

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75652 of 2015

(Arising out of Order-in-Original No. KOL/CUS/PORT/18/2015 dated 30.03.2015 passed by the Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. DIC India Limited

Transport Depot Road,
Kolkata – 700 088

: Appellant

VERSUS

Commissioner of Customs (Port)

Customs House, 15/1, Strand Road,
Kolkata – 700 001

: Respondent

APPEARANCE:

Shri Rahul Tangri, Advocate
Assisted by Smt. Uditā Saraf, Advocate
for the Appellant

Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76782 / 2024

DATE OF HEARING / DECISION: 28.08.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. DIC India Limited, Transport Depot Road, Kolkata – 700 088 (hereinafter referred to as the 'Appellant') has imported the goods "SCRIPTANE PW 28/32H (Petroleum Hydro-treated Middle)" and classified the said goods under Chapter Heading 2709.

2. During the period from February 2010 to September 2010, the Appellant has filed 17 Bills-of-Entry classifying the same goods under CTH 2709 and claimed the benefit under Serial No. 487 of Notification No. 21/2002-Cus. dated 01.03.2002 wherein Basic Customs Duty (BCD) at the rate of 5%

and CVD at the rate of 'nil' is payable. The said 17 Bills-of-Entry were finally assessed by the Customs authorities.

2.1. Subsequently, another 2 Bills-of-Entry viz. Bill-of-Entry No. 560525 dated 25.08.2010 and Bill-of-Entry No. 565304 dated 17.09.2010 were filed by the Appellant classifying the goods under CTH 2709 and claiming the customs duty benefit as above. An enquiry was initiated against the Appellant in respect of the classification of the imported goods i.e., SCRIPTANE. The Department assessed the goods imported by the appellant under the two Bills-of-Entry provisionally under Customs Tariff Heading 2710 on payment of BCD at the rate of 5% and CVD at the rate of 14%. Samples were also drawn under Bill-of-Entry No. 565304 dated 17.09.2010 and sent to the Chemical Examiner, Customs House, Kolkata on 30.11.2010. However, the Chemical Examiner has not given any test report. After two and a half years, another sample was drawn by the Department from another consignment imported in February, 2013 and sent to IIT, Kharagpur vide letter dated 15.02.2013 asking for the classification of the goods. A report dated 26.04.2013 was obtained from IIT, Kharagpur wherein it was opined that the samples fall under Group-B of Annexure-A i.e., CTH 2710.

3. Accordingly, a Show Cause Notice dated 26.12.2013 was issued to the Appellant proposing to demand duty of Rs.52,42,872/- along with interest and penalty.

4. The Notice was adjudicated by the Ld. Commissioner of Customs vide the impugned order wherein the demand as proposed in the Notice was confirmed, along with interest. A penalty of

Rs.1,00,00,000/- was imposed under Section 114A of the Customs Act, 1962. The Ld. Commissioner has also ordered confiscation of the goods imported vide the 19 Bills-of-Entry and imposed redemption fine in lieu of such confiscation.

4.1. Aggrieved against the confirmation of the demands, re-classification of the goods, imposition of redemption fine and penalty, the Appellant filed this appeal.

5. The Appellant submits that 17 Bills-of-Entry were filed by them during the period from February 2010 to September 2010 which were assessed finally classifying the goods under Chapter Heading 2709. It is submitted that the Department did not raise any doubt about the classification of the goods in respect of these 17 Bills-of-Entry and the goods were assessed finally. Thus, the appellant submits that they have not suppressed any information and all the relevant facts were well within the knowledge of the Department. Accordingly, the Appellant submits that there is no suppression of facts with intention to evade payment of tax established in this case and hence, the Show Cause Notice issued on 26.12.2013 by invoking the extended period of limitation is not sustainable. In this regard, the Appellant relied upon the decision in the case of *Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut* [2005 (188) E.L.T. 149 (S.C.)]

