

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 677 of 2006

(Arising out of Order-in-Original CAO No. 68/2006/CAC/CC(I)/AKP dated 29.03.2006 passed by the Commissioner of Customs (Import), Mumbai)

M/s Harital Marbles Pvt. Ltd.

.... Appellant

Neelkantheshwar Bhavan, 126, A.B. Road,
Worli, Mumbai - 400018

Versus

Commissioner of Customs (Imp), Mumbai Respondent

New Custom House, Ballard Estate, Mumbai - 400001

Appearance:

Shri V.M. Doiphode, Advocate for the Appellant

Shri Bhushan Kamble, AC, Auth. Representative for the Respondent

WITH

Customs Appeal No. 704 of 2006

(Arising out of Order-in-Original CAO No. 43/2006/CAC/CC(I)/AKP dated 27.02.2006 passed by the Commissioner of Customs (Import), Mumbai)

M/s Bono Marbles

.... Appellant

9/103, Bhagwan Bhavan, 1st Floor,
Tamba Kanta, Mumbai - 400003

Versus

Commissioner of Customs (Imp), Mumbai Respondent

New Custom House, Ballard Estate, Mumbai - 400001

AND

Customs Appeal No. 705 of 2006

(Arising out of Order-in-Original CAO No. 44/2006/CAC/CC(I)/AKP dated 27.02.2006 passed by the Commissioner of Customs (Import), Mumbai)

M/s Bono Marbles

.... Appellant

9/103, Bhagwan Bhavan, 1st Floor,
Tamba Kanta, Mumbai - 400003

Versus

Commissioner of Customs (Imp), Mumbai Respondent

New Custom House, Ballard Estate, Mumbai - 400001

AND

Customs Appeal No. 801 of 2006

(Arising out of Order-in-Original CAO No. 45/2006/CAC/CC(I)/AKP dated 28.02.2006 passed by the Commissioner of Customs (Import), Mumbai)

M/s Classic Marbles

15, Bhandup Village Road, Subhash Nagar,
Bhandup (W), Mumbai - 400078

.... Appellant

Versus

Commissioner of Customs (Imp), Mumbai Respondent

New Custom House, Ballard Estate, Mumbai - 400001

AND

Customs Appeal No. 802 of 2006

(Arising out of Order-in-Original CAO No. 64/2006/CAC/CC(I)/AKP dated 24.03.2006 passed by the Commissioner of Customs (Import), Mumbai)

M/s Classic Marbles

15, Bhandup Village Road, Subhash Nagar,
Bhandup (W), Mumbai - 400078

.... Appellant

Versus

Commissioner of Customs (Imp), Mumbai Respondent

New Custom House, Ballard Estate, Mumbai - 400001

Appearance:

Shri Anil Balani, Advocate for the Appellant

Shri Bhushan Kamble, AC, Auth. Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85788-85792 / 2020

Date of Hearing: 07.02.2020

Date of Decision: 25.09.2020

Per: Dr. D.M. Misra

These appeals are filed against respective Orders-in-Original passed by the Commissioner of Customs (Import),

Mumbai since involved common issue, hence are taken up together for disposal.

2. The facts more or less are common in all these appeals. However, to appreciate the issue under dispute it would suffice in narrating the facts of M/s Harital Marbles Pvt. Ltd. The said Appellant have imported 148.47 MTs of rough marble blocks which were provisionally assed by Mumbai Customs considering the value as US\$ 95 PMT. With effect from 1.4.1999 import of marble block was allowed under SIL if the unit price was US\$ 300 PMT (CIF) or above. The import of 'other calcareous stone' was restricted under the EXIM policy and specific license was required for its importation till 7.5.1999. However, from 8.5.1999, import of blocks/slabs of 'other calcareous stone, other than marble was allowed under SIL if the unit price was above US\$ 300 PMT (CIF) for blocks and US\$ 450 PMT for slabs. To ascertain whether the imported goods were marble or other wise samples from the imported consignments were drawn and sent to Geological Survey of India (GSI), Nagpur. After testing the said sample, it was opined by GSI that the goods were variety of lime stone but not marble. Even though the appellant did not agree with the said test report and claimed that the goods were marble; however after waiving issuance of show-cause notice, they requested for adjudication and expressed their willingness to pay duty @ US\$ 300PMT and debit SIL to the tune of 3 times of value of the imported goods as required under the EXIM Policy in force at the relevant time. The Commissioner of Customs (Import), Mumbai adjudicated the case on 14.3.2000

