CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 316 of 2009

(Arising out of Order-in-Original No. 192/2008/CAC/CC(I)/SR/GR-IIB dated 06.01.2009 passed by the Commissioner of Customs (Imports), Mumbai).

Shri Manish Patel .... Appellant

Versus

Commissioner of Customs (Import) .... Respondent
Mumbai

WITH

Customs Appeal No. 318 of 2009

(i) Shri Ashok H Palan .... Appellant

Versus

Commissioner of Customs (Import) .... Respondent
Mumbai

Customs Appeal No. 364 of 2009

(ii) Shri Subhash Chaudhary .... Appellant
(Proprietor of M/s Salasar Imports)

Versus

Commissioner of Customs (Import) .... Respondent
Mumbai

Customs Appeal No. 365 of 2009

(iii) Shri Dilip Patel .... Appellant

Versus

Commissioner of Customs (Import) .... Respondent
Mumbai

Appearance:

Shri S.P. Mathew, Advocate for the Appellant

Shri Ramesh Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. S. SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.A/85896-85899/2019

Date of Hearing: 16.11.2018
Date of Decision: 15.05.2019

Per: Dr. D.M. Misra

These appeals are filed against Order-in-Original No. 192/2008/CAC/CC(I)/SR/GR-IIB dated 06.01.2009 passed by the Commissioner of Customs (Imports), Mumbai.

2. Briefly stated the facts of the case are that the appellant Shri Subhash Chaudhary, Proprietor of M/s Salasar Imports imported packing paper by declaring the same as "Fruit Grape Guard Packaging Paper in sheet form coated with Sodium Meta Bi Sulphite" claiming benefit exemption Notification No.21/2002 Cus. Dt. 01.3.2002. On chemical test of the consignment imported against Bill of Entry No. 567313 dated 10.05.2005 t by the Department it was found to be free from 'Sodium Meta Bi Sulphite'. Consequently, alleging that the appellant had wrongly availed duty exemption against Sr. No. 153 of Notification No. 21/2002-Cus dated 1.3.2002 by mis-declaring the description of the goods, show-cause notice was issued to them on 20.10.2005 for recovery of the differential duty and proposing confiscation of the goods seized during the course of investigation and also proposal for imposition of

penalty under various provisions of the Customs Act, 1962. On adjudication, the demand was confirmed and the goods were directed for confiscation and penalty were also imposed on the importer and other noticees as well under various provisions of the Customs Act, 1962. Hence, the present appeals.

3. At the outset, learned Advocate Mr. S.P. Mathew for the appellant has submitted that even though in the first chemical test report dated 30.5.2005 of Dy. Chief Chemist,Mumbai returned the remnant sample opining that the presence of Sodium Meta Bi Sulphite could not be tested, but in the second test report dated 10.6.2005, on testing of the samples, it was opined that the same was "free from sodium meta bisulphite". Also, the sample tested by Central Revenue Chemical Laboratory (CRCL), New Delhi, on the fresh samples drawn in its rest report it was opined that the sample is "free from sodium bi sulphite". The request for cross-examination of the chemical examines/experts by the appellant has been denied by the adjudicating authority. It is his contention that the denial of cross-examination of the experts resulted in grave injustice to them, hence, the said reports should not be relied. In support, he referred to the following judgments: -

(a) Tulsyan NEC Ltd. Vs. CC, Chennai – 2003 (157) ELT 627 (Mad.)

(b) AMKAP Marketing Pvt. Ltd. Vs. CCE, Lucknow – 2010 (256) ELT 260

(c) CCE, Nagpur Vs. Mattel Toys (I) P. Ltd. – 2015 (325) ELT A157(SC)

