

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

CUSTOMS Appeal No. 12033 of 2015- DB

[Arising Out Of Order-In-Original/Appeal No MCH-PRCOMMR-PVR-25-2015-16 Dated 30.09.2015 Passed By Commissioner Of CUSTOMS-MUNDRA]

Goodrich Maritime Pvt Ltd

...Appellant

214-218, Sai Commercial Centre, Govandi East,
Mumbai
Maharashtra-88

VERSUS

C.C.-Mundra

...Respondent

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

WITH

CUSTOMS Appeal No. 12034 of 2015-DB

[Arising out of Order-in-Original/Appeal No MCH-PRCOMMR-PVR-25-2015-16 dated 30.09.2015 passed by Commissioner of CUSTOMS-MUNDRA]

Venkatraman Thyagarajan

...Appellant

Managing Director, Goodrich Maritime Pvt Ltd.,
214-218, Sai Commercial Centre, Govandi East,
Mumbai
Maharashtra-88

VERSUS

C.C.-Mundra

...Respondent

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

APPEARANCE:

Shri T. Vishwanathan, Shri Manish Jain, Ms. Shruti Khanna, Advocates for the Appellant

Shri Rajesh K Agarwal, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (TECHNICAL), RAJU
HON'BLE MEMBER (JUDICIAL), SOMESH ARORA

FINAL ORDER NO. A/10395-10396 / 2023

DATE OF HEARING:02.03.2023

DATE OF DECISION:02.03.2023

RAJU

These appeals have been filed by M/s. Goodrich Maritime Pvt Ltd., against demand of Custom Duty on Flexi containers imported by them by denying benefit of Notification No. 141/94- Cus dated 16.03.1994. Appeal has also been filed by Venkatraman Thyagarajan, Managing Director of the appellant against imposition of penalty under Section 112 of the Customs Act, 1962.

2. Learned Counsel pointed out that three issues have been raised in the impugned proceedings and all three have been answered by the earlier decision of the Tribunal in case of identical product in the case of C.C.- Jamnagar Vs. Jr. Roadlines Pvt Ltd with Jr. Roadlines Pvt. Ltd and Dhiren Rajde Vs. CC.- Ahmd.- 2020 (9) TMI 856 (CESTAT- Ahmd). The three issues are as under:

- (1) If the product imported by them namely, 'Flexi Tank Container' is durable container or not.
- (2) If it is the responsibility of the importer themselves to export the goods in terms of Notification of No. 141/94- Cus.
- (3) Whether the fact that the exporter of goods has claimed drawback or otherwise has any impact of the applicability of Notification No. 141/94- Cus.

He pointed out that all questions have been answered in the earlier decision and therefore, the appeal should be allowed.

3. Learned AR relied on the impugned order.

4. We have considered the rival submissions, we find that all the three questions referred para 2 above have been answered by Tribunal in the case of M/s. C.C.- Jamnagar Vs. Jr. Roadlines Pvt Ltd with Jr. Roadlines Pvt. Ltd and Dhiren Rajde Vs. CC.- Ahmd. (supra) is reproduced below:

4. We have heard both sides and perused the records. The limited issue to be decided in the present appeal is whether the Flexi Tank Containers imported by M/s JR Roadlines is durable in nature and are eligible for exemption under notification 104/94-Cus dated 16/03/1994. The contention of the Revenue is that since Flexi Tank Container is admittedly used for one time sea voyage and not repeatedly used, it cannot be considered as durable and consequently, the same will not be eligible for exemption under the above notification. The entire emphasis of the Revenue is that the subject Flexi Tank Containers are not repeatedly used. We find that whether the goods Flexi Tank Containers used one time or has repeated use, the only criteria to be satisfied is that whether Flexi Tank Containers on which exemption notification no. 109/94-Cus was claimed is durable or otherwise. We find that as per code of practice for Flexi Tanks relied upon by the assessee, the general criteria of the test of Flexi Tank Containers are as under:

"Section A

1. General

1.1. This test method is intended to prove the ability of Flexitanks and their installations in ISO shipping containers to withstand the effects of a longitudinal impact.

1.2. Testing shall be conducted by facilities that meet the test provisions required for the COA impact test and are approved for this purpose by the COA.

1.3. The test container shall be built according to ISO standards to meet ISO criteria and shall be a used container, with normal wear and tear and be rated at 30 tonnes gross for 20ft units and 32 tonnes gross for 40ft units, which represents containers in general service.

