

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

REGIONAL BENCH- COURT NO.3

CUSTOMS Appeal No.10541 of 2019

(Arising out of OIA-MUN-CUSTM-000-APP-455-17-18 dated 14/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Spencer Polymers

.....Appellant

Through Its Proprietor Shri Amit Lohia
518/13 D, 1st Floor Street No. 1 Vishwas Nagar Shahdara
DELHI

VERSUS

C.C.-Mundra

.....Respondent

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

APPEARANCE:

Shri. Vikas Mehta, Consultant for the Appellant
Shri A R Kanani, Superintendent (AR) for the Respondent

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

Final Order No. 11899 /2024

DATE OF HEARING: 24.06.2024
DATE OF DECISION:30.08.2024

RAMESH NAIR

The issue involved in the present case is whether the appellant's imported goods calcium Carbonate is classifiable under CTH 28365000 as claimed by the revenue or as calcite powder falling under CTH 25369030 as declared by the appellant.

2. Shri. Vikas Mehta, Learned Consultant appearing on behalf of the appellant at the outset submits that the entire case was made out on the observation of the Chemical examiner, Customs Laboratory, Kandla wherein he had opined that the goods imported by the appellant is Calcium Carbonate. He submits that at the relevant time the goods were imported and tested by the Customs Laboratory, Kandla i.e. during 2013, the Laboratory was not equipped for testing of the said product and it has been clarified by the Board Circular No. 43/2017-Cus., dated 16.11.2017 and also

Board Circular No. 15/2009-Cus. dated 07.06.2009. He submits that considering this position, this Tribunal has allowed the appeal in the case of ASIAN GRANITO INDIA LTD VS. COMMISSIONER OF CUSTOMS, MUNDRA-2021 (375) E.L.T 597 (Tri. – Ahmd.)

3. Shri. A.R. Kanani, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order. He also placed decision of this Tribunal in the case of Meghraj Chemicals And Agencies vide Final Order No. A/11554/2023 dated 20.07.2023 wherein, the identical product on the basis of Chemical Laboratory Report held classifiable under CTH 2836500.

4. Countering the above judgments relied upon by the Revenue Shri. Vikas Mehta submits that firstly this decision of the Tribunal was ex-parte as none represented on behalf of the appellant in that case. Secondly, this decision has not considered the Division Bench decision of this Tribunal in the case of ASIAN GRANITO INDIA LTD (supra). He submits that the entire judgment is based on concurrence with order of the lower authority. However, no independent finding was given. Therefore, the decision of Meghraj Chemicals and Agencies is distinguishable.

6. We have carefully considered the submissions made by both the sides and perused the records. We find that the department's claim of classification of the imported goods i.e. calcite powder as calcium carbonate under CTH 28365000 is based on Customs Laboratory report of Kandla which only opined that the goods is calcium carbonate.

6.1 We are of the view that firstly even if goods are calcium carbonate only because of this it is not classifiable under CTH 28365000. In order to classify under the said tariff item, the goods should be in confirmation to IS standard and must meet with the parameters provided in the IS specification. However, in the present case no such test was done. Secondly, as per Board Circular No. 03/2007-Cus dated 16.11.2017 and Board Circular No. 15/2019-Cus dated 07.06.2019. The board itself has endorsed that the Customs Laboratory, Kandla did not have the facility to test the imported goods in question. Therefore, in such case any report given by the said laboratory which is not equipped with the facility of testing such product, the test report cannot be accepted as correct and on that basis classification cannot be decided. The decision of ASIAN GRANITO INDIA LTD (supra) directly applies in the present case is reproduced below:

"The issue involved is that whether the Calcite Sand (Calcite Powder) imported by the Appellant is classifiable under CT 2503 90 30 as

claimed by the Appellant or required to be classified under CTH 2836 50 00 as confirmed vide the impugned order.

2. The facts of the case are that based on SIIB Kandla investigation, samples were drawn from the imports made under different Bills of Entries, and the Kandla Customs Laboratory reported that the goods were "Uncoated Precipitated Calcium Carbonate". Since the Precipitated Calcium Carbonate is not a mineral product, but a chemical classifiable under CTH 2836 50 00, differential duty demand of 2.5% BCD was raised vide SCN on the Appellant in respect of imports made under 56 Bills of Entry, compared to NIL BCD assessed in such BEs at the time of import made under CTH 2503 90 30. The said demand stands confirmed vide the impugned order along with interest, apart from confiscation, redemption fine and penalties being imposed on the Appellant.

3. Shri S.R. Dixit, Ld. Counsel appearing for the appellants argued that the samples were not drawn properly, even if in presence of the representative of the Appellant, since sampling was not done as per Clause 4.1 - APPENDIX B IS : 918 : 1985 pertaining to Calcium Carbonate, Precipitated for Cosmetic Industry. It was argued that in terms of the judgment of Hon'ble Apex Court in the case of Tata Chemicals Ltd. - [2015 \(320\) E.L.T. 45](#) (S.C.), test reports based on improperly drawn samples were required to be discarded and ignored.