5.1. In respect of the 17 Bills of Entry which were assessed finally, the Appellant also submits that when the authorities were already aware of the alleged discrepancy, the Show Cause Notice invoking the extended period of limitation is not permissible. In this

regard, the Appellant has relied upon the following decisions: -

- (i) *Commissioner of Central Excise, Mangalore v. Pals Microsystems Ltd.* [2011 (270) E.L.T. 305 (S.C.)]
- (ii) *Mopeds India Ltd. v. Commissioner* [1991 (56) E.L.T. 241 (Tribunal)] affirmed by the Hon'ble Supreme Court in 1991 (53) E.L.T. A79 (S.C.)

5.2. The Appellant also submits that mere misclassification of a product can never be a ground for alleging suppression and thus, invoking the extended period of limitation is not sustainable. Reliance was placed on the following decisions in support of their contention: -

- (i) *Incredible Unique Buildcon Pvt. Ltd. v. Commissioner of C.Ex. & S.T., Alwar* [2022 (65) G.S.T.L. 377 (Tri. - Del.)]
- (ii) *Kayem Food Industries Pvt.Ltd. v. Commissioner of C.Ex., Delhi-III* [2018 (10) G.S.T.L. 394 (Tri. - Chan.)]

5.3. In respect of the remaining 2 Bills-of-Entry which were provisionally assessed by re-classifying the goods under CTH 2710, the Appellant submits that the report obtained by the Department from IIT, Kharagpur was based on a sample drawn from a consignment imported in the year 2013; the test report merely stated that the said goods fall under category B viz. Heading 2710; this classification was based on the leading queries raised by the Department seeking to categorize the petroleum products under three specific categories namely, CTH 2709, 2710 and 2713. It is further submitted in this regard that the test report does not serve as a proper evidentiary document and confirmation of duty based on such reliance would be violation of the principles of

natural justice. In this regard, the Appellant placed their reliance on the decision in the case of *Jaymco Polymers Pvt. Ltd. v. Commissioner of Cus., (Import) [2022-TIOL-629-CESTAT-MUM]* wherein the demand confirmed on the basis of test report was set aside holding that the sampling was not done in conformity with the prescribed specifications and hence, the report cannot be relied upon. The Appellant submits that it is the settled position of law that the chemical examiner can only give an opinion about the nature of the goods and not the classification of the goods. Reliance in this regard is placed on the decision in the case of *Essar Oil Ltd. v. Commissioner of Cus. (Preventive), Jamnagar [2015 (326) E.L.T. 310 (Tri. – Ahmd.)]*. In view of the above, the Appellant submits that re-classification of the goods imported and confirmation of demand on the basis of test report received from IIT, Kharagpur is not sustainable.

6. On the other hand, the Ld. Authorized Representative appearing for the Revenue reiterated the findings in the impugned order.

7. Heard both sides and perused the appeal records.

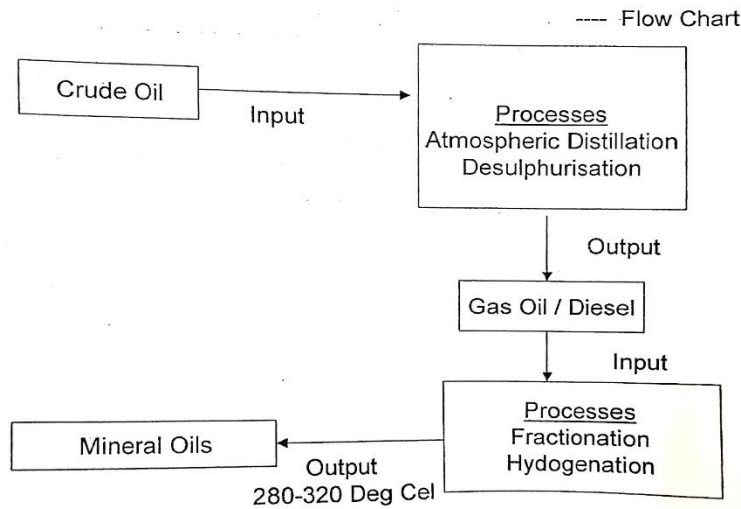
8. We observe that the appellant has imported the goods viz. "SCRIPTANE PW 28/32H (Petroleum Hydro-treated Middle)" and classified the said goods under Chapter Heading 2709. In respect of the 17 Bills-of-Entry filed by the appellant during the period from February 2010 to September 2010, we observe that the Bills of entry were assessed finally classifying the goods under Chapter Heading 2709. We observe that the Department did not raise any doubt about the classification of the goods in respect of these 17 Bills-of-Entry when the goods were assessed finally. These