and observed that since the value of the goods was less than US\$ 300 PMT, the same was restricted and since the import did not possesses specific Import License, the goods were liable for confiscation. He observed that the goods were liable to confiscation under Sections 111(d) and 111(m) of the Customs Act, 1962 but since the goods were released on execution of PD Bond and guarantee took a lenient view and refrained from fine but imposed penalty of Rs.3.00 lakhs. Aggrieved by the said order, the Revenue filed appeal before this Tribunal. This Tribunal vide order dated 31.5.2002 remanded all such cases for *de novo* adjudication. The facts of other two appellants namely, M/s Bono Marbles and M/s Classic Marbles are identical to the facts of the above case.

4. In the *de novo* adjudication, the learned Commissioner observed that the goods imported are calcareous stone ‘other than marble’ which could be allowed to be imported only against SIL during the relevant period; he directed confiscation under Section 111(d) and 111(m) of the Customs Act, 1962, imposed fine and penalty in each case as mentioned below.

Appeal No.	Name of the appellant	Redemption fine imposed	Penalty imposed
677/2006	Harital Marble Pvt. Ltd.	Rs.7,50,000/-	Rs.1,50,000/-
704/2006	Bono Marbles	Rs.37,00,000/-	Rs.5,00,000/-
705/2006	Bono Marbles	Rs.2,50,000/-	Rs.50,000/-
801/2006	Classic Marbles	Rs.9,00,000/-	Rs.1,80,000/-
802/2006	Classic Marbles	Nil	Rs.4,20,000/-

Hence, the present Appeals.

5. Learned Advocate Shri V.M. Doiphode for the appellant M/s Harital Marble Pvt. Ltd. has submitted that the learned Commissioner has erred in holding that the subject goods imported by the appellant was not marble but "other calcareous stone" that is 'other than marble'. Even though in the cross-examination, GSI Scientist has accepted that the imported goods are homogenous fine grade and hard calcareous stone, but in providing their opinion, they had ignored the definition given under HSN and the sample was not tested under Metamorphic Re-crystallization Process. Further, he has submitted that the learned Commissioner erred in relying the judgment of Akbar Badruddin Jiwani's case as the Schedule to Customs Tariff Act, 1975 has been aligned with HSN subsequently. The learned Advocate referring to the judgment of this Tribunal in the case of Just Marble Vs. Commissioner of Customs, Jaipur – 2009 (237) ELT 376 (Tri-Del) submitted that in the said case, it was held that lime stone after metamorphic recrystallization is considered as marble if they satisfy physical properties like capability to be polished, etc.. Further, he has submitted that confiscation The Ld. Commissioner has erred in directing confiscation under Section 111(m) of the Customs Act, 1962 as the rate of duty on marble and calcareous stone are and import is permissible against production of SIL whether it is marble or calcareous stone. The Ld. Commissioner ignored the finding of the tribunal once the value is loaded to US\$ 300 PMT which the Value for SILs and the appellants were ready to produce SILs. He ought to have held that there is no violation of section 111(d) of Customs Act, 1962. Further, he has submitted that there is no *mala fide*

intention and there was no deliberate mis-declaration as both marble and calcareous stone were permitted under SILs and the rate of duty was same. Further, alternatively, he has submitted that the redemption fine could not have more than 4.5% of the declared CIF value (three times of US\$ 148.17) and the same could be around Rs.71,739/-.