(d) *Bandana Overseas Vs. CC, Kolkata – 2009 (235) ELT 165 (T)*

(e) *Liberty Oil Mills Vs. CC(I), Mumbai – 2015 (322) ELT 528 (T).*

4. Further, he has submitted that the learned Commissioner grossly erred in rejecting the report of the Head of the Department of UDCT, Mumbai without any sound basis. He has also submitted that while confirming the demand for the past imported consignments cleared by the appellant, no chemical test had been carried out by the Department on the said consignments, therefore, the demand on the past imports/consignments cannot be sustained by adopting the present test reports. In support, he has referred to the judgment of this Tribunal in the case of *Punjab Fibers Ltd. Vs. Commissioner of Central Excise, Delhi – 2002 (141) ELT 819 (T)*. Further, he has submitted that reliance on the statement of the deponents by the learned Commissioner relating to chemical compositions/chemical coating on the product is misplaced. It is his contention that these persons were layman and their opinion is of no relevance, particularly when the manufacturer had certified that the product is coated with sodium meta bi sulphite. Further, he has submitted that the learned adjudicating authority failed to take into consideration that in absence of any allegation of suppression of facts or mis-declaration or without invoking the proviso to Section 28 of the Customs Act, 1962, the demand for the period beyond six months is barred by limitation. In support, the learned Advocate referred to the judgment in the case of *Kaur & Singh*

Vs. CCE, New Delhi – 1997 (94) ELT 289 (SC). Further, he has submitted that the confiscation of the goods relating to past clearances which were neither seized nor provisionally released, cannot is bad in law and cannot be sustained. In support, he has referred to the judgment of this Tribunal in the case of *Sun TV Network Ltd. Vs. CC, Chennai – 2018 (360) ELT 1068 (T).*

5. Per contra, learned AR for the Revenue has submitted that the appellant in the consignments of packing paper imported mis-declared the same with an intention to avail the benefit of Sr. No. 153 of the Notification No. 21/2002-Cus dated 1.3.2002. The test results of the chemical test on the sample drawn from the consignment for which Bill of Entry No. 567313 filed on 10.5.2005 revealed that it is 'free from sodium meta bi sulphite'; the principal condition to claim benefit of Sr. 153 of Notification No. 21/2002 dated 1.3.2002. After the consignment dated 10.5.2005 they have imported further six more consignments and Bill of Entry for clearance of four consignments claiming exemption under Notification No.21/2002Cus , which on chemical test also found to be free from sodium meta bi sulphite.

6. It is his contention that besides the chemical test carried out in the Customs Laboratory at Mumbai and also at CRCL, New Delhi, the statements of various persons recorded during the course of investigation, particularly that of Shri Dilip Patel

claimed to be authorized representative of the importer revealed that they have mis-declared the imported goods as "Fruit grape guard packaging paper coated with sodium meta bi sulphite" to avail the benefit of exemption. The Ld. Commissioner has rightly rejected the request for cross-examination of the said examiner as such reports cannot be brushed aside on the basis of private reports in view of the Judgment of the Hon'ble Supreme Court in the case of M/s Reliance Cellulose Products Vs Collr.of C.E. Hyderabad 1997 (93) ELT 646 (SC).

7. The learned AR for the Revenue has further submitted that attempt of the appellant to show that sodium Bi sulphite is volatile in nature hence, at the time of its test might have been evaporated is without any basis being not supported by any chemical literature. On the contrary, referring to the Wikipedia page on sodium Meta bi sulphite" he has submitted it shows that melting point of sodium meta bisulphate is 170°C, which is 70 more than the boiling point of water. Also, rebutting the argument of the appellant that sodium meta bisulphite decomposes fast , he has submitted that no evidence nor any literature in support of the said argument produced by the appellant. He has further submitted that since the appellant has mis-declared the goods in question, therefore, extended period has been rightly invoked for recovery of the duty on imported consignments cleared in the past wrongly availing the benefit of the Notification

8. Heard both sides and perused the records.

9. The issues for determination are:-

(i) Whether the imported goods declared as "Fruit Grape Guard Packaging Paper in sheet form coated with Sodium Meta Bi Sulphite" is eligible to the benefit of exemption Notification No.21/2002-Cus, dt.1.3.2002.

(ii) Whether on the basis of test report of samples relating to few consignments could be applied to the consignments imported and cleared in the past be denied the benefit of Notification No.21/2002-Cus dt.1.3.2002. *a*nd consequential action thereof.