final assessments were not challenged by the department and hence the assessment attained finality. We observe that the department cannot re-open the classification of the goods imported vide these 17 Bills of Entry later by invoking suppression clause. We observe that the appellant has not suppressed any information from the department when the goods were imported under these 17 Bills of entry and all the relevant facts were well within the knowledge of the Department. Thus, we hold that there is no suppression of facts with intention to evade payment of tax established in this case and hence, we hold that the Show Cause Notice issued on 26.12.2013 by invoking the extended period of limitation is not sustainable. Thus, we hold that the re-classification of the imported goods vide the 17 Bills of entry under CTH 2710, on the basis of Test Report received from IIT, Kharagpur, is not sustainable. Accordingly, we set aside the demands confirmed in the impugned order in respect of all these 17 Bills of Entry.

8.1. Regarding classification of the goods imported vide the two Bills of Entry as mentioned in paragraph 2.1 *supra*, the Appellant submits that proper classification of these goods is also under Chapter Heading 2709. For the sake of ready reference, CTH 2709 of the Customs Tariff Act, 1975 is reproduced below: -

2709 00 00	Petroleum oils and oils obtained from bituminous minerals, crude	kg.	5%	-
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8.2. In this regard, the Appellant submitted a flow chart of the manufacturing process of the impugned goods along with diagrammatic display, which is reproduced below: -



8.3. As per the description provided under Chapter Heading 2709, we observe that Petroleum oils and oil obtained from crude fall under Chapter Heading 2709. In this case, from the flowchart extracted hereinabove, we observe that the goods imported by the Appellant is extracted from crude. Thus, we find that the product viz. SCRIPTANE is appropriately classifiable under CTH 2709. We observe that the adjudicating authority has considered the classification of the impugned goods under CTH 2710, as the supplier of the goods classified the goods under CTH 2710. The adjudicating authority also relied upon the report of the Chemical Examiner to classify the goods under the CTH 2710. In this regard, we observe that it is the settled position of law that the Chemical Examiner can only give an opinion about the nature of the goods and not the classification of the goods. Similarly, value of the goods, if any, mentioned by the Chemical Examiner should be corroborated by other evidences such as market enquiry. Reliance in this

regard is placed on the decision in the case of *Essar Oil Ltd. v. Commissioner of Cus. (Preventive), Jamnagar* [2015 (326) E.L.T. 310 (Tri. – Ahmd.)]. We observe that the classification of the imported goods is to be done as per the Tariff Entries, Section Notes and Chapter Notes of the Customs Tariff Act, 1975. Classification of the goods mentioned by the supplier in the Invoice is not relevant for determining the classification of the goods imported into the country. In this case, since the goods imported are extracted from Crude, it appropriately fit into the description of the Tariff Entry 2709. Accordingly, we hold that the impugned goods imported by the Appellant vide the two Bills of Entry as mentioned in paragraph 2.1 *supra*, are appropriately classifiable under Chapter Heading 2709 and they are eligible for the benefit of exemption as per Sl. No. 487 of Notification No. 21/2002-Cus. dated 01.03.2002.

9. In view of the above, we hold that the classification of the goods under CTH 2710 in the impugned order in respect of all the 19 Bills of Entry is not sustainable and accordingly, the demand of differential duty confirmed in the impugned order in respect of all the 19 Bills-of-Entry by re-classifying the impugned goods under CTH 2710 is set aside.

9.1. Since the demand raised against the Appellant itself is set aside, the question of demanding interest and penalty does not arise. We also find that the ingredients required for imposing penalty under section 114A does not exist in this case. Accordingly, we set aside the penalty of Rs.1,00,00,000/- imposed under Section 114A of the Customs Act, 1962.

10. In the result, the impugned order is set aside and the appeal filed by the Appellant is allowed.

(Operative part of the order was pronounced in open court)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd