

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

REGIONAL BENCH – COURT NO. III

Customs Appeal No.41022 of 2014

(Arising out of Order-in-Appeal C.Cus.No.382/2014 dated 10.03.2014 passed by
Commissioner of Customs (Appeals), Chennai]

Mr. Crescent Marine Traders

No.36 (old No.85), Ground Floor
Xavier Street,
Chennai 600 001.

Appellant

VERSUS

Commissioner of Customs (Sea-Import)

Custom House,
No.60, Rajaji Salai,
Chennai 600 001

Respondent

WITH

**(i) Customs Appeal No.371 of 2011 (Crescent Marine Traders);
(ii) Customs Appeal No.372 of 2011 (A.K.S.Mohammed
Farook); (iii) Customs Appeal No.373 of 2011 (A.K.S.Haroon
Rasheed)**

(Arising out of Order-in-Appeal C.Cus.No.869, 870 and 871/2011 dated 27.10.2011
passed by Commissioner of Customs (Appeals), Chennai]

APPEARANCE :

Shri J. Shankar Raman, Advocate for the Appellant
For the Appellant

Shri M.Jagan Babu, AC (A.R) for the Respondent
For the Respondent

CORAM :

**HON'BLE MS. SULEKHA BEEVI, C.S., MEMBER (JUDICIAL)
HON'BLE MR. MADHU MOHAN DAMODHAR, MEMBER(TECHNICAL)**

DATE OF HEARING : 28.03.2019
DATE OF DECISION : 29.04.2019

FINAL ORDER No. 40686-40689 / 2019

PER BENCH

Since all the appeals involve identical dispute they are taken up for common disposal.

2. The facts of the case are that Crescent Marine Traders (hereinafter referred to as CMT) had imported a consignment of 2500 kgs. (in 250 kgs. bags) of "Agar Agar Strips" against invoice dt. 01.06.2010 of M/s.Topsea Enterprises, Hong Kong declaring the assessable value as Rs.2,17,478.25 and paid duty of Rs.78,588/- on 15.06.2010. On 16.6.2010 when the above consignment was about to be cleared out of customs charge, the officers of SIIB, Seaport Customs, Chennai examined the goods. It was found that the consignment had been packed in 250 white plastic gunny bags (each bag containing 10 packets in plastic cover each packet weighing 10 kg.) all affixed with white paper sticker bearing the details: "Agar Agar Strips; N.W.;10 Kgs./Bag; Date of Produce: April 20, 2010; Date of validity: April 20,2012; Batch No.2001004021; Registration No.3500D20012. The consignment was opened and examined in presence of CHA and two representatives. Samples were also drawn and goods seized under mahazar dt. 16.6.2010. On 17.06.2010, the officers of SIIB Seaport Customs Chennai also visited / searched the appellant's firm premises in Chennai. On 7.7.2010, the samples were forwarded to Centre for Advanced Studies in Botany, University of Madras, Guindy Campus, which in its report dated 15.7.2010 opined that the sample was Agar Agar with no pathogenic micro-organisms upon culture on different media. Nevertheless, on 16.8.2010 another representative sample was sent for re-test by the Central Food Laboratory, Mysore which, in turn, sent its opinion dated 13.9.2010 stating as under :

".....the sample of agar agar does not confirm as Food Ingredient under the provisions of PFA Act 1954 & the rules thereof, in that

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- a) Batch no. not mentioned as required under rule 32 e; and
- b) Dates of manufacture & expiry not mentioned as required under rule 32 (f) & 32(i) respectively."

A SCN dt. 01.10.2010 was issued to CMT and other noticees inter alia proposing (a) to reject the price of Rs.82.87-86.13/Kg CIF (USD 1.8-2.5/Kg CIF) declared in the live as well as past five consignments and to enhance to Rs.432.67/Kg CIF;

(b) to deny the benefit of notification No.21/2002-Cus (sl.no.28) & 3/2006-CE (sl.no.1 & 8) claimed in the bills of entry (live and past)

(c) to confiscate the live consignments as well as the past consignments;

(d) to demand customs duty amounting to Rs.16,27,382/- for the past five consignments, charge interest and impose penalty on the appellant as well as on the partners.