6. Learned Advocate Shri Anil Balani appearing for M/s Bono Marbles and M/s Classic Marbles submitted that the goods imported are marble; the overseas supplier and Indian consumers deal with it as marble and it is usable as marble and the Department also treats the same as marble for calculating the market price. He has further submitted that GSI scientist considered in the cross-examination that the goods are marble as per HSN Explanatory notes. He has submitted that HSN Explanatory Notes and useful guides for classification of the marble. In support, he has referred to the judgment of *Phil Corporation Ltd.-2008 (223) ELT 9(SC)* and *Vodafone Essar Gujrat Ltd. - 2018 (360) ELT A193 (CESTAT-LB)*. He has submitted that in several decisions, this Tribunal disagreed with the GSI report and held that the goods were commercial marble as per trade parlance and on the basis of CRCL report. Alternatively, he has submitted that even if the goods are held to be "other calcareous stone", import was permitted after 8.5.1999. All the Bills of Entry in these cases are filed after 8.5.1999. Therefore, reliance on the Bills of Lading itself, by the learned Commissioner, in the impugned order, is bad in law. It is his contention that in principle the validity of an import is to be

tested on the date of import only and not on the date of shipment. The date of shipment is relevant only if import is allowed on that date and restriction was imposed subsequently. Further, he has submitted referring to the judgment of the Tribunal in the case of Royal Impex and others Order No. C-I/1596-1620/WZB/2002 dated 13.5.2002 that once the goods are assessed at a particular CIF value, the same value should be applied for determining requirements under EXIM Policy; there was no reason not to accept SIL so as to obviate confiscation under Section 111(d) of the Customs Act, 1962 and for this reason the Tribunal remanded the case.

7. Per contra, the learned AR for the Revenue has submitted that prior to 1999 the import of marble and other calcareous stone remained to be restricted item and specific import license was required for its clearance. W.e.f. 1.4.1999, import of marble slab was allowed under SIL if the unit price was US\$ 450 PMT (CIF) or above. On the import of other calcareous stone was restricted and specific license was required for its importation till 7.5.1999. From 8.5.1999, import of blocks/slabs of other calcareous stone (other than marble) was also allowed under SIL if the unit price was above US\$ 300 PMT (CIF) for block and US\$ 450 PMT for slabs. In the present case, samples were drawn and sent to GSI, where after testing it was certified that the goods were a variety of lime stone but not marble. He has submitted that the learned Commissioner after considering the GSI report and its relevance to the present case and evidence of cross-examination of Scientist of GSI and the principles of law laid

down in *Akbar Badruddin Jiwani Vs. CC 1990 (47) ELT 161 (SC)* held that scientific and technical meaning be considered in identifying the product as calcareous stone and not marble. In this context, he has referred to the example of serpentine; in the HSN explanatory notes it specifically excludes Serpentine from Heading 2515 of CTA, 1975 which covers marble also. It is his contention that the HSN goes on to say that even though Serpentine or ophite are sometimes called marble, but they are excluded from the heading 2515 for classification purposes

8. He has further submitted that the claim of the appellant that they had no motive in declaring the goods other calcareous stone other than marble and not as marble is not correct since with effect from 1.4.99 marble slabs valued at more than 450 US\$ PMT Could be imported against SIL whereas calcareous stone other than marble could not be imported at all without a specific import license even if CIF value more than 450 US\$. This policy was changed only with effect from 08.5.1999. In this case all the shipments were prior to 8.5.1999 and there was no SIL permitting import of the calcareous stone, hence, there was a clear-cut motive on the part of the importer is for mis-declaring calculus to other than marble as marble. The date of shipment is relevant and not the date of filing bill of entry in view of the judgment of the Hon'ble Madras High Court in the case of *Agro 1 Stop Vs. Commissioner of Customs, Chennai-II – 2019 (367) ELT 972 (Mad)*, *Royal Impex Vs. Commissioner of Customs – 2019 (366) ELT 820 (Mad)*, *Siddhi Vinayak Vs. Union of India – 2019 (367) ELT 928 (Bom)*. Therefore, the goods are liable for

confiscation under Section 111(d) of the Customs Act, 1962 as they did not possess any specific license on the date of shipment. Also, the learned Commissioner has rightly imposed penalty under Section 112(a) of the Customs Act, 1962. In support, he has referred to various judgments in this regard.

