CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 50052 of 2019

(Arising out of order-in-original No. 01/CMMR/CUS/ADJ-I/2018 dated 28.09.2018 passed by the Commissioner, Central Goods, Service Tax & Central Excise, Indore).

M/s Hershey India Private Limited **Appellant**
Plot No. 5, New Industrial Area
Mandideep, Raisen Distt, M.P.

VERSUS

Commissioner, Central Goods, Service Tax & Central Excise **Respondent**
Manik Bagh Palace
Post Box No.10, Indore. M.P.

APPEARANCE:

Shri G. Natarajan, Shri Kartik Jindal & Ms. Stuti Karwal, Advocates for the appellant

Shri Sunil Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51356/2019

DATE OF HEARING: 23.04.2019
DATE OF DECISION: 22.10.2019

ANIL CHOUDHARY:

M/s Hershey India Private Limited, Plot No. 05, New Industrial Area, Mandideep, Distt – Raisen (M.P.) (hereinafter referred to as the appellant) is engaged in manufacturing of fruit pulp and other milk based drink beverages including Jumpin, Sofit etc. The appellant imported “Aseptic Packaging Material” for packing the material for their manufactured products under IEC No. 0303014423.

2. For the purposes of manufacturing their products, the appellant started procuring the said Aseptic Packaging Material from Tetra Pak India Pvt. Ltd., in India who classified the product under tariff heading 48115910. It was procured from them for more than 20 years without any dispute in the classification of the product.

3. Subsequently, to meet the increase in demand for its products and further business, the appellant started importing the said packaging material from China. That for procuring the said Aseptic Packaging Material, samples were shared and on that basis considering the usage of the material, the vendor gave a quotation, which suited the appellant. It may be noted that till such time the appellant was not aware about the two categories of the Aseptic Packaging Material viz. Bleached and Unbleached, and also it does not affect the usage of the appellant whether the product be of any category.

4. Thus, the appellant imported the product from China. That vide certificate of origin issued under certificate No. 17C3205B6160/ 00026 the supplier/ exporting country i.e. China classified the Aseptic Packaging Material under HSN Code 4811519100, as no such tariff heading exists under HSN / Customs tariff, appellants adopted the tariff heading 48115910 under the bonafide belief that the product is the same which they used to procure locally from Tetra Pack India Pvt. Ltd. and claimed concessional CVD as applicable for the said

chapter, as done by all other importers. It is pertinent to state that the appellant has only acted upon the bonafide belief regarding the aforesaid classification.

5. Thereafter, the appellant after further negotiations, started making regular imports of Aseptic Packaging Material through Inland Container Depot (ICD), Mandideep, by adopting the classification of the said goods under Custom Tariff heading 48115910, by paying 10% Basic Custom Duty, 6% CVD (vide S. No. 169 of Notification 12/2012-CE dt. 17.03.2012), SAD 4% and applicable Education Cess and Secondary and Higher Education Cess. The Bills of Entries were assessed and cleared under the RMS procedure followed by Customs.

6. It is again relevant to state that the appellant till this time also was unaware of two varieties of Aseptic Packaging Material; 'bleached' and 'unbleached' and the subject goods being bleached were classifiable under chapter heading 48115110, applicable for Bleached Aseptic Packaging Material and not entitled for the benefit of concessional CVD. It is humbly submitted that for the purposes of the operation and usage of the subject goods by the appellant, there was no distinction between bleached and unbleached materials and because the difference could not be ascertained through visual examination, appellant adopted the undisputed classification 48115910, as provided by the Tetra Pak for its products and on the said basis availed the concessional benefit.

7. The appellant made various imports (about 30) of "Aseptic Packaging Material" from Inland Container Depot (ICD), Mandideep through Jawaharlal Nehru Customs House (JNCH), NhavaSheva Port.

8. That the Custom Department sought clarification from the appellant with respect to classification of product under CTH 4811 5910. The appellant vide letter dated 16.1.2017 informed the department that the goods were rightly classifiable under the said heading and undertook to pay the differential duty if it was found otherwise on clarification from its exporters.

