CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 85211 of 2013

[Arising out of Order-in-Appeal No: 867 to 873/MCH/JC/GR.I/2012 dated 15th October 2012 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

20 Microns Ltd … ***Appellant***
307-308, Arundeep Complex, Race Course
Vadodara – 390 007

versus

Commissioner of Customs (Import) ***…Respondent***
New Custom House, Ballard Estate, Mumbai – 400 001

With

Customs Appeal No: 85212 of 2013

[Arising out of Order-in-Appeal No: 867 to 873/MCH/JC/GR.I/2012 dated 15th October 2012 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Chandresh S Parikh, Managing Director … ***Appellant***
M/s 20 Microns Ltd 307-308, Arundeep Complex,
Race Course, Vadodara – 390 007

versus

Commissioner of Customs (Import) ***…Respondent***
New Custom House, Ballard Estate, Mumbai – 400 001

With

Customs Appeal No: 85214 of 2013

[Arising out of Order-in-Appeal No: 867 to 873/MCH/JC/GR.I/2012 dated 15th October 2012 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Sudhir R Parikh, Director – Finance … ***Appellant***
20 Microns Ltd, 307-308, Arundeep Complex,
Race Course, Vadodara – 390 007

versus

Commissioner of Customs (Import) ***…Respondent***
New Custom House, Ballard Estate, Mumbai – 400 001

APPEARANCE:

Ms Shamita Patel, Advocate for the appellant

Shri Bhushan Kamble, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86543-86545/2019

DATE OF HEARING: 09/04/2019
DATE OF DECISION: 09/04/2019

PER: C J MATHEW

These appeals lie against the order of the lower authority, as confirmed by Commissioner of Customs (Appeals), Mumbai – I in order-in-appeal no. 867 to 873/MCH/JC/GR.I/2012 dated 15th October 2012, in the import of 'natural calcite powder' against bill of entry no. 726554/18.11.2006 on which duty of ₹ 41,950/- was self-assessed. It was held that the goods had been mis-declared as the test results found the samples to be 'precipitated calcium carbonate' and, thereby not eligible for exemption notification no. 21/2002-Cus dated 1st March 2002 (sl. no. 517). Besides confirming differential duty of ₹1,69,078/- and confiscating the goods, penalty of ₹ 1,00,000 and

₹25,000/- was imposed on the importer and on the individual appellants herein. In the impugned order, emanating from the challenge mounted by the three appellants herein and that of the customs jurisdiction, duty recovery, confiscation and penalties were upheld while directing the original authority to rectify the omission of fine *in lieu* of confiscation in the adjudication order.

2. Learned Counsel for appellant contends that intent of the impugned notification is to exempt ‘natural calcite powder’ in all forms and to include those which are cleaned while withholding it from synthetic preparations which are otherwise known as ‘precipitated calcium carbonate’. According to her, the goods had been provisionally cleared to enable the samples to be tested by Deputy Chief Chemist, Mumbai Custom House and by Central Revenue Chemical Laboratory, New Delhi; she contends that the test reports are not reliable as only one of the two factors, *viz,* ‘oil absorption’ was determined owing to lack of wherewithal to test ‘particle size’. It is further argued that, despite requests, only one of the scientists was offered for cross-examination and that even he admitted that the oil absorption value of 24-26 was rejected as applicable to ‘natural calcite powder’ despite a permissible range of 20-35 only because literature indicated otherwise. It is also contended that the tests results could not be accepted in the absence of report on ‘particle size’. Reliance was placed on circular no. 43/2017-Cus dated 16th November 2017 of

Central Board of Excise and Customs to demonstrate that such facility did not exist in the chemical laboratories of the Custom House.

3. Reliance is also placed by Learned Counsel on the decision of the Tribunal in *Gulshan Polyols Ltd v. Commissioner of Central Excise & Service Tax, Meerut [2018 (12) TMI 1573–CESTAT ALLAHABAD]* which has concluded that samples that are not ‘precipitated calcium carbonate IS8167/1978’ should be classified under heading 2530 9090 of the First Schedule to Customs Tariff Act, 1975. Among the earlier decision of the Tribunal that were relied upon in *re Gulshan Polyols Ltd*, in *Shakshi Makfin Pvt Ltd v. Commissioner of Central Excise, Panchkula [2015 (12) TMI 1638 CESTAT CHANDIGARH]* conformity with IS 8767-1978 for classification as ‘precipitated carbonate’ was held to be critical.

4. It would appear that the claim of the appellant for classification under heading 2530 9030, and for consequent exemption, was denied by classifying the goods under heading 2836 9030 of the First Schedule to Customs Tarif Act, 1975. It is seen from the test results and the cross-examination thereof that the ‘oil absorption value’ of the impugned goods cannot be excluded from description as ‘natural calcite powder’ without more specific tests and that reliance on tests does not suffice to revise the classification claimed at the time of import.

5. The contention of the appellant that 'oil absorption value' and 'particle size' are both critical in determining classification cannot be lost sight of. The test report does not refer to 'particle size' and it has been officially admitted that the chemical facilities of the department is deficient in capacity to carry out that test. As the test result is faulty, we apply the principle laid down in *re Gulshan Polyols Ltd* and *re Shakshi Makfin Pvt Ltd* and the decision of the Tribunal in *Commissioner of Customs, Central Excise and Service Tax v. Manikya Creations Pvt Ltd [2019 (365) ELT 130 (Tri.All.)]* that

> *'6. Being aggrieved, Revenue has filed the appeal on the ground that CRCL is fully equipped to test the goods. On the other hand, the appellant has referred to Circular No. 43/2017-Customs, dated 16-11-2017, clarifying - that CRCL has shortlisted the items whose samples cannot be tested in their Laboratories at present and also identified the Lab, where such samples could be tested. Natural Calcite Powder is one of the specified product which CRCL Lab is unable to test.'*

to set aside the impugned order and allow the appeals.

(Pronounced in open court)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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