10. The importers viz. M/s Salasar Imports, a proprietorship concern, whose Proprietor is Shri Subhash Choudhary, had imported a consignment of packaging paper and filed Bill of Entry No.567313 dt.10.05.2005 declaring the description of the said product as "Fruit Grape Guard Packaging Paper in sheet form coated with Sodium Meta Bi Sulphite". Pending clearance from the port, the said consignment was detained and samples were drawn and sent for chemical test. In the first test report dt.30.05.2005 the Dy.Chief Chemist of Customs Laboratory, Mumbai reported that presence of Sodium Meta Bi Sulphite could not be chemically examined. The remnant samples were later sent again and also fresh samples were drawn and sent to CRCL, New Delhi. Samples

on the subsequent imports were also subjected to chemical test. The test report dt.10.06.2005 and later reports of samples of subsequent imports revealed that the samples were free from Sodium Meta Bi Sulphite. On the basis of the said test report, investigations were carried out and statements of various persons were recorded. In his statement, Shri Dilip Patel, who claimed to be the authorised signatory of M/s Salasar Imports admitted to have been imported the goods mis-declaring the same as "Fruit Grape Guard Packaging Paper coated with Sodium Meta Bi Sulphite". He retracted the said statement furnished before the Customs authorities but later withdrew the said retraction and reiterated the statement furnished earlier. Analysing the test reports and the statements recorded during the course of investigation, the adjudicating authority came to the conclusion that the consignments imported by the Appellant on which necessary chemical test were carried out to ascertain the presence of Sodium Meta Bi Sulphite, since resulted in negative, therefore, the benefit of exemption Notification No.21/2002-Cus, dt.1.3.2002 for the consignments seized and released on provisional basis on execution of bond and bank guarantee was not admissible. Also, applying the said test report for the imports made in the past the said benefit of exemption Notification No.21/2002-Cus, dt.1.3.2002 was also denied and the duty was demanded. The relevant exemption Notification No.21/2002-Cus, dt.1.3.2002 (Sr.No.153) reads as follows:-

Sr. No.	Chapter or Heading No or sub-heading No.	Description of goods	Stand-ard rate	Addi-tional duty rate	Condi-tion No.
153	48	Grape guard, namely paper of a type generally used for the packing of grapes and which consists of two sheets of treated white paper pressed together with thin rectangular pouches containing sodium meta-bi-sulphite with kraft paper pasted thereto or a single paper coated with sodium meta-bi-sulphite, and which is used for the purpose of preventing fungal decay and thus helps prolonged storage in fresh condition, imported for use in the packing of grapes.	5%	Nil	-

11. On a plain reading of the said Notification it is clear that to claim the benefit of the said notification, it is necessary to establish that the said paper be used for packing of grapes coated with Sodium Meta Bi Sulphite which is used for the purpose of preventing fungal decay and thus helps prolonged storage in fresh condition. Therefore, the necessary condition for claiming benefit of the said notification on import of packaging paper is that the same be meant to be used for packing grapes which helps to keep the grapes in fresh condition and storage for a prolonged period. To ascertain the quality of the imported paper, the same were subjected to chemical test by the Department and when the samples were drawn and tested, it was found to be not containing Sodium Meta Bi Sulphite.

12. The contention of the Appellant is that as initially the samples could not be tested by the Dy.Chief Chemist due to

lack of facility and subsequent test report of Dy.Chief Chemist, Mumbai and CRCL, New Delhi indicated that the samples do not contain Sodium Meta Bi Sulphite, hence the said reports cannot be relied upon, without subjecting the experts/chemical examiners to cross examination. Advancing reasons for not containing Sodium Meta Bi Sulphite in the sample of the imported paper it is stated that the same may be due to delay in import and also delay in test of the samples. The Appellant has further argued that the paper imported initially, contained Sodium Meta Bi Sulphite but, either due to decay or evaporation during storage, traces of Sodium Meta Bi Sulphite could not be found in the sample.

13. Rebutting the said argument, the learned A.R. for the Revenue has submitted that Sodium Meta Bi Sulphite is not a volatile substance and could not be evaporated during storage after its import for the simple reason that the melting point of Sodium Meta Bi Sulphite 170^0C is more than 70^0C of the boiling point of water. Besides, the Sodium Meta Bi Sulphite coated paper is imported for preventing the decay of grapes during storage for longer period. In the event, Sodium Meta Bi Sulphite evaporates before being put to use then the very purpose of coating with Sodium Meta Bi Sulphite would be defeated.