1.4. Any scheduled test shall be announced to the COA with at least 3 weeks lead-time."

From the above test criteria, it can be seen that it is necessary that Flexi Tanks should have an ability to withstand the effects of the longitudinal impact. The test provision also requires following impact test to be conducted:

- a) Rail Impact Test*
- b) Puncture resistance or impact strength*
- c) Seal (weld) strength*

- d) *Tensile strength and elongation*
- e) *Tear Resistance*
- f) *Temperature tolerance*
- g) *Valve Leakage Testing*

The Tank Containers shall be according to ISO standard and shall be a used container of normal wear and tear and be rated at 30 tonnes gross for 20 ft units and 32 tonnes gross for 40ft units, which represents containers ingeneral service. With the above specification of test and various impacttests, it is clear that Flexi Tank Containers are indeed durable.

Moreover, these containers are imported, thereafter, the same is fitted in the steel containers and in the Flexi Tank Containers the liquid cargo is filled. The dulyfilled cargo is loaded on the ship/vessel and the same is exported. In our view, the containers once imported and then re- exported after fitting in steel containers and duly filled with liquid cargo itself shows that this entire process is possible only if the container is durable. The Flexi Tank Container can endure an ocean voyage for liquid cargo and the same was imported for exporting bulk liquid cargo. During sea voyage on account of movement of ship and wave induced dynamic forces, the liquid cargo in the Flexi Tank Containers undergoes sloshing and surging. Therefore, the Flexi Tank Containers must be durable and strong enough to withstand the impact of such movement of the liquid in the Flexi Tanks. Accordingly, as per the use and nature of the containers as discussed above it has to be durable containers. The above facts are not in dispute even by the Revenue. The Revenue's contention is only that the same is not reused and has norepeated use. We find that this Tribunal in a number of judgments held that merely because the container has no repeated use but if the contained is durable, the durability of the container cannot be negated only for the reason that the same has no repeated use and the benefit of exemption notification has been extended, some of the judgments are cited below:

a) Dimasuki Tea Co. Ltd. vs CC-1995 (75) ELT 158

"39.*First and foremost the words `durable containers` have to be considered. In view of the definitions which have been indicated as well as the common understanding, it is evident that these have to be interpreted and understood in the context in which they are used and with reference to the type of article or articles of which the container is made and for which they are used or intended to be used.*

With the advance of technology many materials have been discovered which are capable of providing strength,

persistency, permanency and resistance to wear and tear etc. and they are available for making containers in addition to conventional materials. Not only that durability is a relative term and containers of different materials may be durable to a varying extent. [Repeated use or capacity thereof is an inferring criterion and not the only one which could be resorted to in the above context. (Further repeated use is generally related or relatable to a product and purpose and may not be always advisable even if the article was otherwise durable)]. Therefore, in the case of the type of containers imported by the appellants, a test was required to be conducted before deciding whether such containers could be considered as durable or not. But no test report/technical literature or market report has been produced before us by either side. In the circumstances, we find that the material produced before us is insufficient to record a specific finding in this regard."

b) CC vs Assam Company (India) Ltd. 1995 (78) ELT 168

"4. According to the Concise Oxford Dictionary (New Seventh Edition), container means 'vessel, box etc. designed to contain some particular things.' The word 'durable' has been defined as 'capable of lasting', remaining useful, for a period...". We agree with the learned Counsel for the respondents that the expression durable has been used in Notification No. 97/79 in the context of the utility of the container for packing tea for export and since the tea sack made of four ply printed paper with aluminium inner foil was strong enough to withstand sea voyage from India, it is undoubtedly durable in nature."

c) CC vs Indofil Chemicals Company-2006 (199) ELT 871

"The Revenue is aggrieved by the order of the Commissioner of Customs (Appeals), extending benefit in terms of Notification No. 104/94-Cus., dated 16-3-94 to 6650 pieces of laminated paper bags imported by the respondents herein for packing chemicals for export purpose."

2. We have heard both sides. We find that the only issue for determination viz. as to whether the goods in question are capable of repeated use, has been decided by the Tribunal in the case of CC v. Assam Company (India) Ltd. [1995 (78) E.L.T. 168], wherein tea sacks made of four ply printed paper with aluminium inner foil were held to be strong enough to withstand sea voyage from India and held to be durable containers entitled to the benefit of

exemption under Notification 97/79- Cus., dtd. 2-5-79 which is pari materia with Notification No. 104/94 which is under consideration in the present appeal. Following the ratio of the above order, we see no reason to interfere with the impugned order of the Commissioner (Appeals). We accordingly uphold the same and reject the appeal."

