

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 20517 of 2021

[Arising out of Order-in-Appeal No. 286/2021 dated
02/08/2021 passed by Commissioner of Customs
(Appeals), Bangalore.]

M/s. The Tyre Mark

'Sai Sadan', No.19,
2nd Cross, Behind HDFC Bank
Sindhi Colony J.C. Road
BANGALORE – 560 001.
KARNATAKA

Appellant(s)

VERSUS

**Commissioner Of Customs,
Bangalore**

C.R. BUILDING, QUEENS ROAD,
P.B.NO. 5400,
Bangalore – 560 001.
Karnataka

Respondent(s)

Appearance:

Mr. Devan Parikh, Sr. Advocate and Mr. G. B. Eswarappa, Advocate for
the Appellant

Shri P. Rama Holla, Superintendent, Authorised Representative for the
Respondent

CORAM:

**HON'BLE SHRI S. K. MOHANTY, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER**

Final Order No.20853/2021

Date of Hearing: 08/11/2021

Date of Decision: 28/12/2021

Per: P. ANJANI KUMAR

Heard both sides and perused the records of the case

2. The appellant's herein M/s The Tyre Mark had imported 220 numbers of "Hankook off the road mining tyres 31 x 10.5 R 15" at a declared value at Rs.6,81,098 and filed Bill of Entry No.8945985 dated 25.09.2020; they classified the same under CTH 40118080 and claimed benefit of notification No.46/2011-CUS dated 01.06.2011; the appellants claimed that the tyres in question are primarily off road tyres used in mining vehicles such as TATA HITACHI LOADER as well as off roading vehicles like FORCE GURKHA. The revenue however, in the course of assessment, sought to take a view that the goods in question are required to be classified under CTH. 40111010 as tyres meant for motor cars and cannot be classified under CTH 40118000 and accordingly are "restricted" and a license as per DGFT Notification No.12/2015-2020 dated 12.06.2020, is required for import. A Show Cause Notice dated 09.10.2020, was issued to the appellant seeking reclassification of impugned goods under CTH 4011 1010 and proposing confiscation and penalty. Deputy Commissioner, vide Order-in-Original No.101/2020 dated 07.11.2020, confirmed the allegations. On an appeal filed by the appellants, Commissioner (Appeals) rejected the appeal filed by the appellants. Aggrieved by the order of the Commissioner (Appeals), the instant appeal was filed.

3. Mr. Deepak Parikh, Sr. Advocate and Mr. GB Eswarappa, Advocate, appearing for the appellants, submits that on examination of the tyres, it was demonstrated that the entries made in the Bill of Entry tallied completely with the goods as per the examination report

and there was thus no question of any misdeclaration about nature of goods; information supplied by the respondents, in reply to an RTI application filed by the appellant, indicate that the classification entered by the appellants was correct; during the proceedings they claimed alternate classification was also made under CTH 40119000 and the goods were free for import; original authority passed order without considering their submissions.

4. He submits that even during the proceedings, clarifications were given vide letter 12.01.2021, in response to query by the office of Commissioner (Appeals); the appellants received, vide letter dated 10.08.2021, in reply to their RTI application dated 12.03.2021, File Noting of file C. No. VIII/ 48/ 27/2020; as per the same Assessment Deputy Commissioner & the Joint Commissioner of Customs, ICD, Whitefield Bangalore, agreed that

"On verification of the documents on the file and submissions made by the importer at the time of personal hearing it appears that the importer has rightly classified goods under CTH '40118000'.

However, shed officers particularly shed Deputy Commissioner had a contrary opinion that

in view of the fact that the item under dispute are 'restricted' in nature and difference of opinion of classification of goods between assessing and shed officers, I seek your instruction for further necessary action"

5. Learned Counsel submits that the issue is directly covered by Hon'ble Tribunal larger Bench judgment reported at 2002 (140) ELT 273; Tribunal held that tyres meant exclusively for off the road use would fall in old TI 16 (iii) and new TI 4011.91; Supreme Court 1997 (92) ELT-14 also held that words "use upon road" would denote the principle of dominant use and not where it may move incidentally; use on road being only "ancillary or incidental to the main use" will not make it motor vehicles. He submits that as per the Hon'ble Supreme Court, dominant

and primary purpose of a motor vehicle is to be dominantly used on the road. Clearly, therefore, a tyre which is used for serving its dominant purpose only can be classified as tyres meant for motor vehicles.

7. Learned Counsel submits that the present entry is even more restricted as it talks of tyres for "motor cars" and not even "motor vehicles"; Motor vehicle is much broader than motor cars; again like erstwhile TI 34, a reference to CTH 8703 would bring out the fact that even as per the present tariff, the use of the words "motor cars" is more restrictive than the use of the words "motor vehicles"; a perusal of various sub-headings would show that motor cars are used only as one of the sub-heading of the main heading i.e. various kinds of vehicles; clearly, therefore, "tyres for motor cars" is only restricted to normally understood motor cars that are used for plying on the road; therefore, a tyre used exclusively only for off road and which cannot be used for on roading ought to be classified under CTH 4011 90 00; in some cases, it is also used for mining purposes and, therefore, may also merit classification under CTH 4011 80 00; it certainly is not as normal tyres meant for motor vehicle; they do not serve the normal and dominant purpose of use of a motor car on the road. The fact that tyres in question are MUD terrain tyres designed for predominant and primary use in rocky forest, etc. terrain and for off roading as more than adequately established by the facts on record.