3.1 He further submitted that the Appellant had disputed the sample drawal as well as incapability of Kandla Customs Chemical Lab before lower authority which was not wrongly discarded by original authority. He also submitted that the C.B.E. & C. vide Circular No. 43/2017-Cus., dated 16-11-2017 has categorically admitted that Customs Laboratories are incapable of testing calcite powder due to lack of infrastructure and the Customs labs became so equipped only in the year 2019, as evident from C.B.E. & C. Circular No. 15/2019-Cus., dated 7-6-2019. He heavily relied upon the following case laws wherein identical issue of classification of calcite powder was involved and it was held that CRCL reports cannot be relied upon based on Circular No. 43/2017-Cus., dated 16-11-2017 and classification under CTH 2503 was upheld in all such cases :

- (a) Manikya Creations (P.) Ltd. - [2019 \(365\) E.L.T. 130](#) (Tri. - All.)
- (b) Pavas Polychem (P.) Ltd. - 2018 (2) TMI 1573 - CESTAT ALLAHABAD
- (c) 20 Microns Ltd. - [2020 \(372\) E.L.T. 403](#) (CESTAT)
- (d) Gulshan Polyols Ltd. - [2019 \(366\) E.L.T. 728](#) (Tri. - All.)

3.2 He further argued that the most crucial aspect to determine whether a product is precipitated Calcium Carbonate or Calcite powder, is to check for "Oil Absorption ratio" and "particle size", which determines whether the Calcium Carbonate is precipitated or natural. This was also taken due note of by the Hon'ble CESTAT in the case of 20 Microns (supra). Since the Kandla Lab had no facility to test the product in question at all, and did not test particle size anyway, the said test reports clearly need to be discarded. Without prejudice, It is his submission that in any case, the findings of test reports should be restricted to particular lot of goods imported under respective BEs and not to all past imports. The Appellant also claims to have obtained independent test report from Central Glass & Ceramic Institute, Naroda Center (CSIR), to justify that based on certain parameters, the products imported are natural calcite powder only and not precipitated Calcium Carbonate.

3.3 He also drew attention to IS 63 : 2006 being the Indian Standards for "requirements and methods of sampling and test for naturally occurring calcium carbonate, that is, whitening for manufacture of paints and putty" as also IS : 8767-1978, i.e. the Specification for Precipitated and activated Calcium Carbonate for Paints, the range of Oil Absorption and other parameters are not found in the present case at all. This IS : 8767-1978 was referred to in the cases of 20 Microns (*supra*), Gulshan Polyols (*supra*) as well as in the case of Sakshi Makfin [[2016 \(343\) E.L.T. 972](#) (Tri. - Chan.)] before concluding that identical production question was classifiable under Chapter 25 and not under Chapter 28.

3.4 He further submits that the product literature and product safety datasheet by foreign suppliers clearly shows that the product is Natural calcium carbonate and the parameters do not meet the Indian Standards for Precipitated Calcium Carbonate. He also stated that Natural Calcium Carbonate and Calcite are one and the same and as per Hawley's Condensed Chemical Dictionary, Calcite is referred to as CaCO₃ and defined to be the most common form of Calcium Carbonate. It is his submission that other handful of imports by other importers from same/similar suppliers, where BEs were filed under CTH 28 and not CTH 25, does not determine correct classification of the goods imported by the Appellant. The Appellant imported the said products by classifying it under Chapter 28 after January, 2014, since there was no revenue implication involved on account of rationalization of BCD under Chapters 25 and 28 on Calcium carbonate for imports from ASEAN countries and in any case there is no estoppel against the law.

3.5 He also submits that the appellant has since bona fide declared the goods in the Bills of Entry on the basis of import documents, there is no suppression of facts on their part, therefore, extended period ought not to have been invoked.

4. On the other hand, Shri T.G. Rathod, Ld. Joint Commissioner (Authorised Representative) appearing on behalf of the revenue reiterated findings recorded in the impugned order. He submits that most of the case laws relied upon by the Appellant pertain to Calcite powder, whereas the Appellant had imported Calcite sand and as such the said case laws cannot be said to be applicable to the present case. He also argue that one small variation in fact will have a major impact on whether a case law is applicable to specific facts of the case or not. He further argued that Kandla Customs Lab was equipped to test the goods in question, otherwise, they would have informed regarding their inability to conduct tests.

4.1 He relied upon various case laws to the effect that test results of independent labs on basis of samples drawn in absence of revenue authorities cannot be relied upon. He also relied upon various case laws to suggest that test report of Govt. chemical examiner cannot be brushed aside. He further argued that contemporaneous imports by other importers suggests the classification to be that under CTH 28 and not CTH 25.

