is called as rubber processing oil but when used specifically to aid in the dispersion of fillers is known as plasticizer. He submits that the test eligibility to import cannot change at the time of the assessment. He submits that denial of exemption on the ground of alleged misdeclaration is not sustainable as the same can be merely a technical infraction as the goods have not been diverted but it was admittedly used for manufacture of export products and this fact has even been confirmed by the jurisdictional Central Excise Authorities. He submits that that it is a settled position in law that duty cannot be exported and denial of exemption would result in taxing the exports. Without prejudice, he also submitted that demand of duty in the present case is not

sustainable by application of Doctrine of Revenue Neutrality as the noticee is otherwise also entitled for duty drawback, therefore, the duty so demanded would have to be refunded in the form of drawback as it is the policy of the government to zero rate of exports.

3.1 He submits that the use of export products has been verified by AC, CE-letter dated 13.08.2015. He further submits that for all 27 authorizations, EODC has been issued by DGFT. Bonds have also been discharged by the Customs. Irrespective of classifications, the imported material has been used by the importer for manufacture of export product. He submits that the Adjudicating Authority has also observed that the definition of raw material in the FTP and Notification No. 96/2009- CUS is wide and not limited to a particular heading. The Notification No 96/2009 is not confined to a particular chapter heading of the tariff and it applies to all the goods falling in the Schedule of the Customs Tariff Act. He submits that there could have been any intention on the part of the importer to mis-classify the goods since the imported goods were always eligible for the exemption notification as raw material under the particular scheme , irrespective of being classified under CTH 3812 or 2707.

3.2 He placed reliance on the judgment in the case of PSL Ltd vs. Commissioner of Customs, Kandla – 2015 (328) ELT 177 (Tri. Ahmd) which is squarely applicable in the instant case. The said judgment was confirmed by Hon'ble Supreme Court in CA Nos. 10071-10074 of 2014 and the review petition (C) Nos. 1613-1616 of 2015 filed by revenue was also dismissed by Supreme Court- 2016 (331) ELT A89 (SC).

3.3 He further submits that the classification and description in advance authorization as well as bill of entry is same as has been approved and assessed by the department at the relevant time, even the description in

test report and the description declared in the Bill of Entry is also identical. The description in the bill of entry i.e. "Miscellaneous Chemical Plasticizers-Shell flavex 525 B (Rubber Processing Oil)" is the same description which is also given in the test report. The Advance Authorization also uses the same ITCHS as "Miscellaneous Chemicals- Plasticizers" therefore, it is factually incorrect to state that the noticee gave different declarations.

3.4 The bill of entry No. 8757120 dated 13.12.2021 was provisionally assessed and was finally assessed on 28.02.2014 without any change. The same practice as approved by the department by way of this very assessment order was followed by respondent while making an application for Advance Authorization as well as for filing Bill of Entry in subsequent imports. The department has never objected or challenged the same till the issue of the SCN. Customs bond has been discharged even after the issuance of the SCN which goes to prove that there was no violation of any sort including Condition No (iii) the respondent cannot be penalized or put into a worse position because the noticee followed the quasi judicial orders in letter and spirit.

3.5 He further submits that notwithstanding the merit of the case, the entire demand proposed in the SCN is otherwise hit by limitation in as much as there is no corroborative evidence to invoke grounds for extended period of limitation. Without prejudice, if department wishes to change stand regarding classification the same can only be with the prospective effect. In this regard he placed reliance on the Hon'ble Supreme Court Judgment in the case of Myosre Electrical Industries Ltd – 2006 (204) ELT 517 (S.C).

3.6 The SCN is dated 30.08.2017 whereas the date of last bill of Entry is 01.05.2015 which is past the normal limitation period of two years. Hence, the entire demand is hit by limitation. He submits that as regard the reliance

placed by the department in the case of Ginni Filaments- 2005(181) ELT 0145, he submits that definition of material as used in Notification No 96/2009-Cus has been read by the Adjudicating Authority in isolation, The same has been read with FTDR Act further read with FTP. Notification 96/09 is an enabling notification to implement the Advance Authorization Scheme prescribed under FTP. The said notification is more in the nature of a subordinate legislation. In case of any ambiguity in interpreting the notification, it is a settled legal position that the provision of FTP would prevail. Therefore, Ginni Filaments is not applicable in the facts of the case.