3. The appellant assailed the allegations contained in the show cause notice. As regards the live consignment it was contended that the appellant had already paid the duty of Rs.78,588/- and the goods were about to be cleared on 16.6.2010 but they were detained. As regards the past consignment (5 Bills of Entry) the assessments were already over and the Department cannot reopen the assessment done by the officials. Reliance was placed on the ruling of the Hon'ble Supreme Court in the case of South India Television [2007 (214) ELT 3 (SC)].

4. Original adjudicating authority confirmed the demands proposed in the SCN vide an Order-in-Original No.16423/2011 dated 5.7.2011, imposed penalty of Rs.75,000/- under Section 112 (a) of the Customs Act, 1962 on CMT apart from confirming duty, amounting to Rs.16,27,382/- with interest. Equal penalty of Rs.16,27,382/- was imposed under Section 114A ibid. Penalties of Rs.1 lakh each under

Section 114AA ibid were also imposed on A.K.S Mohammed Farook and A.K.S. Haroon Rasheed.

5. On appeal, the Commissioner (Appeals) vide Order-in-Appeal C.Cus No.869-871/2011 dated 27.10.2011 (impugned order for Appeals C/369-371/2011) modified the adjudicating authority's order as follows :

i. The redemption fine imposed for the past consignment was set aside.

ii. Directed the lower authority to consider the request for re-test pertaining to live consignment and on receipt of the test report pass such order as deemed fit. The lower authority's order was set aside for the limited purpose of re-testing.

iii. Except for the above, the order was upheld as far as valuation and suppression of facts are concerned.

6. Aggrieved against the OIA dt. 27.10.2011, all the three noticees namely CMT, A.K.S.Mohammed Farook, A.K.S.Haroon Rasheed filed Appeal Nos.C/371-373/2011 respectively which are now before this Tribunal. While deciding the stay application, vide Stay Order No.175-177/2012 dt. 22.3.2012, the Tribunal inter alia directed pre-deposit of Rs.2 lakhs. The Tribunal also inter alia passed the order as under :

"The appellants plead that because of the delay in release of the goods, the goods are deteriorating and is likely to become unfit for human consumption shortly. They pray for quick relief in the matter. In view of this, we direct the adjudicating authority to pass orders on priority basis and decide the issue whether the goods in question are fit for human consumption preferably within a period of 15 days from today, and if found fit to release the goods on payment of redemption fine as originally decided by the adjudicating authority. This order is without prejudice to the rights of the appellant to contest the merits of such confiscation, in further proceedings."

Pursuant to CESTAT order, retest was conducted and a report was issued on 19.04.2012. The Additional Commissioner of Customs on the

basis of such retest conducted de novo adjudication with regard to the issue of enhancement of value of goods and also confiscation, and vide an OIO No.18829/2012 dt. 23.05.2012 held that declared values of the goods are liable to be rejected, ordered for enhancement of the declared values, held that the entire goods valued at Rs.2,17,478/- imported vide Bill of Entry dt. 14.06.2010 are not fit for consumption since expired and not conforming to the Food Safety and Standards (Packaging and Labelling) Regulations, 2011. CMT was given option to pay a fine of Rs.25,000/- in lieu of confiscation for the purpose of re-export only. The goods were directed to be re-exported within a period of 30 days from the date of the receipt of the order. Penalty of Rs.10,000/- was imposed CMT.

7. Against this order, CMT approached the Commissioner (Appeals), who vide OIA No.382/2014 dt. 10.03.2014, observing that the goods have been exported on payment of redemption fine and penalty issued the following order :

“I have gone through the Order-in-Original and other relevant papers including the submissions made by the Consultant. The issue lies in a short compass. The enhancement of assessable value done by the proper officer is correct as the goods were grossly undervalued. The LAA has cited several contemporaneous imports as well as data collected from internet to show that the goods which were sought to be valued at Rs.86.13/Kg. Was indeed selling in the range of Rs.438-441/Kg. This blatant under-valuation was correctly detected the value enhanced. The pleading that the LAA should not have given any findings with respect to valuation as the matter is still subjudice before the Tribunal, Chennai vide Appeal No.C/371-373/2011 is taken note of.

