IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos. C/71137-71138/2016-CU[DB]

(Arising out of Order-in-Appeal No. NOI-CUSTM-000-APP-0340 & 0341-15-16 dated 08/03/2016 passed by Commissioner (Appeals), Central Excise & Customs, Noida)

Commissioner of Customs, Noida **Appellants**

Vs.

M/s Sachin Chemical Agency &
(In Appeal No. C/71137/2016)

M/s Manikya Creations Pvt. Ltd.
(In Appeal No. C/71138/2016) **Respondents**

Appearance:

Shri Sandeep Kumar Singh (Dy. Commr.) AR for Appellant
Shri Vaibhav Dixit (Advocate) for Respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 07/08/2018
Date of Decision : 07/08/2018

FINAL ORDER NOs. - **72157-72158/2018**

Per: Archana Wadhwa

The assessee is Pvt. Ltd. Co. and engaged in the business of import of "Chalk-Natural Calcium Carbonate" (Natural Uncoated Ground Calcium Carbonate) from Vietnam and thereafter selling the same within the country. The appellant claimed to have imported Natural Ground Calcium Carbonate e.g. Calcite and Chalk

Powder which is classified under Chapter 25 of the Customs Tariff e.g. Calcite (25309030), Chalk (25090000). On 04.06.2013 some samples of the imported consignment of similar product were sent by the Customs Authorities, ICD Loni, vide Test Memo Nos.208 dated 04.06.2013, 210 dated 12.06.2013 and 211 dated 12.06.2013 to CRCL, New Delhi. However, the samples were returned back by the CRCL with their covering letter where in they admitted that they do not possess the facility to conduct the test of Natural Calcium Carbonate and returned the samples to the Custom Authorities. The ICD-Loni again sent the samples of Natural Calcium Carbonate to CRCL Delhi vide test Memo No.259 and 260 both dated 11.09.2013 but this time to CRCL returned the samples without testing with their remark on the face of the Test Memo that “FOR THE WANT OF REQUIRED FACILITIES, THIS LABORATORY IS NOT ABLE TO ANALYSE THE SAMPLE OF CALCITE POWDER (UNCOATED) PRESENTLY”. The samples were then sent for testing to Indian Bureau of Mines, Nagpur from ICD-Loni for similar product. However, Indian Bureau of Mines also expressed their inability to test the samples due to lack of certain testing equipments with them and returned back the samples to the Customs Authorities. In a reply under RTI Act, given to one of appellant business colleague, where in they sought details of the equipments/machines installed/purchased by CRCL after 13.09.2013 (i.e. after the date when CRCL returned the samples without testing on account of non possession of equipments) for testing samples of Calcite Powder/Natural Calcium Carbonate. The CRCL vide letter dated 25.07.2014 stating that:- No new equipments/machines have been installed/purchased specifically for testing the sample of calcite powder/calcium carbonate after 13.09.2013. On account of incapability of conducting test of subject product by CRCL Delhi and Indian Bureau of Mines, Customs staff at ICD-Loni started sending samples to a NABL accredited Lab namely Spectro Analytical Labs Ltd., Okhla, New Delhi. The samples of the appellants were sent to Spectro Analytical Labs Ltd., New Delhi from IDC-Loni due to refusal of CRCL for testing of the said samples of same commodity i.e. Chalk Powder. Accordingly, Spectro Analytical Labs Ltd. replied to all the 10 queries enquired by Customs, ICD-Loni in their Test Memo including those mentioned at Serial No.09 & 10 of the Test Memo and categorically distinguished the crystalline structure of the samples by using XRD and

SEM and identified the sample as Natural Uncoated Ground Calcium Carbonate. The ICD-Loni, again sent samples for testing to CRCL despite the fact that CRCL, New Delhi was not equipped with testing equipments to test the samples and even the request of the department for testing was earlier turned down by CRCL, New Delhi. The Test Memo No.112 dated 24.03.2014 contained 10 queries, similar to the earlier Test Memos sent to the NABL accredited laboratories. Queries mentioned at Serial No.9 & 10 of the Test Memo, are reproduced hereunder:-

> *"9. Whether Calcinations/Roasting has taken place.*
> *10. Whether there is any change chemical or crystalline structure i.e. whether the product under testing has passed through the process of crystallization. If yes, then whether Orthorhombic or Hexagonal – Rhombohedral structure, (XRD/CRYSTALLOGRAPHY)."*

2. The CRCL, New Delhi gave test reports by declaring samples as of "**Uncoated Precipitated Calcium Carbonate**". A perusal of the test report shows that the same was prepared by one Mr. S.K. Singh, Chemical Examiner who gave the test report only on the basis of "oil absorption test" by relying on Indian Standard 8767-1978 and dealt with the Query No.9 & 10 of the test memo as under:-

"9. Not related with testing.

10. No such test is recommended in Indian Standard."

3. Another test report was also prepared by the same chemical examiner i.e. Sh. S.K. Singh on same date i.e. on 07.05.2014 wherein he preferred to cover only first 05 tests while the rest 05 tests were left and were not even recorded in his report After having knowledge of the aforesaid test reports dated 07.05.2014, one of the importers as ICD-Loni moved an application before the CRCL, New Delhi under the Right to Information Act, 2005 (hereinafter referred to as the RTI Act, 2005) seeking information regarding the Indian Standard used by CRCL to test calcite powder/natural calcium carbonate. The aforesaid application was disposed of by the same chemical examiner Mr. S.K. Singh by stating that no Indian Standard Method was available to test calcite powder/natural calcium carbonate. In the meantime, the appellant managed to get the copies of the information from one of their business colleagues of similar commodity at ICD-Loni, under the RTI Act from the customs authorities at Chennai and Nhava Sheva, Maharashtra, who by their orders dated 13.01.2014, 16.01.2014, 24.06.2014 and 26.06.2014 held that X-Ray Diffraction, Atomic Absorption Spectrometry (AAS) tests

etc. have to be carried out of differentiating between Natural Calcium Carbonate (Calcite Powder), Synthetic (Coated) Calcium Carbonate & Precipitated Calcium carbonate. The appellant informed that in a reply under RTI Act, given to one of appellant business colleague where in they sought information whether CRCL Delhi posses the X-Ray Diffraction (XRD) machine for testing samples of Calcite Powder/Natural Calcium Carbonate. The CRCL vide their reply dated 19.08.2014 stated that, CRCL do not posses X-Ray Diffraction facility. Meanwhile, on the insistence of the Customs Authorities at ICD, Loni, the appellant had no option but to get their goods cleared after depositing Bank Guarantee of duty at higher rates i.e. the rates applicable to "**Precipitated Calcium Carbonate**" falling under chapter 28 of the Customs Tariff Act, 1975. The appellant has requested the Customs Authorities many a times for retesting the samples in any other NABL Lab, but the customs authority at ICD-Loni had not taken any action for sending the samples to any other laboratory equipped to test the samples as required by the test memo. In a similar matter, some other Importers filed a Writ Petition against the reports of CRCL for similar goods in the Hon'ble High Court of Allahabad and demanded the retesting of their samples at any NABL accredited Lab. The Hon'ble Court decided the matter and directed the Commissioner ICD-Loni to settle the issue of retesting within four weeks time. However, Commissioner ICD-Loni again turned down the request of retesting the samples of such Importers on the ground that "pick and choose facility cannot be granted to the Importers". All importers again preferred an appeal before Hon'ble Allahabad High Court against the order of the Commissioner, ICD-Loni. The Hon'ble Court, this time, referred the matter to CESTAT to decide the issue of retesting the samples by any Lab other than CRCL. Consequently, the CESTAT, New Delhi has decided a case of M/s Rathi Enterprises, 3451-B, Main Hansapuri Road, Delhi vide its Final Order No. A/50137/2015-SM(BR) dated 19.01.2015. In the instant case, the Commissioner of Customs & Central Excise, Noida vide its Order-in-Original No.02/CUS/Commr./Noida/2014-15 dated 07.11.2014 had rejected the request of the party to allow them to get their samples tested in any laboratory other than CRCL. The CESTAT vide aforesaid order has held that the samples be retested from any laboratory other than CRCL and, thereafter, the adjudicating authority should pass an appropriate order in accordance with law.

4. The Deputy Commissioner, ICD Loni, Ghaziabad, issued two letters dated both dated 12.11.2014 to the Chief Manager, Punjab National Bank, Sector 18, Noida and the Branch Manager, YES Bank, South Extension, Branch, D-12, New Delhi for recovery of the Bank Guarantees of the appellant, which were filed against the provisional release and copies of the said letters were addressed to the appellant. The appellant has paid the differential duty but under protest. However no formal order for the finalization of the provisional assessment has been issued. Further the Appellant had requested the Customs authorities many a times for re-testing the samples in any other NABL Lab but not considered. Till date, the Customs Authority at ICD-Loni had not taken any action for sending the samples to any other laboratory equipped to test the samples as required by the test memo.

5. It is seen that assessments were finalised and letters for enforcement of bank guarantees were issued to the banks with a copy to the respondent. The same were appealed against before Commissioner (Appeals), who vide his impugned order, observed as under:-

> *"The Customs Authorities of LONI, ICD are directed in the interest of justice to get the retesting of the samples, in respect of the Bills of Entry under*

appeal, done from a Government approval lab, other than CRCL, which is equipped to test and report on the all ten points of the test memo, finalize the provisional assessment on the basis of those reports and issue a speaking order following the principles of natural justice as well as extending the benefit of consequent relief, if any."

6. Being aggrieved, Revenue has filed the appeal on the ground that CRCL is fully equipped to test the goods. On the other hand, the appellant has referred to Circular No.43/2017. Customs dated 16.11.2017, clarifying – that CRCL has shortlisted the items whose samples cannot be tested in their Laboratories at present and also identified the Lab, where such samples could be tested. Natural Calcite Powder is one of the specified products which CRCL Lab is unable to test.

7. The above fact demolishes the Revenue's case. As such, we find no merits in the Revenue's stand. Their appeal is accordingly rejected.

(Pronounced in Court)

Sd/-	**Sd/-**
(Anil G. Shakkarwar)	**(Archana Wadhwa)**
Member (Technical)	**Member (Judicial)**

Lks