3.7 He submits that it is not a case of expansion of the scope of a term for availing any exemption while the classification under 3812 by the department was approved finally, these continued to be declared and assessed as such both in the bills of entry as well as in the Advanced Authorization. There has not been any change either in the specification of the import goods or in the purported use of the said import goods. These very import goods, at a much later stage have been proposed to be changed by the department under a different heading vide the above SCN. Therefore, the issue expanding the scope of the exemption notification does not arise. As regard the department's heavy reliance in the case of Dilip kumar & Co.- 2018 (361) ELT577 (SC) he submits that there is no ambiguity in availing of exemption under Notification No. 96/2006- Cus read with FTP except for the issue of classification. This finding of the Adjudicating Authority has not been challenged. Even if the department wishes to challenge the classification, it is not legal to allege that the earlier classification was a case of mis- declaration especially when there is no positive intent to do so or any pecuniary benefit to do so. Therefore the decision of the Hon'ble Supreme Court in the case of Dilip kumar & Co. is not applicable to the facts of the present case.

3.8 As regard the contention of the revenue that there is no diversion or utilization in the manufacture is not relevant, issue of EODC or closure of Bond is not fatal. He submits that no diversion or use in the manufacture of export product has no relevance. These facts are crucial to determine bonafide and to ascertain the fact that there were any willful misdeclaration, if any.

3.9 The issuance of EODC and subsequently discharge of Customs Bonds even after issuance of SCN and forwarding a copy of the same to Joint Director, DGFT, further indicate that there were no violations of any condition of any sort as prescribed in FTP or Customs Notification. Without prejudice, even if there were any technical infractions even if any non-observance of the same has been deemed to have been sanctioned by the proper officer. Therefore, the judgment in the case of Sheshank Sea Foods Pvt. Ltd (Supra) is not applicable to the facts of the present case.

3.10 He submits that it is incorrect to state that the demand has been dropped by the adjudicating authority on presumption that the importer was free to get an Advance Authorization for import of subject goods and would have been allowed by DGFT while ignoring at the time of import goods were not covered by the Advance Authorization scheme and hence not eligible for exemption. He submits that goods were always covered in the Advance Authorization as the description as well as CTH matched with the description found in the test report and also as finally assessed by the Customs Authorities. There was no divergence. The ground that there is no finding that the goods imported were technically covered by the general description of the item mentioned in the Advance authorization is without any legal force. There is positive categorical finding that the import goods have been used as plasticizer for manufacture of export products as has been verified by jurisdictional central excise authorities vide their letter

dated 13.08.2015. There is another finding that except the "Classification issue, there is no other issue involved.

3.11 He further submits that the department has not challenged in the appeal that import goods were classified under 3812 determined vide an assessment order passed in pursuance to finalization of provisional assessment in respect of Bill of Entry No. 8757120 dated 13.12.2012. The said order has not been challenged by the department or by the noticee. It is also a fact that the technical details of the import goods and the description of the import goods were found in consonance with the test result dated 30.10.2015. It is also a fact that the classification upto 4 Digit level is harmonized and same under FTP as well First Schedule to the Custom Tariff Act, 1975. The Adjudicating Authority under Customs Act has no jurisdiction or powers to examine the scope of the very same import goods(the classification of which has already been determined under Customs Act) whether this import goods technically would be covered by the general description of the item mentioned in Advance Authorization under the same CTH , until and unless there are any corroborative reasons indicating diversion or mensrea, has not been challenged. In view of the binding findings, this ground is without any legal force and should be dismissed.

3.12 Without Prejudice, he further submits that facts EODC have been issued and Customs Bonds have been discharged indicate that the non-observance of any condition, whatsoever, had since been sanctioned by the proper officer else the EODC would not have been issued and the customs bond would not have been discharged. Hence section 111(o) is not applicable in the facts of the present case.

3.13 He further submits that all the entry made in the Bills of Entry including the classification declared is as per the extent provision of the Customs Act; no confiscation under section 111(m) can be upheld. The only issue involved is of classification based on the assessment order issued by the proper officer in this very case.

3.14 The Adjudicating authority has no jurisdiction or powers to examine the scope of the very same import goods, the classification of which has already been determined under Customs Act whether these import goods technically would be covered by the general description of the item mentioned in Advance Authorization, until and unless there are corroborative reasons indicating diversion or mensrea. He submits that in view of the binding findings, this ground is without any legal force and should be dismissed. With his above submission, he prays to uphold the impugned order and dismiss the revenue's appeal.