5. We have carefully considered the submissions made by both the sides and perused the records. We find that the appellant had claimed at the threshold that the Kandla Customs Lab is not equipped to conduct test on Calcite Powder and even drawl of sample was also disputed as being improper. While in general, it is true that test report of CRCL cannot be brushed aside lightly, however, when CBEC itself categorically admits that for calcite powder, their Labs were not equipped to test the same till 2019, as evident from Circular No. 43/2017-Cus., dated 16-11-2017 as also Circular No. 15/2019-Cus., dated 7-6-2019, the Kandla Customs Chemical Lab reports as relied upon in the impugned order have to be discarded. The various case laws as relied upon by the Appellant, duly based on the said Board

Circular dated 16-11-2017, in the context of classification of calcite powder and precipitated calcium carbonate, are well founded and apply to the present case on all fours. The present case is identical to that in the case of 20 Microns (supra) as also Manikya Creations and Pavas Polychem (supra). It therefore must be held that in absence of any independent cogent evidence to reject the classification under CTH 2503 90 30 as claimed by the Appellant, the claim of the revenue to classify the very goods under CTH 2836 50 00 has no support and must fail.

6. *Since the test reports cannot be relied upon in light of the categorical admission in Circular No. 43/2017-Cus., dated 16-11-2017 regarding lack of infrastructure in Customs Labs to test calcite powder, we do not deem it necessary to examine whether the sampling was properly done as per applicable BIS including Clause 4.1 - APPENDIX B OFIS : 918 : 1985 or otherwise.*

7. *We also find merit in the submissions made by the Ld. Counsel for the Appellant that even otherwise, the test reports of Kandla Customs Lab do not test all parameters as required under IS : 8767-1978, i.e. the Specification for Precipitated and activated Calcium Carbonate for Paints, and the range of Oil Absorption and other parameters (including particle size) are not found in the present case at all. This IS : 8767-1978 was referred to in the cases of 20 Microns (supra), Gulshan Polyols (supra) as well as in the case of Sakshi Makfin (supra) before concluding that identical product in question was classifiable under Chapter 25 and not under Chapter 28.*

8. *The distinction sought to be made by the Ld. AR on behalf of the revenue, that the BE mentions calcite sand whereas calcite powder was the product imported in all these cases, does not have force. When minerals, both in lump or powder form, otherwise stand classified under Chapter 25, the very fact that imported goods in present case was "sand" and not "powder" may otherwise suggest that the goods in question was not precipitated Calcium Carbonate at all, since particle size is of great importance, apart from Oil Absorption ratio, in light of the various case laws relied upon by the Appellant.*

9. *Under the circumstances, there is no option but to go by the technical data sheet/description provided by overseas supplier for the products in question. Nowhere the suppliers refer to the product to be of "Precipitated" form at all. In fact, the presence of other minerals, the Oil Absorption Ratio shown in the technical data sheet otherwise show that the product in question is not Precipitated and hence, the classification sought for by the Appellant under CTH 2503 90 30 therefore has to be upheld.*

10. *We also agree with the contention that there is no estoppel against the law and irrespective of handful of imports by other importers or by Appellant himself after Jan., 14 under CTH 2836 50 00, the burden is cast upon the revenue to dislodge the classification assessed under the BEs already filed by the Appellant, and based on mere test reports by Kandla Customs Lab, which was admittedly not equipped to conduct such tests, such burden is not discharged by the revenue authorities in the present case, so as to alter the classification of the imported goods.*

11. *In view of our above findings, the differential duty demand, interest, fine and penal action is not sustainable. Hence the impugned order is set aside. Appeal is allowed with consequential reliefs, if any arise, in accordance with law."*

In the above decision, it can be seen that since laboratory were not equipped at the relevant time, it was held that the test report of such laboratory cannot be accepted. The department's claim of change of classification also will not sustain. As regard, the decision in case of Meghraj Chemicals And Agencies relied upon by the revenue, we find that firstly it is ex-parte order as no representation was made by the appellant in that case. Moreover, the decision which was given by the co-ordinate bench in the case of ASIAN GRANITO INDIA LTD which dealt the same issue was neither placed before the bench nor the bench had occasion to consider the same. The vital aspect of Board circular whereby it was confirmed that the customs laboratory, Kandla was not equipped for testing the calcium powder was also not placed before the bench. Therefore, the Tribunal decision in the case of Meghraj Chemicals And Agencies is per incuriam. Therefore, the said decision is clearly distinguishable.

7. As per our above discussion and finding the claim of the revenue to classify the calcite powder imported by the appellant being based only on Chemical Examiner Report of Customs Laboratory, Kandla which is not equipped for testing the goods in question has no legs to stand.

8. Accordingly, the impugned order is set aside, appeal is allowed.

(Pronounced in the open court on 30.08.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)