Coming to the confiscability and reduction of redemption fine and penalty, I find that the goods are eminently confiscable under Section 111 (d) read with Food Safety and Standards Regulations 2011 and Foreign Trade Policy. Since the goods have been declared unfit under Food Safety (Packaging and Labelling) Regulations, 2011, the order for confiscation and imposition of redemption fine only for re-export is also correct. The quantum of Rs.25,000/- imposed as redemption fine is fair as the value of goods is Rs.2,17,478/- . The penalty of Rs.10,000/- under Section 112 (a) is also nominal and need not be interfered with.

As regards the refund of the amount involved since the appellant himself is stating that the LA was not correct in taking up the entire issue when the appeal is pending before Hon'ble Tribunal, I find that any discussion of refund of duty amount would be incorrect at this stage till the final outcome of the appeal before CESTAT. As regards, Rs.3000/- it is directed that the LAA may verify the facts once again and if indeed the amount had not been spent towards the forwarding charges of the samples for test, the same may be refunded as per law.

Hence appeal C/41002/2014 filed by appellant CMT.

8.1 When the matter came up for hearing, on behalf of appellants, Ld. Counsel Shri J. Shankarraman reiterated the grounds of appeal in respect of all the three appellants and also made oral and written submissions which can be summarised as under :

8.2 The valuation adopted by the Department is contrary to law and factually incorrect. The purchase price was Rs.84.60/kg and after adding customs duty, port expenses, transport etc. the value would come to Rs.160.70 and after adding a profit margin of Rs.12% the sale price would be around Rs.180. The same goods have been sold in the market around Rs.200/- kg during the relevant period. Whereas the value was enhanced to Rs.432.67/kg by the original authority. The notice in paragraph 17 admits that though the goods are of comparable quantities the exact nature of the parameters i.e., whether bleached or not and the gel strength and the exact nature of the transaction between the parties is not known. As regards the allegation that one Mohamed Farook the partner is also the owner of M/s.Nisha International Singapore and a partner of M/s.Topsea Enterprises, Hongkong merely based on website contents. He never had ownership or partnership in the above overseas supplier. He cannot hold share or stake in the firms abroad without obtaining permission or observing formalities from RBI, IT department and other government agencies. No evidence has been let in by the Department. For the reasons stated

in the appeal grounds the appeal may please be allowed on merits as well as on limitation.

8.3 As regards Appeal No.C/41022/2014 the department committed the mistake of not placing the sticker on the package indicating the date of expiry and it resulted in huge loss to the appellant. For the fault of the Department the appellant cannot be penalized.

9. On the other hand, Ld. A.R Shri M. Jagan Babu reiterated the findings in the impugned orders.

10.1 After going through the records, we find that the two sets of appeals are undeniably intertwined. The impugned live consignment of Agar Agar Strips was imported vide Bill of Entry dt. 14.06.2010. In the first round of appeals C/371-373/2011, the issues that had come up for Tribunal concerned not only enhancement of declared values of the imported goods and penalties imposed on the other two co-appellants, but also the contention of CMT that due to the delay in release, the goods are deteriorating and are likely to become unfit for human consumption.

