CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. C/993/2010

(Arising out of Order-in-Appeal No. 266 (GR.VI)/2010(JNCH)/IMP-251 dated 27.09.2010 passed by Commissioner Customs (Appeals), Mumbai-II, JNCH, Sheva)

Kores (India) Ltd. **Appellant**
Plot No.10,
Off Dr. E. Moses Road,
Worli, Mumbai 400 018

Vs.

Commissioner of Customs (I), N.S. **Respondent**
JNCH, Post Uran,
Dt. Raigad,
Sheva 400 707.

Appearance:

None for the Appellant
Ms. Trupti Chavan, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/85792/2019**

Date of Hearing: 21.01.2019
Date of Decision: 21.01.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against order in appeal No 266 (GR.VI)/2010 (JNCH)/IMP-251 dated 27.09.2010 of the Commissioner Customs (Appeal) JNCH Nhava Sheva. By the impugned order Commissioner (Appeal) has held as follows:

"I uphold the Order in Original with the modification that the goods are classifiable under CTH 34070010 and reject the appeal."

1.2 By his order in original, Joint Commissioner Customs Group IV, has held as follows:'

"10. I order to re-classify the goods under CTH 96020090 of the goods viz "creative Toys/ Modelling Clay" covered under B/E No 650647 dtd 27.08.09 under Section 111(m) of the Customs Act, 1962.

11. I also impose a penalty of Rs 10,000/- (Rupees Ten Thousand Only) on the importer M/s Kores (India) Ltd under Section 112 (a) of the Customs Act, 1962.

12. On payment of penalty, the above said Bill of Entry shall be reassessed with amendment in description and classification of the goods."

2.1 Appellants had filed Bill of Entry No 650647 dated 27.08.2009 for import clearance of 1778 Cartons of "Creative Toys Modelling Clay" as per invoice No NARA2009/33/KORE dated 23.06.2009 for an invoice value of US$ 33770.88. They claimed classification under CTH 95030090.

2.2 After examination of the goods on first check basis, the assessing group was of the view that they had misdeclared the CTH as 95030090 instead of 34070010 to avoid payment of CVD @ 8%.

2.3 Thus revenue was of the view because of misdeclaration of Classification to avoid CVD, the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962 and appellants were liable to penalty under Section 112(a) of the Customs Act, 1962.

2.4 The matter was brought to notice of the importer (appellant) and after considering the submissions made by the appellant vide their letter dated 17.09.2009 and during the personal hearing on 01.10.2009, Joint Commissioner, adjudicated the matter as per his order referred in para 1.2, supra.

2.5 Aggrieved appellants preferred appeal before Commissioner (Appeal). Commissioner (Appeal) disposed of the appeal filed as per his order in appeal referred in para 1, supra.

2.6 Aggrieved appellants have preferred this appeal.

3.1 In their appeal appellants have challenged the impugned order stating that-

i. From the terms CTH 34070010, it is evident that said heading is in respect of "modeling paste" and CTH 95030090 is in respect of "toys". Thus the dispute in the present case is whether the imported goods are "modeling paste" or "toys"

ii. Commissioner (Appeal) has in his order referred to HSN Explanatory Notes to Chapter 9503, wherein it has been stated that this heading excludes modeling pastes put up for children's amusement. The imported goods are not modeling paste, but clay. Clay is use by children by constantly changing its shape and is thus clearly a recreational model as child indulges in re-creative activity by constantly changing its shape.

iii. Since the clay imported by them is not "modeling paste" the imported goods would merit classification under CTH 95030090.

iv. In past when they imported the same goods Custom Authorities had assessed the Bill Of Entries under CTH 95030090. [Bill Of Entry No 758703 dated 23.01.2009].

v. The imported goods is used exclusively by children for entertainment by making different shapes by help of different moulds. The product is marketed and sold as "modeling clay for children's play and entertainment." It is settled law that irrespective of technical/ chemical composition, the classification should be determined as per the trade understanding and recognition. [Metagraphs Pvt Ltd [1996 (88) ELT 630 (SC)], Shon Ceramics Pvt Ltd [191 (52) ELT 608 (T)], Calcutta Chemical Co Ltd [2008 (232) ELT 637 (T)]}

vi. The imported goods thus were correctly classifiable under CTH 95030090 as claimed by them.

vii. Penalty imposed on them is not justified.

4.1 None appeared for the Appellants at time of hearing despite notice. Matter had been fixed for hearing on 13.07.2018, 8.11.2018 and 21.01.2019. Since matter has been adjourned number of times it has been taken up for disposal after hearing Ms Trupti Chavan, Assistant Commissioner, Authorized representative for revenue.

4.2 Learned Authorized Representative reiterated the findings of the Commissioner (Appeal). She submitted that the imported goods under consideration are nothing but "modeling paste put up for amusement of children" and hence as per HSN explanatory note excluded from heading 9503 as claimed by the appellant. She also referred to the terms of heading 34070090 and argued that this heading is more specific than the general entry "toy" in chapter 9503.