9. Heard both sides and perused the records.

10. The issues involved in the present appeal for consideration is whether: (i) the goods imported by the Appellant are "other calcareous stone" as alleged by the Revenue or "marble" as claimed by the appellants; (ii) the goods are liable to confiscation and penalty is imposable on the Appellants.

11. The undisputed facts are that the appellants have filed Bills of Entry between May and June, 1999 for clearance of imported goods declaring the same as Rough Marble Slabs/Blocks with value less than 350 US\$. The goods were provisionally assessed and thereafter samples were drawn and sent for testing to GSI, Nagpur, where after testing, it is opined as:

"it is a variety of LIMESTONE (of IBM specifications). It does not show any evidence of metamorphic recrystallisation and thus is NOT A MARBLE"

12. The appellant had waived issuance of show cause notice and agreed to discharge duty on the enhanced value. Consequently, on adjudication the Commissioner accepted the report and held that the imported goods were not marble but other calcareous stone. Taking a lenient view as the appellant have agreed to discharge duty on the enhanced value, he has

not directed confiscation but imposed penalty only. Aggrieved by the said order, Revenue filed appeal before the Tribunal. This Tribunal by its order dated 31.5.2002 remanded the matter for *de novo* adjudication. In the *de novo* adjudication, learned Commissioner after considering the report of GSI and evidence of cross-examination of one of the Officer of GSI, held that the imported goods are not 'marble' but 'other calcareous stone'. In arriving at the conclusion, the learned Commissioner heavily relied upon the judgment of the Hon'ble Supreme Court in the case of *Akbar Badruddin Jiwani's case (supra)*. The Advocates appearing for the appellants submitted that the principle laid down in *Akbar Badruddin Jiwani's case* is not applicable to the facts of the present case and distinguishable. However, the learned Commissioner while answering the said argument, observed as under: -

"24. It is not understood why the importers are going to such great pains to say that for classification of marble under the import Policy or the Customs Tariff it is the commercial parlance test which would be taken into consideration and not the technical or scientific test. All these issues have been discussed in details by the Apex Court, way back in the year 1990, in the case of *Akbar Badruddin Jiwani – 1990 (47) ELT 161 (SC)*. The Apex Court had clearly held that since the entries in the ITC Schedule Customs Tariff talk of both marble and calcareous stone, it is the scientific and technical meaning which has to be taken into consideration for marble and not the commercial trade parlance. The Apex Court also referred to the BIS Standards (IS: 1130-1969) which also the technical and scientific meaning has been taken for determining whether a stone is marble or not. This also explains the background behind the department initially asking the testing laboratories and institutes to give their opinion with reference to HSN but later on asking their opinion on the basis of technical and scientific specifications. It is also ironical that in the *Akbar Badruddin Jiwani* case the trade itself had argued that it is the scientific and technical meaning of marble which should be taken into consideration, but now they are proposing the entirely reverse proposition that marble should be classified on the basis of commercial trade parlance and not by technical and scientific meaning. There is no way by which the *Akbar Badruddin Jiwani* case can be distinguished from the present case. In the said Apex Court decision the HSN description of marble was also referred to and there has been significant change either in the HSN or the Customs Tariff so far as heading 2515 is concerned."

13. We find merit in the observation of the Ld. Commissioner. No plausible argument was advanced on behalf of the appellants in support of their claim that the judgement of Hon'ble Supreme Court in the above case is distinguishable and not applicable to the case. Also, as observed by the Id. Commissioner and submitted by the Ld. AR for the Revenue that even though the appellants have raised an alternative argument that in the common parlance the goods imported by them is known as marble, but they failed to produce any evidence to substantiate the said claim. Thus, in absence of sufficient proof the said alternate plea also cannot be acceptable. Therefore, the goods imported by the appellants are not 'marble' but 'calcareous stone other than marble' which requires specific import licence at the relevant time.