10.2 We find that CESTAT vide Stay Order dt. 22.03.2012, the relevant part of which has been reproduced supra, had also directed the original authority to "*pass orders on priority basis and decide the issue whether the goods in question are fit for human consumption*". In the resultant proceedings that have followed, the goods were got retested by the CFTRI, Mysore, who vide their report dt. 19.04.2012 opined that the sample does not conform to the standards of Food Safety and Standards (Packaging and Labelling) Regulation, 2011 for the reasons that since date of expiry declared in the label is dated 20.04.2012 the shelf life of the product is less than 60% and also that manufacturer's address is not given as required. Based only on these report, the Additional Commissioner of Customs proceeded to do de novo

adjudication of the matter and vide order dt. 23.05.2012 held that goods expired on 20.04.2012, therefore they cannot be consumed and cannot be released, hence liable for confiscation under Section 111 (d) of the Customs Act, 1962. The adjudicating authority confiscated the consignment and gave option to pay a redemption fine of Rs.25,000/- in lieu of confiscation, however only for the purpose of re-test. However, we find that the authority has gone beyond the scope of the direction given by CESTAT in the Stay Order dated 22.03.2012 and enhanced declared value of the goods, this time from Rs.82.87 per kg to Rs.437.71 per kg. and also imposed penalty of Rs.10,000/- on the importer under Section 112 *ibid*. We are unable to fathom how such a full scale re-adjudication of the matter including the aspect of re-enhancement of declared value could have been taken up by such adjudicating authority, when the main appeal itself was pending before the CESTAT. The correct procedure in this situation for the adjudicating authority would have been to conduct retest and file the report to the Tribunal as to whether the goods were fit for human consumption or otherwise. No doubt, the Commissioner (Appeals) has taken note of the appellant's contention that the adjudicating authority was not correct in taking up the entire issue when the appeal is pending before the Tribunal. Nonetheless, the Commissioner (Appeals) has passed orders in the impugned order dt. 10.03.2014 predominantly upholding the orders of the original authority.

10.3 In the circumstances, it would be necessary for us to go into the manner and method of the testing conducted at the time of import. The goods were imported on 14.06.2010. Only after almost a month, samples were forwarded to Centre for Advanced Studies in Botany, University of Madras, Guindy Madras who in their report dated dt. 15.07.2010 confirmed that the sample was agar-agar with no pathogenic microorganisms upon culture on different media. For reasons not entirely clear, the department chose to send yet another sample, after one month of first test, on 16.8.2010, this time to Central Food

Laboratory, Mysore (CFTRI). The said Laboratory after passage of almost another month sent its opinion dated 18.09.2010, which stated that the sample does not conform as food ingredient under the provisions of the PFA Act, 1954 and the Rules thereof for the reasons (a) Batch number not mentioned as required under Rule 32 (e) and (b) Dates of Manufacture and Expiry not mentioned as required under Rule 32 (f) & 32 (i) respectively. After passage of almost another two months, the SCN dated 01.10.2010 was issued, which then was adjudicated after a passage of nine months by the first Order-in-Original dated 05.07.2011. Appeal made to the Commissioner (Appeals) was also decided after another three months on 27.10.2011. Although the adjudicating authority in his order had disregarded the report of University of Madras, he had however permitted clearance of the goods for home consumption on payment of redemption fine, which was subsequently torpedoed over by the Commissioner (Appeals) by ordering further retest. We are just not able to reconcile with the humongous delay of more than 16 months in respect of the live consignment, for a journey from import stage to orders by the Commissioner (Appeals) for goods which admittedly had a limited shelf life. This sad episode does not stop here. The Stay Order of CESTAT Chennai dated 22.03.2012 had categorically directed the adjudicating authority to decide the issue whether the goods are fit for human consumption "*preferably within a period of 15 days from today*". However, the said authority took another 60 days to decide this aspect and further, choose to go beyond the scope of the directions of the Tribunal to re-adjudicate all the aspects of the import once again. In the first place, the department's lethargy, in particular, the 16 months delay discussed supra, has resulted in such a piquant situation that when the sample was sent for re-test, CFTRI Laboratory could only point out that the goods have less than 60% shelf life since they expired on 20.04.2012. To add insult to injury, the adjudicating authority in his unauthorised readjudication order dated 23.05.2012 blithely holds in para-36 thereof, that as the goods have already expired, they cannot be

consumed and so decides that the goods cannot be released since they are not fit for human consumption.