d) Sam Agri Tech Ltd. vs CC 2017 (353) ELT 358

3. *I have heard the submissions made before me. The word used in the Notification No. 104/94 is "containers of durable nature". The authorities below relied upon the Board Circular (mentioned supra) to interpret the word „durable“ as „capable of being reused“. It is thus observed by the department that since the containers used for packing the perishable products are of disposable nature, they cannot be considered as durable containers. The said view of the department is highly imaginary.*

The appellants are using containers for exporting perishable products. As submitted by Id. Consultant for the appellant, the packing is done as per the specifications of the overseas purchaser of the product. Further, the department cannot insist that the containers should be capable of reuse when the products are being exported. When the products are being exported after packing in containers, the appellants cannot be expected to reuse such containers for further packing. The appellant cannot be compelled to do something which is practically not possible for them. The meaning of „durable containers“ has been examined in the judgment relied upon by the Id. Consultant for appellant [Dimakusi Tea Co. Ltd. v. CC, Calcutta (supra)]. The Tribunal has analysed the meaning as under:

"First and foremost the words 'durable containers' have to be considered. In view of the definitions which have been indicated as well as the common understanding, it is evident that these have to be interpreted and understood in the context in which they are used and with reference to the type of article or articles of which the container is made and for which they are used or intended to be used. With the advance of technology many materials have been discovered which are capable of providing strength, persistency, permanency and resistance to wear and tear etc. and they are available for making containers in addition to conventional materials. Not only that durability is a relative term and containers of different materials may be durable to a varying extent. [Repeated use or capacity thereof is an inferring criterion and not the only one which could be resorted to in the above context. Further repeated use is generally related or relatable to a product and purpose and may not be always advisable even if the article was otherwise durable]. Therefore, in the case of the type of containers

imported by the appellants, a test was required to be conducted before deciding whether such containers could be considered as durable or not. But no test report/technical literature or market report has been produced before us by either side. In the circumstances, we find that the material produced before us is insufficient to record a specific finding in this regard.

According to the Concise Oxford Dictionary (New Seventh Edition), container means 'vessel, box etc. designed to contain some particular things.' The word 'durable' has been defined as 'capable of lasting', remaining useful for a period'. We agree with the learned Counsel for the respondents that the expression durable has been used in Notification No. 97/79 in the context of the utility of the container for packing tea for export and since the tea sack made of four ply printed paper with aluminum inner foil was strong enough to withstand sea voyage from India, it is undoubtedly durable in nature.

In the case of Dimakusi Tea Co. Ltd. v. Collector of Customs, Calcutta reported in [[1995 \(75\) E.L.T. 158](#) (Tribunal)] the Tribunal held that durability is a relevant term -and containers of different materials may be durable to a varying extent (the Tribunal was seized of the interpretation of Notification Nos. 97/79 and 150/80 in the context of sacks made by using three ply high strength craft paper and one ply high strength craftpaper with aluminum inside ply used for packing tea. The Tribunal held that repeated use or capacity is a inferring criterion and not the only one which could be resorted to in the above context. The Tribunal extended the benefit of Notification No. 150/80; however the benefit of Notification No. 97/79 was not extended as there was no material to decide whether the containers could be considered as durable or not. However, in the case before us, the Collector has satisfied himself that the tea sacks were durable in nature and it is the department that has not been able to substantiate its contention that the sacks were not durable in nature. Therefore, the appeal remains unsubstantiated. Accordingly, we see no reason to interfere with the impugned order, confirm the same and reject the appeal."

The Tribunal has analyzed that the containers need not be capable of being reused to be durable containers. From the facts of the case as well as decisions cited supra, I hold that the rejection of benefit of exemption by the authorities below is unjustified. The impugned order denying the exemption under Notification No. 104/94 is set aside. The appeal is allowed with consequential reliefs, if any.

We find that from all the above judgments the Tribunal has categorically held that merely because the container does not have repeated use, the nature of durability cannot be rejected. The only criterion to be seen is that whether the container in itself is durable in nature. As per the nature of container and use thereof as discussed above it is clear that the container imported by the assessee is durable. Moreover, even taking reference from the above judgments, we find that on comparison basis also, all the packing containers which were subject matter in the above cases, the Flexi Tank Container is much durable. Therefore, applying the ratio of the judgments in the above cases, in our view, it is clear that the Flexi Tank Containers imported by the assessee is durable container. Consequently notification no. 104/94-Cus is available to such containers. We also observe that neither the Show Cause notice nor Order in original, raise any dispute that Flexi Tank Containers are strong enough to withstand and endure the rigours of sea waves. Therefore, durability of the containers in isolation is not in dispute. Revenue is also harping on the point that subject containers do not have repeated use, therefore, it is not durable. This very issue has been considered time and again in the above cited judgments. Therefore, only because the containers do not have repeated use, the containers which are otherwise durable benefit of notification cannot be denied. Learned Counsel also pointed out that apart from the issue of durability, the Adjudicating Authority has also taken a ground for denying the exemption that re-export of the Flexi Tank Containers was not done by the present assessee but by the exporters of liquid cargo and also on the ground that exporters to whom the appellant has sold the Flexi Tank Containers have claimed drawback by factoring in the process of Flexi Tank Containers in the exports.

We find that this allegation was not raised in the show cause notice. Therefore, this particular finding is beyond the scope of show cause notice. The Adjudicating Authority cannot raise any new grounds in the Adjudication Order which was not raised in the Show Cause Notice. This is a settled law in the following judgments:

a) Prince Khadi Woollen Handloom Prod Co-op Indl. Soc. Vs CCE-1996

(88) ELT 637 (SC)

3. *If it is the case of the Revenue that the appellants are not entitled to the benefit of the exemption under the said Notification by reason of the fact that the appellants do not own the factories in which the woollen fabrics are produced, the Revenue must give to the appellants a notice to show cause in this regard and the matter must be processed from that stage.*

b) CCE vs Ballarpur Industries Ltd. 2007 (215) ELT 489 (SC)

21. *Before concluding, we may mention that, in the present case, the second and the third show cause notices are alone remitted. The first show cause notice dated 21-5-1999 is set aside as time-barred. However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule*

In view of the above settled law, any finding given by the Adjudicating Authority on the issue which was not raised in the show cause notice has no meaning and the same will stand nullified. Having discussed above, we also find that in the notification there is no condition that the imported durable container should be re-exported by the importer themselves and also there is no condition regarding the availment of drawback or otherwise. Therefore, otherwise also, on both the counts, the finding of the Adjudicating Authority is firstly not relevant, consequently, will not adversely affect the eligibility of the notification no. 104/94-Cus. The appellant M/s JR Roadlines vehemently submitted that the demand relates to appeal no. C/11972-11973/2015 is entirely time barred. We find that there is no dispute on the fact that the appellant have made a correct and true declaration of description of the goods in their Bills of entry. The goods have been physically examined by the Custom department and examination report has been submitted. As per the condition of notification, the appellant had executed the bond which after fulfilment of condition that re-export of the container duly filled with liquid cargo bond has been cancelled. The appellant with a bona fide belief claimed the exemption notification 104/94-Cus without making any mis-declaration. The Custom department has very consciously after satisfying themselves allowed the exemption notification and not only that they have cancelled the bond after satisfying that export obligation is fulfilled. In this undisputed fact, there is no suppression of fact on the part of the assessee and custom department was free to interpret in their own manner whether the exemption to be allowed or not. Therefore, it cannot be said that there is any suppression of fact, mis-statement or misdeclaration on the part of the assessee. Therefore, the entire demand relates to appeal no. C/11972- 11973/2015 is unsustainable also on time bar apart from merit of the case. As regard the Revenue's submission relying on board circulars, we find that the same board circular has been considered in the judgments cited. Therefore, the Tribunal's judgments will prevail over the board circular. As regard the judgment of this Tribunal in the case of Paul Abrao Agencies P Ltd. supra relied upon by the Learned Authorized Representative, we find that firstly, the judgment was ex-parte, no material of the appellant was considered. Secondly, the said judgment was given on the premise that importer did not carry out any processing, nor

exported the same on processing. However, in the present case, there is no issue of processing of the imported container. Moreover, there is no condition of processing of imported container in the notification no 104/94-Cus. Therefore, decision

in the case of Paul Abrao Agencies P Ltd. is clearly per incuriam of the terms of notification no. 104/94-Cus. Accordingly, the said decision cannot have force of binding. As regard the Revenue's appeal since identical issue is involved, we have considered submission of both sides as the same were adopted in case of Revenue's appeal by both the sides, we need not to give a separate finding on the said appeal. As per the discussion and finding given as above, we are of the view that the appellant M/s JR Roadlines is entitled for notification 104/94-cus. Accordingly the appeal nos. C/11972-11973/2015 are allowed. Revenue's appeal bearing no. C/11346/2014 is dismissed.

Relying on the aforesaid decision of Tribunal in the identical circumstances, the appeals are allowed, with consequential relief.

(Dictated & Pronounced in the open Court)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

PALAK