9. That the appellant immediately after such enquiry from the department, sought clarification from its vendor at China who stated that the said imported product has a component of Bleached paper, and upon such clarification from the supplier as to classification and nature of the product being shipped by them, it came to their knowledge that there are two varieties of Aseptic Packaging Material, bleached and unbleached and the subject goods imported by the appellant were bleached and classifiable under chapter heading 4811 5110 and thereby not being entitled for the benefit of concessional CVD as provided by the Notification No. 12/2012-CE dated 17.03.2012. The appellant vide letter dated 02.03.2017, immediately informed the Customs Department and agreed to pay the differential customs duties. It may be noted that the said action of paying differential duty was voluntary and there was no demand from the department till such time. Further, it was never the intent of the appellant to evade the duty and had acted to adopt the classification only under its bonafide belief. It is humbly submitted that for the

purposes of the operation and usage of the subject goods by the appellant, there was no distinction between bleached and unbleached materials and because the difference could not be ascertained through visual examination. The above sequence of events would vouch the law abiding nature of the appellant and their bonafides.

10. The appellant vide Challan No. 0733/22/03/2017/01 dated 22.03.2017 paid differential custom duty of Rs. 1,75,82,864/- including interest of Rs. 16,17,303/- and further an amount of Rs. 1,01,159/- towards interest vide Challan No. 0733/15-4-2017/01 dated 15.04.2017. That the said payments were made by the appellant voluntarily and legitimately acknowledging their mistake and without any dispute or delay, paid the amount due from them before the issuance of any notice upon them. It is pertinent to mention that the appellant on 17.07.2017 (after issue of show cause notice) for taking benefit of Section 28(5) and (6) of the Customs Act, 1962, also paid 15% penalty under protest to the tune of Rs. 23,88,612/- to safeguard further penal consequences. Though the appellant was of the view that no penalty was payable by them, in order to reduce the impact of penal consequences, they paid this reduced penalty, as provided for in the statute, in a worst case scenario. That is why they have informed the department that the payment of penalty was under protest.

11. The appellant duly acknowledged their mistake, addressed all correspondences from the Department and paid the differential custom duty alongwith interest. The said misunderstanding arose

from precedent classification by appellant's suppliers and as adopted by the appellant himself.

12. Thereafter a show cause notice No. 01/COMMR/CUS/ICD-MDP/2017 dated 15.06.2017 was issued to the appellant alleging of wilfully mis-declaring and wrongly classifying the goods under Customs Tariff heading 48115910 and not under 48115110, thereby evading proper payment of custom duties. The notice also proposed to demand differential customs duties of Rs. 1,59,24,081/- with respect to 30 bills of entries alongwith interest under Section 28 AA of the Customs Act, 1962 and proposing to impose penalty under Section 112(a) and 114AA of the Act. Further, it proposed to appropriate the differential custom duties amount paid by the appellant to the tune of Rs.1,59,24,081/- and Rs. 17,08,181/- against total interest payable.

13. The show cause notice was adjudicated on contest and the proposed classification by Revenue was confirmed. Further, the differential duty of Rs. 1,59,24,081/- was confirmed and also appropriated from the pre-deposit made alongwith interest before issue of show cause notice. Further, the goods were held liable for confiscation imported during the period 7.12.2015 to 03.02.2017 under Section 111(m) of the Act, allowing redemption at Rs. 2 crore. Further, penalty of Rs. 5 lakhs was imposed under Section 112 of the Act. Further, penalty is imposed under Section 114A of Rs.39,81,020/-, appropriating from the amount already deposited on 19.07.2017, i.e. within one month of the service of the show cause notice dated 15.06.2017. Thereafter, a corrigendum dated

05.12.2018 was issued substituting the penalty under Section 114A with Rs. 1,59,24,081/- instead of Rs. 39,81,020/-. Further, specifying that the benefit of reduced penalty under the 1st proviso of the said section is thereby available as per statute.

14. Learned Counsel draws our attention to the certificate of origin, issued by 'China Council' for the Promotion of International Trade wherein it is mentioned as Aseptic Packaging Material, having H.S. code 4811519100 relating to invoice dated 27.01.2016. Further, draws our attention to tax invoice No. 1414240 dated 30.01.2014 issued by Tetrapack India Private Limited on appellant, wherein Aseptic Packaging Material has been classified under tariff code 48115910. These documents are on record and the copy of the same is also enclosed in the appeal. It is further urged that there is no malafide on the part of the appellant and the issue was wholly interpretational in nature. Further, the appellant have accepted the classification by Revenue on being pointed out, and have also deposited the differential duty with interest much prior to issue of show cause notice. In this view of the matter, the show cause notice is wholly uncalled for as there has been no pending dispute for adjudication. Learned Counsel also draws our attention to the letter of appellant dated 17.04.2017 addressed to the Assistant Commissioner of the Division, giving intimation of the deposit of differential duty alongwith interest, specifically stating therein as the appellant have deposited the differential duty/ CVD alongwith interest, hence, the issue may be treated as closed. Learned Counsel also draw our attention to their letter dated 16.01.2017 addressed to

the Assistant Commissioner of Customs wherein they have categorically stated that they are importing Aseptic Packaging Material classified under HSN code 48115910 instead of 4811 5110 and were claiming benefit of Notification No. 12/2012, Sl. No. 169. Further, stating that according to them they have rightly classified under ITC 4811 5910. Further, undertaking to pay any differential duty and later on it is found that there classification is not proper by the Department.

15. It is further urged that in the aforementioned facts and circumstances, the issue of show cause notice is bad and there is no serious allegation of any malafide on the part of the appellant, and except that the classification adopted by appellant created an ambiguity in view of the certificate of origin, classifying the goods under HS code 4811519100. It is further urged that only when the Revenue made enquiry and appellant have made further inquiry from their supplier/ manufacturer based at China, they could understand that they are importing Aseptic Packaging paper which is bleached. In view of the exemption notification it appeared to Revenue that the appellant importer wrongly classified and availed benefit of exemption/ concessional duty which was not available in case of Aseptic Packaging Material classifiable under 48115110 under which exemption is not available vide Notification No. 12/2012. It is further urged that the appellant had filed Bills of Entry giving the classification according to them, and it was upon the Customs Department to dispute the classification as bills of entry is finally assessed by the Department, and there is no case of any deliberate

mischief or malafide on the part of the appellant. Accordingly, they prayed for setting aside of the penalty imposed.

16. Learned Authorised Representative appearing for the Revenue supports the impugned order. He further stated that the appellant company is a multinational and they have the advice of competent professional available. Thus, such type of error in classification on their part appears to be with a malafide design to avail the benefit of concessional rate of duty, which was not available under the right classification.

17. Having considered the rival contentions, we find that admittedly appellant have paid the differential duty with interest much before the issue of show cause notice. Further, subsequent to issue of show cause notice dated 15.06.2017, appellant have also deposited penalty @ 15% on 19.07.2017 i.e. within one month of the service of the show cause notice. We find that sub-section (5) read with sub-section and (6) of Section 28 of Customs Act provides that, where any duty is short levied has not been charged by reason of collusion or any wilfull mis-statement or suppression of facts by the importer, to whom a notice have been served under sub-section (4), such person may pay the duty in full or in part as may be, accepted by him and the interest payable thereon and the penalty equal to 15% of the duty specified in the notice, or the duty so accepted by that person, within thirty days of receipt of the notice and informed the proper officer of such payment in writing, the proper officer shall on recording satisfaction that the duty with interest and penalty (@15%) have been paid in full, then the proceeding in respect of such person

to whom notice is issued under sub-section (4) shall be deemed to be conclusive, as stated therein.

18. In view of the provisions of sub-section (5), (6) read with sub-section (4) of Section 28, we hold that the proceedings stood concluded on deposit of differential duty alongwith interest and 15% penalty. In view of the matter, we set aside the impugned order in original and allow the appeal with consequential benefits.

(Pronounced on 22.10.2019)

(Anil Choudhary)
Member (Judicial)

(C. L. Mahar)
Member (Technical)

Pant