10.4 The first CFTRI test report dated 18.09.2010 had opined that the sample did not conform as food ingredient under the provisions of PFA Act, 1954, only for technical reasons like batch number was not mentioned, date of manufacture and expiry was not mentioned. This lapse / discrepancy certainly cannot be attributed to the importer-appellant but only to the officers who forwarded the samples for test. Possibly, if these details had also been made incorporated in the test request, the CFTRI may well have reiterated the report dated 15.07.2010 of the University of Madras that the sample was Agar-Agar only with no pathogenic microorganisms upon culture on different media. The second sample for retest was obviously sent after prolonged delay as a result of which the CFTRI rightly pointed out that the goods were nearing their expiry period.

10.5 It is also interesting to note that even when CFTRI in their initial report dt. 18.09.2010 had flagged the non-mention of batch number and non-mentioning the dates of manufacture and expiry of goods, while sending the samples for retest, the department again goofed up, this time by not mentioning the name of the manufacturer. This is definitely a tragedy for which the department will have to bear the cross, especially when there is no dispute that the appellant-importer had given all these details at the time of import.

10.6 In these circumstances, we hold that the report dt. 15.07.2010 of University of Madras has to be taken as the correct report since only that report has discussed the actual nature and condition of the imported goods. Viewed in this light, impugned goods cannot be then assailed as not conforming to the Food Safety and Standards (Packaging and Labelling) Regulations, 2011.

10.7 The order of enhancement of value by the original authority in his order dt. 23.05.2012 based on NIDB data also cannot be sustained in view of the plethora of decisions by higher appellate forums including those by this Tribunal, for example,

- (i) Aakash Enterprises Vs CC New Delhi
2017 (358) ELT 987 (Tri.-Del.)
- (ii) Vijaya International Impex, Vs CC (Seaport-Import) Chennai
2018 (359) ELT 270 (Tri.-Chennai)
- (iii) Sarda Energy and Minerals Ltd. Vs CCE Raipur -
2018 (359) ELT 262 (Tri.-Del.)

This being so, that portion the Commissioner (Appeals) Order upholding such enhancement of value from Rs.82.87 per kg. to Rs.437.71 per kg. based on NIDB data is therefore set aside. By implication, the goods cannot then be held liable to confiscation under Section 111 (m) of the Act on the charge of undervaluation. In the event, that part of the LAA upholding the order by the original authority of confiscation of impugned goods under Section 111 (m) *ibid* cannot be sustained and is therefore set aside. In consequence, the imposition of redemption fine of Rs.25,000/- under Section 125 *ibid* is also set aside. C/41022/2014 is allowed on above terms with consequential benefits as per law.

10.8 The penalty of Rs.10,000/- imposed on CMT under Section 112 (a) *ibid* on the charge of having rendered the goods liable to confiscation under Section 111 (d) and (m) *ibid* will also have no legs to stand upon and hence that part of the impugned order of LAA upholding such penalty is also set aside.

10.9 However, we do not interfere with the observation of the Commissioner (Appeals) in respect of the claim for refund of duty paid

as also with regard to refund of Rs.3000/- paid towards forwarding charges for testing.

11. Appeal C/41002/2014 is allowed on above terms.

12. Appeal C/371-373/2011 :

- (i) The rejection of declared value of the goods and order for enhancement of value based on NIDB data and upheld by the Commissioner (Appeals) in the impugned order dt. 27.10.2011 in these appeals cannot be sustained for the reasons discussed herein above in view of the various cases laws as discussed supra, and is therefore set aside.
- (ii) In consequence, upholding by the LAA of confiscation of the impugned goods under Section 111 (m) ibid and imposition of redemption fine under Section 125 ibid will also not sustain and are therefore set aside. In consequence, imposition of penalty on CMT, under Section 112(a) / 114A ibid are set aside. So also, penalties of Rs.1 lakh each under Section 114AA ibid on A.K.S.Mohammed Farook and A.K.S. Haroon Rasheed are also set aside.

13. Appeals C/371-373/2011 are allowed on above terms.

(Order pronounced in the open court on 29.04.2019)

(Sulekha Beevi, C.S)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

