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

Appeal No. C/332 to 337/2011

(Arising out Order-in-Original No. 13/Cus/2010-11/C dated 28.02.2011 & 12/Cus/2010-11/C dated 25.02.2011 passed by the Commissioner of Central Excise & Customs, Nagpur)

For approval and signature:
Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

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M/s. Automark Technologies (I) Pvt Ltd — Appellant
Mayur Khara
Bharat Shipping Agency
M/s. Automark Industries (I) Pvt Ltd
Mayur Khara
Bharat Shipping Agency

Vs.

Commissioner of Central Excise, Nagpur — Respondent

Appearance:

Shri H.G. Dharmadhikari, Advocate for the appellant
Ms.P.V. Sekhar, Addl. Commissioner (AR) for the respondent

CORAM:
Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Ajay Sharma, Member (Judicial)

Date of hearing : 12-02-2019
Date of decision : 09-04-2019

O R D E R No: **A/85689-85694/2019**

Per: C J Mathew

We dispose off these appeals of M/s Automark Technologies (I) Pvt Ltd and M/s Automark Industries (I) Pvt Ltd, arising from order-in-original no. 13/Cus/2010-11/C dated 28th February 2011 and no. 12/Cus/2010-11/C dated 25th February 2011, pertaining to import of goods that were declared as 'glass beads' and classified under heading no. 70181020 of First Schedule to Customs Tariff Act, 1975 between 23rd June 2006 and 26th September 2009 and from 15th February 2005 to 26th September 2009 respectively. The goods had been cleared after due assessment and after the test result confirmed the declaration. Subsequently, these consignments were taken up for investigation and proceedings initiated against importers for mis-declaration of the goods that were alleged to be 'glass microspheres' classifiable under heading no. 70182000 of First Schedule to Customs Tariff Act, 1975. Though appellant does contest the revised classification in these proceedings, the primary arguments are directed at the inappropriateness of invoking the extended period in the absence of any evidence to support the finding of suppression or wilful mis-representation.

2. Clarifying that the impugned goods are used to imprint letters and symbols upon asphalt and other road surfaces after mixing with other material, Learned Counsel for the appellant submits that the imports effected against 83 bills of entry did not lack full disclosure including all documents which are also referred to in the show cause notice and adjudication order. He submits that, prompted by a different heading in the certificate of origin samples had been drawn and that the goods were finally released only against test reports confirming the declaration. Furthermore, he contends that upon import of another consignment of theirs, the customs authorities at Jawaharlal Nehru Customs House, Nhava Sheva had directed them to alter the classification from heading no. 70181020 to heading no. 70169000 of the First Schedule of Customs Tariff Act, 1975 indicating the glaring lack of certainty on the part of the customs administrators themselves. Furthermore, he contends that the appellants, being entitled to CENVAT credit of additional duties of customs, which was the sole consequence arising from reclassification, could not be saddled with the motive of duty evasion by incorrect classification.

3. Learned Counsel claims support from the decision of the Tribunal in *Commissioner of Customs, Kanpur v. Nabroco Tools & Technologies Pvt Ltd [Final order no. 72784/2018 in appeal no. C/70706/2018-CU(DB)]* which has relied upon the decision of the Hon'ble High Court of Bombay in *Starlight Corporation v. Union of*

India [1989 (39) ELT 538 (Bom)] and of the Tribunal in *VMB Impex v. Commissioner of C.Ex., Cus & Service Tax [2015 (321) ELT 522 (Tri-Bang.)]* that was approved by the Hon'ble Supreme Court.

4. Learned Authorised Representative contends that raising of the issue of limitation is not tenable at this stage as the lower authority has dealt with that aspect at length drawing strength from the admitted awareness of the circular of the Director General of Foreign Trade acknowledging classifiability of the goods as of ‘glass beads’, the literature of various suppliers of the importer and the analysis report of the overseas authorities as evidence of intention to obfuscate the correct classification. It is also pointed out that the *Explanatory Notes* in the Harmonised System of Nomenclature makes it abundantly clear that the heading proposed in the show cause notice is intended to be entirely distinct from the heading claimed by the appellants and that the usage is inextricably associated with the entry for ‘glass microspheres’. According to her, the substantive difference between the two is that ‘glass beads’ are in the form of ‘small pierced balls more or less rounded in shape cut by action of frictional heat in a metal drum placed over a furnaces’ while ‘glass microspheres’, being intended for specialized use, are ‘perfect spheres of solid cross section.’

5. Having considered the rival submissions, we find that the ‘glass and glassware’ includes glass beads, glass microspheres etc. and

these have been grouped as ‘glass beads’, ‘glass microspheres’ and ‘others’ indicating these to distinct products. The reliance placed on the decision of the Tribunal in *re Nabroco Tools & Technologies Pvt Ltd* and in *re VMB Impex,* doubtlessly flowing from the decision of the Hon'ble Supreme Court in *re Starlight Corporation,* may not sustain the contention of the appellants as the goods imported in dispute therein were ‘faceted glass beads’ rendering alternative classification under a residuary sub-heading, sought by Revenue, to be unacceptable which do not conform to the goods impugned in the present dispute. In those circumstances, the reliance placed on a decision of the pre-Central Excise Tariff Act regime, with specifically enumerated items that are liable to duties of excise, relevant in the dispute in *re Starlight Corporation,* is not applicable here. It is, therefore, clear from the structure of the relevant chapter in the First Schedule to Customs Tariff Act, 1975 that the imported goods must squarely fall under heading no. 70182000.

6. It is apparent that the same documents, *viz.* the certificate of origin and the certificate of analysis, based on which the impugned order has reclassified the goods, were available with the assessing officer at the time of import. The distinct and different classification adopted in Jawaharlal Nehru Custom House, Nhava Sheva is also a clear pointer to the confusion in classification that may absolve the importers of deliberate intent to misdeclare. It is also apparent that the consequence of differential levy, being restricted to additional

duties of customs, that no particular gain would have accrued to the appellant by misdeclaring the goods. In view of this, we find that the extended period under section 28 of Customs Act, 1962 cannot be invoked for demand of duty.

7. We take note that, during the pendency of the dispute, the appellants had discharged duty liability of ₹15,35,649/- and ₹8,70,494/- pertaining to imports from 23rd June 2009 to 26th September 2009 by M/s Automark Technologies (I) Pvt Ltd and between 15th February 2005 and 26th September 2009 by M/s Automark Industries (I) Pvt Ltd. There is no further amount due from them. As the demand is restricted to normal period of limitation, and in view of the specific finding of lack of deliberate misclassification, there is no scope for invoking penalties under section 114A of Customs Act, 1962 or under section 112 of Customs Act, 1962. Accordingly, we modify the impugned order to restrict the demand to duty and interest for the normal period of limitation. All penalties are set aside.

(Pronounced in Court on 09-04-2019)

(Ajay Sharma)	**(C J Mathew)**
Member (Judicial)	**Member (Technical)**

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