8. Learned Counsel submits that it is even observed in the order in original that *"further specifications found on side walls of the subject goods indicate that the subject goods are suitable for use on SUV and passenger motor cars for off roading experience which is confirmed by the Indian Subsidiary of the manufacturer of the imported tyres i.e. Hankook Tyres LLP India."* Certificates of the purchasers produced by the appellants indicate that they use the tyres in their mining areas; these tyres are used for removing original tyres and putting these special tyres. Original order relies on website of TATA Hitachi Loader; however, it is also found that the OE tyres of the said vehicle are different

from the present tyres; the tyres are primarily and fundamentally meant for off road use; they are not used as OE; the original tyres have to be taken out and these tyres are put in its plates for putting the vehicle to rough off road use; registration of Force Gorkha vehicle shows that the tyres asked for its registration are very different from the tyres being imported; representatives of Hankook Tyres have clarified that the tyres in question are "for off roading activities and not for highway use"; communication which shows that use of such tyres like imported RT 03 mud terrain tyres need to very bad fuel efficiency, lot of noise level and they are only suggested for off roading.

9. Learned Counsel submits that www.bestdrive.com conclusively demonstrates that the difference between "highway terrain (HT)", "all terrain (AT) and lastly "mud terrain (MT)" tyres and it conclusively demonstrates that highway terrain tyres cannot be used for off roading; all terrain tyres have a bit of both characteristics and mud terrain tyres are not suitable at all for use on road; difference in characteristics of the tyres is not even disputed by the Department; though, the burden of proof is on the Department to prove classification, no single instance is shown that the tyres in question are supplied as original equipment with the vehicles; there is not a single car which is marketed with these tyres; these tyres can only be used as substitute tyres where the vehicle is to be put to ready rough off road use; the purpose of the tyres is not to be used as regular pneumatic tyres for motor cars. Reliance on the Clarification by the Indian subsidiary is clearly erroneous; it is clear that others are importing these tyres; it is in the interest of such parties to prevent others from importing and, therefore, they are likely to give an opinion adverse to other importers; the same cannot be binding on the Hon'ble Tribunal.

10. Shri P. Rama Holla, Superintendent, Authorised Representative for the Respondent reiterates the findings in the Order-in-Original and Order-in-

Appeal and submits that the facts of the case are well analysed by the adjudicating authority in the OIO; adjudicating authority has analysed the markings (specifications) /labels found on sidewalls of tyres (as noticed during examination of goods) and on a detailed analysis , has observed that the specifications found on sidewalls of the tyres indicate that the subject goods are suitable for use on SUVs and passenger motor cars; email correspondence with the Indian subsidiary of the manufacturer of such tyres viz. Hankook Tires LLP India, indicates that the said Indian entity vide their mail dated 5/10/2020 have stated that the tyres with these specifications are generally used in SUVs like Mahindra Thar etc; the said Indian subsidiary viz Hankook Tires India LLP, vide the said mail also furnished details of identical goods imported by them wherein the classification adopted for such tyres was found to be CTH 4011 1010.

11. Learned authorised Representative submits that the appellant has declared in e-sanchit that these tyres are used for off the road vehicles such as Force Gurkha & as front tyres for mining vehicles such as Tata Hitachi loader; Based on the information obtained from web site of Force Gurkha and other available details, the adjudicating authority has observed that the said Force Gurkha is an SUV and not an Off-road vehicle nor a construction, mining or industrial handling vehicle and machinery; tariff item 40118000 claimed by the appellant specifically covers tyres of a kind used in construction, mining and industrial handling vehicles; the adjudicating authority explained how the tyres imported by the appellant are not suitable for Tata Hitachi loader; recommended Ply rate(PR) for tyres of Tata Hitachi loader is 16 PR or 12 PR, but not 6PR (PR of tyres imported by appellant); 6PR means less strength, which can not be used for Tata Hitachi Loader which carry heavy loads of mined ore/rocks/sand; hence , the claim of importer is not correct as the technical specifications mentioned on the sidewalls of the subject tyres are not suitable for using on Tata Hitachi Loader.

12. Learned authorised Representative submits that as per information obtained through email correspondence from Indian subsidiary of the manufacturer of imported tyres viz. Hankook India LLP and based on certificates provided by importer, technical write-up uploaded by the importer, website description of Force Gurkha, web site description of Hankook and based on detailed analysis of specifications of imported tyres, the tyres imported by the appellant are not classifiable under CTH 4011 8000 as claimed by the importer. He submits that the classification arrived by the department viz 4011 1010 refers to New pneumatic tyres, of rubber, of a kind used on motor cars (including station wagons and racing cars); so this heading not only covers passenger car tyres but also tyres for station wagons and racing cars; the tyres imported by the appellant are used for Sport utility vehicles like Force Gurkha, Mahindra Thar, Jeep etc which fall in the category of motor cars; hence, the tyres imported by the appellant merits classification under 4011 1010 only; as rightly held by adjudicating authority, there is no need to consider the classification under CTH 4011 9000 as others, as claimed by the importer; as per DGFT Notification.No.12/2015-2020 dated 12.6.2020, the goods falling under 4011 1010, imported by the appellant, are restricted for import w.e.f 12/6/2020; the impugned goods are to be subjected to BIS standards, which has not been done in the case of instant imports.