14. We find merit in the contention of the learned A.R. for the Revenue. On going through the impugned order, we find

that not only on the basis of chemical test report but also relying upon the statement of Shri Dilip Patel, authorised signatory of the Appellant, the Adjudicating authority had concluded that the sample of imported papers when subjected to chemical test, found to be free from Sodium Meta Bi Sulphite. Consequently, he has held that the Appellants are not eligible for benefit of exemption Notification No.21/2002-Cus, dt.1.3.2002. The learned Commissioner has rightly rejected the request for cross examination of the chemical examiner expert, observing that the tests were carried out in normal course of official function and in absence of any bias or malafide, cross examination of the experts is unwarranted. Needless to mention that the test reports cannot be brushed aside merely because the reports from some private agencies are produced indicating different results. As held by Hon'ble Supreme Court in the case of M/s Reliance Cellulose Products Vs Collr.of C.E. Hyderabad – 1997 (93) ELT 646 (SC). Their Lordships in Para 12 of the judgment, observed as under:-

> "12**.** These orders are now under challenge before this Court. We were referred to a number of test reports obtained by the appellant from various persons and on the basis of these opinion, the reports of the Departmental Chemical Examiner and also the Chief Chemist were assailed. We are of the view that the Assistant Collector cannot be said to have erred in relying upon the reports given by the Chemical Examiner and the Chief Chemist. It may be that in a given case, the report of the Chief Chemist may be demonstrated to be palpably wrong. In such a case, the Court may direct re-examination of the whole issue. But that is not the case here. It has not been shown that the Chemical Examiner or the Chief Chemist were in error in their analysis in any way. The views expressed by the Chief Examiner and Chief Chemist of the Government cannot be

> lightly brushed aside on the basis of opinion of some private persons obtained by the appellant."

15. Also, reading the opinion of UDCT, Mumbai, there is no contra report to the test results of CRCL, New Delhi. In the said report, the method of testing of samples has been narrated. There is no opinion about the contents of the samples. Therefore, the said reports also would not be of any help to the Appellant.

16. During the course of chemical test of the samples of consignment against Bill of Entry dt.10.05.2005 and samples of subsequent imported consignments against four Bills of Entry, the results of the samples revealed that it is not coated with Sodium Meta Bi Sulphite. Thus, the Adjudicating authority inferred that the description of the goods was mis-declared in order to avail exemption under Notification No.21/2002-Cus, dt.1.3.2002, hence, directed confiscation of the goods seized and released provisionally with an option to redeem the same on payment of fine.

17. However, the learned Commissioner extrapolated the test results of the samples to the consignments which were imported and cleared in the past. In absence of any adverse test report of the samples relating to past consignment, we do not find merit in the order of the Adjudicating authority, to apply the test results of the samples drawn to the past consignments in directing confiscation and denying the benefit of exemption Notification No.21/2002-Cus, dt.1.3.2002.

Consequently, the test report, in our opinion, be restricted to the consignment of packing papers whose samples were drawn and tested and found to be free from Sodium Meta Bi Sulphite. However, since there is mis-declaration of the description of the imported goods, in order to avail the benefit of exemption Notification No.21/2002-Cus, dt.1.3.2002, the goods which were seized and released provisionally are liable to confiscation and the importer and the persons associated are liable for penalty.

18. We summarize the findings as follows:-

(i) The Appellants are not eligible to the benefit of NotificationNo.21/2002-Cus, dt.1.3.2002 relating to the imported consignments whose samples were drawn and test results found to be free from Sodium Meta Bi Sulphite. The test results of the samples cannot be extrapolated to the consignment cleared in the past.

(ii) The Appellants are liable for discharging differential duty relating to the consignment whose test results were found to be free from Sodium Meta Bi Sulphite and also seized goods are liable for confiscation, and penalty attracted against the importer-Appellant and other Appellants. Since the quantum of demand to be recalculated as above, therefore, to compute the duty, fine and penalty relating to the consignment whose samples were tested, and found to be free from Sodium Meta Bi Sulphite, the matter is remanded to the Adjudicating authority.

19. Appeals are disposed of as above.

(Pronounced in court on 15.05.2019)

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

(Sanjeev Srivastava)
Member (Technical)

Sinha