5.1 We have considered the submissions made in appeal, and during the course of arguments along with impugned order.

5.2 Commissioner (Appeals) has in para 6 and 7 of his order held as follows:

"6. The appellant has claimed the classification under CTH 9503.90. The CTH 9503 covers reduced size models and similar recreational models, working or not, puzzles of all kinds and other toys. The reduced size models are of a kind mainly used for recreational purchases for e.g. models of boats, aircraft, trains, vehicles etc. However, the heading excludes, as per Explanatory Notes, modeling pastes put up for children's amusement. Thus, the

question of classifying the modeling paste under the category of other toys or recreational models does not arise. The appellants have argued that the modeling paste and modeling clay are two different products as the paste is nothing but an adhesive which can be used only once and looses its existence of paste after its use whereas the modeling clay does not have any characteristics of glue or adhesive and can be used for a number of times. It is observed that the Explanatory Notes describe the characteristics of modeling paste falling under heading 34.07. As per the Notes, modeling pastes are plastic preparations generally used by artists for making models and also by children for amusement purposes. Assorted modeling pastes including those put up in sets for the amusement of children, were also covered by CTH 3407 as per the Notes. On the other hand, CTH 96.02 covers articles of modeling pastes moulded into a shape appropriate to their intended use as per the Explanatory Notes. Thus, the modeling pastes are not ordinary pastes used as adhesive but are a kind of material used for making models and clearly include what is described as modeling clay by the appellant.

7. The appellant has insisted that the modeling clay for children's amusement is classifiable as "other toys" under heading 9503.90 which is a residuary heading. Hon'ble Supreme Court in the case of M/s. Bharat Forge and Press Industries (P) Ltd. vs. Collector of C.Excise – 1990 (45) ELT 525 (SC) has held that under a residuary entry only such goods are covered which cannot be brought under various specific entries in the tariff. Similarly, in the case of Western India Plywoods Ltd. vs. Collector of Customs, Cochin – 2005(188) ELT 365 (SC), the Hon'ble Supreme Court has held that application of residuary entry is to be made with extreme caution, being attracted only when no other provision expressly or by necessary implication applies to goods in question. The impugned goods are *specifically covered under the category of modeling paste under CTH 3407. Therefore, the question of classifying them under residuary entry 9503.90 does not arise. Further, Hon'ble Tribunal in the case of Commissioner of C. Excise, Pune-I Vs. Praj Industries – 2009 (242) ELT 430 (Tri.-Mumbai) has held that Explanatory Notes to HSN are safeguide and aid for ascertaining true meaning of any expression used in the tariff. The Notes are not only of persuasive value but are entitled to greater consideration. In the light of the above discussion, the modeling clay for children is correctly classifiable under CTH 34070010 as held by the adjudicating authority."*

5.3 We also refer to terms tariff entry in headings 3407 and 9503 which are as follows:

3407		*MODELLING PASTES, INCLUDING THOSE PUT UP FOR CHILDREN'S AMUSEMENT; PREPARATIONS KNOWN AS "DENTAL WAX" OR AS "DENTAL IMPRESSION COMPOUNDS", PUT UP IN SETS, IN PACKINGS FOR RETAIL SALE OR IN PLATES, HORSESHOE SHAPES, STICKS OR SIMILAR FORMS; OTHER PREPARATIONS FOR USE IN DENTISTRY, WITH A BASIS OF PLASTER (OF CALCINED GYPSUM OR CALCIUM SULPHATE)*
3407 00	*-*	*Modelling pastes, including those put up for children's amusement; preparations known as "dental wax" or as "dental impression compounds", put up in sets, in packings for retail sale or in plates, horseshoe shapes, sticks or similar forms; other preparations for use in dentistry, with a basis of plaster (of calcined gypsum or calcium sulphate):*

34070010	*---*	*Modelling pastes, including those put up for children's amusement*
34070090	*---*	*Other*
9503		*TRICYCLES, SCOOTERS, PEDAL CARS AND SIMILAR WHEELED TOYS; DOLLS' CARRIAGES; DOLLS; OTHER TOYS; REDUCED-SIZE ("SCALE") MODELS AND SIMILAR RECREATIONAL MODELS, WORKING OR NOT; PUZZLES OF ALL KINDS*
950300	*-*	*Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds:*
95030010	*---*	*Of wood*
95030020	*---*	*Of metals*
95030030	*---*	*Of Plastics*
95030090	*---*	*Other*

5.4 From plain reading of the terms of headings under consideration we find that heading 34070010 is more specific for modeling pastes which in our view will include the clays which are used for making models for amusement of children. Since this heading is more specific we are in agreement with the classification as has been held by the Commissioner (Appeal).

5.5 The decisions relied upon by the appellant in their appeal would not be applicable in the present case as the classification can be determined in terms of terms of headings itself.

5.6 However we find that appellants have in the Bill Of Entry declared the goods by describing them correctly as per the import documents. Revenue has not disputed the description/ declaration in respect of the goods. Only dispute being with reference to classification of the goods. It has been held by various authorities that mis-classification cannot be a reason for invoking penal provisions against the importer. Reliance is placed on the decision as follows:

i. R G Sales P Ltd [2002 (148) ELT 1076 (T-Kol)]

ii. Kuresh Laila [2009 (189) ELT 45 (T-Chennai)]

iii. Steel authority of India Limited [2005 (184) ELT 308 (T-Bang)]

iv. Lietronics Vijay India Pvt Ltd [2009 (234) ELT 535 (T-Chennai)]

5.7 In result we uphold the order of Commissioner (Appeal) classifying the imported goods under heading 34070010, but set aside the penalty imposed on the importer under Section 112(a) of the Customs Act, 1962.

6.1 Appeal filed by the Appellants is partially allowed to extent of setting aside the penalties imposed under Section 112(a) of Customs Act, 1962. With the above modification impugned order is upheld.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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