13. Heard both sides and perused the records of the case. The appellant argues that the tyres in dispute are not normal pneumatic tyres; they are used in cars used for off-road purposes such as Rocky Forest and Mud-Terrain and the dominant purpose is not for used on-road. The appellants also submit that Ministry of Industry considers the tyres in question are different from the kind used in normal course; the BIS standards also recognised that tyres are not normal tyres. The appellant submits that the clarification issued by the authorized importers i.e M/s Hankook Tyres should not be relied upon as they are in direct competition with the appellants and hence, the submission cannot be relied upon. They also

rely upon the judgment of Larger Bench in 2017 (350) ELT 107; Hon'ble Supreme Court 1997 (92) ELT 141. We find that the Department relies upon the e-mail correspondence with M/s Hankook Tyres which clarifies that the tyres imported by them are generally used in SUVs like Mahindra Thar etc. and the website of Tata Hitachi wherein it is stated that the specification for front tyres for Tata Hitachi loader is front tyre standards is 9-16-16PR and that PR ratings for the impugned tyres are lower.

14. We find that the impugned tyres have been described by the appellant importer as "Hankook off the road mining tyres 31 x 10.5 R 15" and classified the same under CTH 40118080 whereas the Department seeks to classify the same under CTH 40111010. The crux of the Department's argument is that the impugned tyres are not a kind used in mining etc. and are usable in on-road conditions. We find that the appellants placed on record a clarification issued by the technical service team of M/s Hankook indicating that:

RT05:

- MUD Terrain tyre used specifically for off roading activities not for highway use.
- For High traction & Grip only (not for mileage)

We also find that the appellant has placed before the adjudicating authority certificates issued by various purchasers on the use of impugned tyres. They also placed on record literature available on the website of Best Drive which states that:

"HT tyres are not intended for off-road performance. Rather, the tread pattern is typically designed to deliver a smooth, comfortable ride and good on-road performance. HT tyres are not specifically designed for puncture resistance across the sidewall and tread area. This makes them more susceptible to staking and deflation when driving over less predictable, off-road terrain. Unsealed tracks and trails can be slippery, which makes AT or MT tyres a better choice in this instance."

15. From the above, it appears that the impugned tyres are not normal tyres. This fact is also not disputed by the Department. It is the contention of the Department that the tyres are claimed to be used in vehicles like Gorkha Force Thar etc. which are vehicles for on-road use only and moreover vehicles used for racing etc. are also classified under motor vehicles and therefore, the impugned tyres are rightly classifiable under CTH 40111010. On perusal of the literature made available on record and the clarifications given by some purchasers, it is clear that the impugned tyres are of a different kind from normal tyres notwithstanding the fact that they are also usable for on-road purposes. We find going by the principle of "dominant use" as enunciated in the judgments cited above, as we find that the tyres are basically suitable for off-road use that is in difficult terrain and rocky/muddy areas etc. It is to be concluded that the impugned tyres are not specifically designed for normal on-road purposes. Only because the tyres can be fitted in to the vehicles like Force Gorkha or Thar etc. they cannot be classified as tyres for normal vehicles for on-road use. We also find that the certificate issued by the Ministry of Industry supports this contention. We find that the Department's reliance on a clarification given by a competitor and that too on an e-mail cannot be considered as clinching evidence to rely upon. Moreover, in the impugned import, the supplier is not M/s Hankook and the comparative description, if any, of the impugned tyres and those imported by M/s Hankook India Ltd. is not given. Under the circumstances, the lower authorities cannot rely on such evidence. It is not the case of the Department that normal on-road vehicles are supplied with the impugned tyres by the original equipment manufacturers. The impugned tyres are used for replacing the existing tyres whenever the vehicle is used in muddy or off terrain. It can be seen that even Tractors, Dumpers etc. which are primarily designated for off the road used also travel some distances on the road till they reach the place of their use. By no stretch of imagination such vehicles and the tyres thereof can be regarded to be for on-road purposes. We also see that the appellants submit that though

the vehicles can also be used for roading purposes it would be very bad fuel efficient while creating higher noise levels. Therefore, nobody uses them normally for roading. We also find that the Department opines that the impugned tyres are not of a kind used in vehicles which are used for mining etc. In such circumstances, the alternate claim made by the appellants could hold good. In view of the above, the impugned tyres are required to be considered as special purpose tyres for off-road purposes. For this reason, we find that the impugned order is not maintainable and is liable to be set aside.

16. In view of the above, we set aside the impugned order by allowing the appeal with consequential relief, if any, as per law.

(Order pronounced in the Open Court on **28/12/2021**)

(S. K. MOHANTY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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