14. The next issue needs to be determined is whether there is violation of the relevant provisions of law on import goods. The contention of the appellant is that all these goods imported into India after 8.5.1999, hence insisting specific import licence only for the reason that the shipment were done prior to the said cut off date i.e. 8.5.1999 is not tenable in law. We do not find merit in the said contention of the appellants in as much as the issue is settled in a series of cases including in the cases by the *Hon'ble Madras High Court in Royal Impex Vs. CC, Chennai-II 2019 (366) ELT 820(Mad.)*, & *Agro 1 Stop Vs. CC, Chennai-II 2019 (367) ELT 972(Mad.)* and *Bombay High Court in Siddhi Vinyak Vs. UOI 2019 (367) ELT 928 (Bom)*, whereunder it is held

that the date of shipment is relevant for compliance and not the date of import.

15. Consequently, the question is whether the goods are liable for confiscation. The Ld. Commissioner has held that the imported goods have been declared as marble but on examination found to be not of 'marble' and is liable for confiscation under section 111(m); also since at the time of its shipment the appellant did not have specific import license, the goods are liable for confiscation under section 111(d) of Customs Act, 1962.

16. We find that this Tribunal considered similar issue in case of *Just Marble Vs. Commissioner of Customs (Import), Mumbai – 2017 (352) ELT 251 (Tri-Mum)* and *Classic Marble Vs. Commissioner of Customs (Import), Mumbai – 2014 (312) ELT 719 (Tri-Mum)* and *Jai Bhagwati Impex Pvt. Ltd. Vs. Commissioner of Customs & Central Excise, Goa – 2017 (351) ELT 328 (Tri-Mum)*, held that in absence of SIL on import of the calcareous stone, the same are liable for confiscation and attracts penalty. Therefore, we do not find reason to interfere with the said finding of Ld. Commissioner

17. The learned Advocate Shri Anil Balani referred to the judgments of this Tribunal viz. (i) *Just Marble Vs. Commissioner of Customs, Jaipur – 2009 (237) ELT 376 (Tri-Del)* (ii) *Radha Mohan Lal Vs. CCE, Jaipur 2009 (238) ELT 677 (Tri.Del.)*, *Stone Man Marble Indus Vs. CC, Jaipur 2009 (240) ELT 276 (Tri.Del.)*,

CC, Jaipur Vs. Flora Marbles 2012 (283) ELT 247 (Tri.-Del.) where the report of GSI was not accepted Tribunal. We have carefully considered the said judgements. In all these cases either the report of the GSI was found to be vague or conflicting opinions between GSI and CRCL, New Delhi had been noticed. In contrast, in the present case, the officer of GSI has been cross examined by the appellants in connection with the report furnished indicating that the goods in question is not marble. In the cross examination he affirmed the report. In these circumstances, the observation of the Tribunal in the aforesaid cases cannot be made applicable to the facts of the present case.

18. The Ld. Advocates for appellants have vehemently argued that the redemption fine and penalty imposed by the adjudicating authority is disproportionate and excessive. In this regard, we need not dwell much on the said issue as this Tribunal in similar circumstances, in the case of *Gurukripa Marbles Vs. CC 2006 (201) ELT 79 (Tri.-Mum)* following the judgement of Hon'ble Bombay High Court in *Commissioner of Customs, Nhava Sheva Vs. Marma Classic – 2005 (156) ELT 14 (Bom)*, later approved by the Hon'ble Supreme Court reported as *Commissioner of Customs (Import) Vs. Stoneman Marble Industries – 2011 (264) ELT 3 (SC)* held that the redemption fine be restricted to 20% of CIF value and penalty to 5% of the said value. In the facts and circumstances of the case, ends of justice would meet if the fine and penalty is reduced to 20% and 5% respectively.

19. Consequently, the impugned orders are modified to the extent of reduction of fine and penalty to 20% and 5% respectively, and all the appeals are remanded to the adjudicating authority to calculate the redemption fine and penalty accordingly.

20. Appeals are disposed of as above.

(Pronounced in court on 25.09.2020)

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

(P. Anjani Kumar)
Member (Technical)

Sinha