IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/295/2010
CROSS-OBJECTION NO: C/CO-76/2012

[Arising out of Order-in-Appeal No: 777 to 782 (Gr.II.D)/2009 (JNCH)/IMP-378 to 383 dated 23rd December 2009 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Commissioner of Customs (Imports)
Nhava Sheva … ***Appellant***

versus

Positive Packaging Industries Ltd ***…Respondent***

APPEAL NO: C/444/2012

[Arising out of Order-in-Appeal No: 119 (GR.CRC-I) /2011 JNCH-IMP-105 dated 29th February 2012 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Huhtamaki PPL Ltd … ***Appellant***

versus

Commissioner of Customs (Imports)
Nhava Sheva ***…Respondent***

Appearance:

Shri PK Shetty, Advocate for assessee

Shri Manoj Kumar, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 30/08/2018
Date of decision: 04/10/2018

ORDER NO: A/87532-87533/2018

Per: C J Mathew

By this common order, we dispose off these appeals of Revenue and assessee impugning two different orders-in-appeal but relating to the same imports.

2. The appeal of Revenue is against order-in-appeal no. 777 to 782 (Gr.II.D)/2009(JNCH)/IMP-378 to 383 dated 23rd December 2009 of Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai – II which, upon appeal against assessment of anti-dumping duty, leviable *vide* notification no. 82/2009-Cus dated 20th July 2009, in six bills of entry, no. 712724/08.10.2009, no. 706798/05.10.2009, 713422/08.10.2009, 715745/10.10.2009, no. 717918/12.10.2009 and no. 722373/15.10.2009, for import of 'polypropylene cosmoplene terpolymer' of various grades, granted relief to M/s Positive Packaging Industries Ltd (now M/s Huhtamaki PPL Ltd).

3. Though the objection of M/s Huhtamaki PPL Ltd to coverage under the notification imposing anti-dumping duty on the plea that it was limited only to 'homopolymers of propylene and copolymers of propylene and ethylene' and not extendable to imports of 'terpolymers of propylene, ethylene and butyne', was not accepted by the assessing officer, the first appellate authority did so leading to appeal of Revenue. Cross-objection of the importer is also taken up for disposal.

4. In the meanwhile, importer sought refund of the duty liability discharged on assessment which, though sanctioned, was credited to the Consumer Welfare Fund in accordance with section 27 of Customs Act, 1962. The upholding of this in order-in-appeal no. 119 (GR.CRC-I)/2011 JNCH-IMP-105 dated 29th February 2012 of Commissioner of Customs (Appeals), Mumbai – II is the cause of appeal by M/s Vista Film Packaging (now M/s Huhtamaki PPL Ltd).

5. According to Learned Authorised Representative, the cited notification imposes anti-dumping duty on 'copolymers of polypropylene' imported through Singapore from M/s Sumitomo Corporation Asia Pte Ltd and relies upon note 4 of chapter 39 of the First Schedule to Customs Tariff Act, 1975, *i.e.*

> *'4. The expressions "copolymers" covers all polymers in which no single monomer unit contributes 95% or more by weight to the total polymer content.*
>
> *For the purposes of this Chapter, except where the context otherwise requires, copolymers (including co-polycondensates, co-polyaddition products, block copolymers and graft copolymers) and polymer bends are to be classified in the heading covering polymers of that comonomer unit which predominates by weight over every other single comonomer unit. For the purposes of this Note, constituent comonomer units of polymers falling in the same heading shall be taken together.*
>
> *If no single comonomer unit predominates, copolymers or polymer blends, as the case may be, are to be classified in the heading which occurs last in numerical order among those*

which equally merit consideration.'

and placing further reliance on the sub-heading notes, in the context of inclusion of 'co-polymers', he contends that the first appellate authority had failed to render a proper interpretation on the dutiability of the said goods.

6. *Per contra*, Learned Counsel, advancing the grounds adduced in the memorandum of cross-objection, argues that the final findings of the anti-dumping duty authority, which is the sole foundation for issue of customs notification, has clearly restricted itself to the imports of 'homopolymers and copolymers of the particular product'. Drawing attention to the scope of the examination by the anti-dumping authority in paragraph 30 of the findings, Learned Counsel also submitted that 'terpolymers' were specifically excluded from its consideration. Amplifying on this, he also submits that final notification no. 119/2010-Cus dated 19th November 2009, at serial no. 18, adopts the description furnished by the designated authority to the exclusion of all else. According to him, this particular notification was subject to further clarification in no. 354/140/2009-TRU dated 3rd December 2010, removing 'terpolymer' from coverage in the description pertaining to the imposition of duty. Our attention is also drawn to order-in-appeal no. 714(Gr.IIG)/2017 (JNCH)/Appeal-II dated 20th October 2017 of Commissioner of Customs (Appeals-II), JNCH, Nhava Sheva, which has, in appeal against assessment of the

anti-dumping duty, held clearly, on the basis of this amendment, that 'terpolymers' imported by the appellant are not liable to anti-dumping duty. Learned Counsel contends that acceptance of this order by Revenue precludes the profession of a contrary stand in the present appeal. Considering the clarification issued and the scope of the proceedings before the anti-dumping duty authority, we are in complete agreement with the order of first appellate authority that anti-dumping duty is not leviable on the impugned imports.

7. On the appeal against the disposal of the refund claim, we take note that there is an adumbration of the test of unjust enrichment; to counter this, the balance sheets for the relevant years were also submitted. We find that, in the relevant years, appropriate provisions have been made indicating that the incidence of duty had been borne by the importers. With the invalidation of imposition of anti-dumping duty, the duty collected in consequence should not, in these circumstances, have been credited to the Consumer Welfare Fund but released in accordance with the provisions of section 27 of the Customs Act, 1962. We set aside the order impugned and allow the appeal of assessee.

(Pronounced in Court on 04/10/2018)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as100914091809*