4. We have carefully considered the submission made by both the sides and perused the records. We find that the case of the department is that since the appellant has mis-declared the import goods as "Miscellaneous Chemical: Plasticizer " under CTH 38122090 whereas on test of the product it was found to be rubber process oil classifiable under 27079900 therefore the appellant are not eligible for exemption notification No . 96/2009-Cus dated 11.09.2009 issued under Advance Authorization Scheme, merely for this reason it was proposed in the SCN for confiscation of goods demand of Custom Duty and Consequently fine and penalty. As per the impugned order the learned Adjudicating Authority has decided the classification as Rubber Processing oil under CTH 27079900 however, maintaining the benefit of Notification No 96/2009-Cus dropped the proceeding of the SCN. We find that even though the classification of the goods has been changed from 38122090 to 270799000 but the goods imported by the appellant

even though as per the test report due to the reason that the product's Aromatic Constituent exceeds Non Aromatic Constituents but the goods were admittedly used by the appellant in the manufacture of their export final product as Plasticizer only. Therefore, as per the use the respondent has correctly mentioned the description as Plasticizer.

4.2 We further find that as per the Notification No. 96/2009 all the raw materials are exempted if it is used in the manufacture of export goods. In the present case there is no dispute that the goods imported by the respondents are used in the manufacture of their final export product this has been established on the basis of verification conducted by the Assistant Commissioner of Central Excise and Service Tax, Bhiwadi Rajasthan vide letter dated 31.12.15 wherein it was stated that the subject goods imported under Advance Authorization by the noticee during last 5 years has been used by them for the manufacture. With this undisputed fact substantive requirement of FTP and the Notification No 96/2009-Cus was complied with.

4.3 We further find that there is no reason for respondent to mis- declare the classification because even if the correct classification as held by the department is declared by the appellant the same benefit was available to the appellant. Therefore, it is only on the basis of test report which found that aromatic constituents exceed that of non aromatic constituents. the use of the product does not get altered therefore only because the appellant has not declared the classification correctly that too under their Bonafide belief the benefit of Advance Authorization and notification issued there under cannot be denied. This issue has been considered by this tribunal in the case of PSL Ltd vs. Commissioner of Customs, Kandla – 2015 (328) ELT 177 (Tri. Ahmd) wherein the similar issue has been considered. In that case the appellants imported Hot Rolled Steel coils/Plates which were used for making steel pipes for export under Advance Authorization. All the appellants described the goods as "Primer HR Coils" and classified under

CTH 72083690. The Advance Authorization issued to the appellants allowed import of Non alloy HR Coils/plates classifiable under 72083690. Revenue found that the appellants have imported other steel classifiable under CTH 7225. The issue before CESTAT was to decide whether the appellants have made willful mis-declaration on the Bills of Entry in order to evade payment of custom duty. The Hon'ble CESTAT referred to the decision of Hon'ble Apex court in the case of Northern Plastic Ltd- 1998 (101) ELT 549 (SC) and held that classification of steel under CTH 7208 cannot be considered as mis-declaration. The relevant extract from the decision of CESTAT is reproduced below:

"15. Next issue for consideration before us is whether appellants have made a wilful misdeclaration on the Bills of Entry in order to evade payment of customs duty or to take any undue financial benefits. In this regard it is the case of the Revenue that the act of all the importers by declaring CTH 7208 in the Bills of Entry amounts to wilful misdeclaration with intention to evade duty. It was also the case of the Revenue that some of the Certificates of Origin were indicating the CTH as 7225 which was thus known to the importer appellants. Further with respect to imports made by M/s. Welspun Corporation Limited it was strongly argued by the learned Special Counsel appearing on behalf of the Revenue that this importer gave certificates of the imported steel from manufacturer indicating the same as 'Non-alloy steel' and also that appellant did not enclose Mill Test Certificates at the time of examination of the goods. To counter this claim the Advocate appearing on behalf of M/s. Welspun Corporation Ltd. argued that Certificate of Origin in certain cases were also showing CTH as 7208. Regarding giving a certificate from the supplier of goods as a 'Non-alloy steel' was only as per the international understanding that PSI grades are considered as 'Non-alloy steel' by the manufacturers of the grades. It was also appellant's case that Mill Test Certificates were not submitted as these were not asked for and also due to the fact other importers also receiving same grades of steel, from same supplier sometimes in the same vessel, did provide the Mill Test Certificates. That even certificates of origin given by the appellant along with other customs documents to the Assessing Officers, were indicating the steel of CTH 7225. By giving such certificates also appellants have not suppressed any information from the department with any intention to evade duty. It was therefore, correctly claimed by the importer-appellants that there was no intention to evade any duty. The intention to evade duty can also not be attributed as the imported steel was used by the appellants in the manufacture of steel pipes which have been duly exported containing the grades of steel imported. In this regard reliance placed by importers on Para 3 of the Customs Appraising Manual at page 20 which is relevant and reproduced below :

"3. Declaration of tariff classification.

The Bill of Entry can be filed by an importer himself or he can have it processed through his Clearing Agent who is authorized and holds a Custom House Agent's Licence. Whereas the Bill of Entry as

mentioned above contains various columns relating to the goods, their value and their assessment under Customs Tariff as also Central Excise Tariff (for countervailing duty), it is not obligatory under the Customs Act that while presenting to Customs the importer or his Clearing Agent must indicate in the Bill of Entry the correct Customs Tariff Heading or customs duties or c.v. duties leviable or total duty leviable on the goods sought for clearance against the Bill of Entry. However, an indication of Customs Tariff Heading and Exemption Notification, if any, which the importer feels may be applicable to his goods is normally expected to be given at the time of presentation in the relevant column of the Bill of Entry to enable allocation of the Bill of Entry to proper Group/Appraiser and to expedite its processing.

In case the Customs Tariff Heading or Central Excise Tariff Heading under which the party feels his goods will be covered are not finally accepted by the Deptt. appropriate classification under the Customs & Central Excise Tariff would be made in the Appraising Group without any action against the Importer.

The Board considers that Section 29 S.C.A. (Now Sections 17 and 46 of C.A.'62) are not a sufficient authority for requiring importers to furnish the Tariff classification although there is no obligation in asking them how their previous imports were classified and ascertaining from them the details regarding the use and composition of the articles imported.

(F. No. 70 (12)-Cus.I/53. C.B.R., New Delhi, dated 22-8-1953)"

15.1 It is evident from the above Para of the Appraising Manual that a classification head can be given by the importer so that it is helpful to send the import documents to the concerned Appraising Group. Such a classification declared in Bills of Entry can only be considered as a claim of classification by the importers, as held in Paras 22 & 23 by the Apex Court in the case of Northern Plastic Ltd. v. Collector of Customs & Central Excise [[1998 \(101\) E.L.T. 549](#) (S.C.)] reproduced below :

"22. As the goods imported by the appellant were being used and intended to be used as Cinematographic Film, the appellant had described them as Cinematographic Films covered by sub-heading 3702.20. No attempt was made by the customs authorities either before the Collector or before CEGAT to show that the goods imported by the appellant were ordinarily not used as Cinematographic Films or were not intended by the appellant for such a use. Moreover, looking to the Heading 3702 and its sub-heading, it does not appear that such goods were intended to be covered by sub-heading 3702.90. As regards the claim for exemption in payment of countervailing duty the appellant had stated that it was entitled to the benefit under Notification No. 50/88-C.E. The declaration made by the appellant has been found to be wrong by the Collector and CEGAT on the ground that there was a separate exemption notification in respect of jumbo rolls for Cinematographic Films. While dealing with such a claim in respect of payment of customs duty we have already observed that the declaration was in the nature of a claim made on the basis of the belief entertained by the appellant and therefore, cannot be said to be a misdeclaration as contemplated by Section 111(m) of the Customs Act. As the appellant had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.

23. We, therefore, hold that the appellant had not misdeclared the imported goods either by making a wrong declaration as regards the classification of the goods or by claiming benefit of the exemption

notifications which have been found not applicable to the imported goods. We are also of the view that the declarations in the Bill of Entry were not made with any dishonest intention of evading payment of customs and countervailing duty."

15.2 *In the light of above law laid down by the Apex Court, in the present imports made by the importer-appellants a declaration given with respect to classification of steel as CTH 7208 in the Bills of Entry, cannot be considered as wilful misdeclarations with intention to evade customs duty, in the absence of any other corroborative evidence"*

The ratio of the judgment in PSL case squarely applicable to the facts of the present case. The judgment of the tribunal in PSL case has been affirmed by the Hon'ble Supreme Court and also the review petition filed by the revenue was dismissed. In the present case also there is no dispute about the use of the import goods under Advance Authorization for manufacture of the export goods. It is also a fact that even though there is a change in parameter of aromatic Constituents but the goods were used as a plasticizer therefore, applying the ratio of PSL case in the respondent's case also the eligibility of notification No 96/2009 under Advance Authorization cannot be denied merely because there is a change of custom tariff heading of the product. Accordingly, the Learned Adjudicating Authority rightly extended the benefit of exemption notification despite the change in classification. It is also observed that even though the SCN was issued, EODC were issued and Customs Bond have been discharged, it clearly indicates that there is no non observance of any condition, for this reason also benefit of notification cannot be denied. Though the department is not precluded for investigating a matter as related to classification but EODC was issued on the ground that the goods imported have been used for the intended purpose therefore, the benefit cannot be denied.

4.4 We also find that the respondent has raised the issue of limitation; however, the revenue has not made out any ground on limitation. We find that for the earlier period the same goods have been classified under different chapter heading i.e. 27072990, 27101990 and 38122090 by the department at different time. This indicates that the department itself

did not have any clarity regarding classification of goods. In one such case in import of identical goods by the respondents from Mundra port vide Bill of Entry 8757120 dated 13.12.2012 sample was drawn and the assessment was made provisionally upon receipt of the test report the assessment was finalized under CTH 3812 by the officer. The said assessment has not been challenged by the department. It is the submission of the appellant that based on the said final assessment the respondent thereafter followed the same classification and declared the same in the subsequent import from all the ports. We find force in this submission of the respondent therefore, there is no willful mis declaration of the goods. Hence, no malafide can be attributed to the respondent even if the declaration made there is not found acceptable in as much as it is the matter of the interpretation and onus to correctly classify the goods is upon the revenue. Therefore the demand for the extended period is also not sustainable on limitation. We have carefully gone through the finding of the adjudicating authority which are reproduced below:

"25. Now I come to second issue regarding admissibility of benefit of Advance Authorization for the import of the impugned goods by the Noticee. The imported material has been cleared without payment of duty claiming benefit of Advance Authorization Scheme under Notification No. 96/2009-Customs dated 11.09.2009. The Noticee, in their defence submissions, contended that as long as the raw-materials imported by them have been used in the manufacture of resultant export product, there is no irregularity and benefit of duty exemption against Advance Authorization is admissible in view of the definition of raw material in the FTP and Notification No 96/2009-CUS, which is wide and not linked with the classification under a particular heading.

26. Further, the Noticee has also contended that on the basis of exports made by them against the Advance Licenses, the DGFT has issued EODC in all cases and accordingly, the Bonds executed by them at Custom Hose, Mundra, for duty free import have also been discharged/released. The Noticee has further submitted that the impugned goods i.e, "Shell Flavex Oil 595" has been used by them in the tyre manufacturing process as a plasticizer and not as a processing

oil and that Rubber Processing Oil when used specifically to aid in the dispersion of fillers in known as plasticizer, that the test of eligibility to import cannot change at the time of issuance of the Advance Authorization and at the time of assessment; that the denial of exemption on the ground of alleged mis-declaration is not sustainable as the same can be merely a technical infraction as the goods have not be diverted but used for manufacture of export products and this fact has even been confirmed by the jurisdictional Central Excise Authorities, that it is a settled position in law duty cannot be exported and denial of exemption would result in taxing the exports that notwithstanding the conclusion above, demand of duty in the present case is not sustainable by application of "Doctrine of Revenue Neutrality" as the Noticee is otherwise also entitled for duty drawback, therefore the duty so demanded would have to be refunded in the form of drawback as it the policy the Government to zero rate the exports

27. *I find merit in the above submissions made by the noticee . Except the imported goods were not classified correctly, there is no evidence to show that the same were diverted and not utilized for manufacture of expert products. The Assistant Commissioner of Central Excise & Service Tax , Bhiwadi - ii , Rajasthan , vide his letter dated 13.08.2015 , inform the Deputy Commissioner Gr. VII - D , JNCH , that the jurisdictional Range Officer has verified that the subject goods imported under Advance Authorization by the noticee during last 5 years have been used in the manufacture of the final product .*

28. *I also find that for all the 27 Advance Authorizations against which demand has been raised in the impugned SCN , export obligation has been fulfilled by the notice and EODC has been issued by the DGFT . Accordingly , the bonds executed by the Noticee for the respective Advance Authorizations have already been discharged by the Customs Authorities pursuant to the fulfillment of the Export Obligation and redemption of the material has been used by the importer for manufacture of export product.*

29. *I further observed that the definition of raw material in the FTP and Notification No. 962009 - Cus is wide and not limited to a particular heading . As per para 4.1.3 of the FTP ((2009-14) , Advance Authorizations were issued to allow duty free imports of inputs which physically incorporated in the export product . Notification No. 96 / 2009 - Customs dated 11.09.2009 granted exemption to ' materials ' imported into India against an Advance Authorization for*

and materials have been defined in the notification to mean raw material , components intermediates , consumables , catalysts and parts which are required for the manufacture of resultant export product . The Notification No. 96 / 2009 - Cus . is not confined to a particular chapter heading of the tariff and it applies to all the goods falling in the Schedule of the Customs Tariff Act . Therefore , the importer was always free to get an Advance Authorization issued for import of the subject goods duty free as " Process Oil falling under CTH 2707 " and the same would have been allowed by the DGFT . Therefore , I am of the view that there could not have been any intention on the part of the importer to mis - classify the goods since the imported goods were always eligible for the exemption notification as raw material under the particular scheme , irrespective of being classified under CTH 3812 or 2707 .

30. The basic aim of duty free exemption schemes under the Foreign Trade Policy is to enable importers to import duty free inputs which are used in the manufacture of finished goods which are subsequently exported without payment of duty. All the duty exemption schemes are operated with the objective of Zero Tax Exports. There are a number of provisions / procedures available under the Foreign Trade Policy to achieve Zero Tax Exports, Advance Authorization scheme being one of them. The background for such export incentive schemes cannot be to burden the export products with additional customs duties owing to procedural or technical issues. In the instant case, the importer has followed the scheme in spirit since they have used the imported inputs in the manufacture of their, products. Since all the imported goods were meant for manufacture of export goods, illegal benefit has accrued to the Noticee from the wrong classification. The duty free under the scheme were allowed subject to the condition of discharge of export obligation which has already done by the Noticee and EODCs have been issued by the DGFT in all the cases. In this scenario, the demand of the duty under the impugned Show Cause Notice merely on account of change of the classification of the imported inputs would defeat the purpose of the Advance Authorization scheme as implemented through Notification No. 96 / 2009 - Cus dated 11.09.2009 .

31. My above view is supported by the case law of PSL Ltd vs. Commissioner of Customs Kanda (2015 (328) ELT 177 (T - Ahmd) , which is squarely applicable to the instant case . In the case of PSL Ltd vs. Commissioner of Customs, Kanda , the appellants imported Hot rolled Steel coils/plates which were used for making steel pipes for

export under Advance Authorization . All the appellants described the goods as ' Prime HR Coils and classified under CTH 72083690. The Advance Authorization issued to the appellants allowed import of Non alloy HR Coils/plates classifiable under 72083690. Revenue found that appellants have imported other steel classifiable under CTH 7225. The issue before CESTAT was to decide whether the appellants have made willful mis declaration on the Bills of Entry in order to evade payment of customs duty. The Hon'ble CESTAT referred to the Customs Appraising Manual and the decision of the Apex Court in the case of Northern Plastic Ltd Vs. Collector of Customs & Central Excise [1998 (101) ELT 549 (SC) and held that classification of steel by the appellants under CTH 7208 cannot be considered as mis - declaration as it is only a claim made by the importers on the basis of the belief entertained by them . Hence , such a declaration of classification cannot be considered as willful mis - declaration in the absence of any other corroborative evidence . This case was affirmed by the Supreme Court in Civil Appeal Nos . 10071-10074 of 2014 and the Review Petition (C) Nos . 1613-1616 of 2015 against the said Civil Appeals were dismissed by the Supreme Court [2016 (331) ELT . A89 (SC)) . Hence, the said case law has attained finality and required to be followed in order to adhere to judicial discipline.

32 . In view of the above , I find that the Notices has not violated the conditions of duty free import under Advance Licenses and therefore , the proposal for confiscation of 56,11,160 Kgs of " Shell Flavex Oil 595 having assessable value of Rs. 34,26,25,952/- imported by them under various Advance Authorizations (as listed in Annexure - A to the Show Cause Notice) , under Section 111 (m) & 111 (o) of the Customs Act , 1962 , is not legally sustainable . Moreover , as there is no allegation of diversion of duty free imported goods , therefore the demand for Customs duty leviable thereon does not survive .

33. Interest & Penalty ; In view of discussions and findings contained in the foregoing pars , I find that the duty demand proposed in the Show Cause Notice is not sustainable . Consequently, the demand of interest and penalty would not stand. "

5. On reading of the above finding we do not find any infirmity therein.

Therefore, the impugned order is liable to be sustained.

6. Accordingly we uphold the impugned order and dismiss the revenue's appeal.

(Pronounced in the open court 29.10.21)

RAMESH NAIR
MEMBER(JUDICIAL)

RAJU
MEMBER(Technical)

Geeta

