CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87530 OF 2019

[Arising out of Order-in-Appeal No: 833 & 834(CAC)/2019(JNCH)/Appeal-II dated 24th May 2019 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Siya Traders
F-11/0-3 Shantivan Society, Sector – 7, Sanpada
Navi Mumbai - 400707 … ***Appellant***

versus

Commissioner of Customs (NS-V)
Jawaharlal Nehru Custom House, Nhava Sheva
Tal: Uran - 400707 ***…Respondent***

APPEARANCE:

Shri Prashant Patankar, Consultant for the appellant
Shri Manoj Das, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87315 /2021

DATE OF HEARING:	22/09/2021
DATE OF DECISION:	16/12/2021

PER: C J MATHEW

In this appeal of M/s Siya Traders, against order-in-appeal no.

833 & 834(CAC)/2019(JNCH)/Appeal-II dated 24th May 2019 of Commissioner of Customs (Appeals), Mumbai – II, the direction that

> *'7.6 In these circumstances, the Original Authority (OA) should decide the matter afresh after allowing re-test of the RSS drawn from the consignment available with Customs. The appellant should also be allowed to make submissions before the OA and the OA should afford the opportunity of personal hearing to the appellant in compliance of principles of natural justice. As the matter is remanded on the primary issue of improper procedure for testing of goods and inconclusive test report, I refrain from discussing the merits of the case. The OA should examine the whole case afresh on considering all the submissions of the appellants. All aspects of decision on merits of the case by the original authority are kept open.'*

is under challenge.

2. Though the matter has travelled on two occasions to the first appellate authority, it was only the latest order of remand that has caused grievance to the appellant; on the first occasion, following the cavil of the appellant, it was ordered that the test report would have to be validated by cross-examination of the signatories of the said report. In the remanded proceedings, the original authority did permit the cross-examination, as directed, before going on to reject the claim for exemption from basic customs duty of ₹ 4,39,940/- and levying anti-dumping duty of ₹ 33,87,904 as imposed under notification no 51/2012-Cus (ADD) dated 3rd December 2012 at serial no. 2. Besides

confiscating the impugned goods valued at ₹ 48,26,024/- under section 111(m) of Customs Act, 1962, with option to redeem on payment of fine of ₹ 5,00,000/-, and imposing penalty of ₹ 3,83,784/- on the appellant herein, penalty of ₹ 1,00,000/- was imposed on the proprietor of the importing entity under section 112 of Customs Act, 1962. The proprietor, in personal capacity and as importer, approached the first appellate authority who passed the order now impugned.

3. The appellant, a proprietorship concern, had filed bill of entry no. 3663814/18.10.2017 for import of 'pre-sensitized positive offset aluminium plates (for offset printing machine)' from Malaysia and claimed exemption from basic custom duty, in accordance with the ASEAN-India Free Trade Area Preferential Tariff as enabled by notification no. 46/2011-Cus dated 1st June 2011 (serial no. 1182), for discharge of duty liability of ₹ 8,68,684/-. Owing to doubts about correctness of the declaration, samples were forwarded to M/s Alpha Plus on 30th October 2017 for testing and, as per their report dated 31st December 2017, these were established to be 'computer-to-conventional plate (CtCP) digital offset printing plates' which was not in conformity with the description in the bill of entry. The samples of the impugned goods sent to IIGT School of Printing and Packaging was reported as suitable for 'CtCP use' and the base material to be 'aluminum' with 'pre-sensitized' coating. In further clarification dated

15th December 2017, the said agency reported that 'pre-sensitized coating' is a feature of all plates and that it is the exposure time that distinguishes 'pre-sensitized analog plates' and 'computer-to-conventional plates' with the former taking anywhere between 15 to 20 minutes while the latter anywhere from 30 seconds to five minutes.

4. The absence of any marking to indicate Malaysian origin on the packages prompted further investigations as certain 'pre-sensitized plates' were leviable to anti-dumping duty imposed *vide* notification no. 51/2012-Cus (ADD) dated 3rd December 2012. In the course of investigations, 'whatsapp' messages, extracted from the mobile telephone of Mr Sushil Nalage, were taken on record as evidence of lack of manufacturing facility with the supplier in Malaysia and of the goods having originated in Peoples' Republic of China from the routing of amounts paid by the appellant to M/s Henan Huida Print All Digital Material Co Ltd, China through the Malaysian intermediary. These were confirmed in statement recorded from Mr Sushil Nalge.

5. The test report of IIGT School of Printing and Packaging was relied upon in the order of the original authority, after discarding that from Alpha Plus, to disallow claim for preferential rate of duty and, on the conclusion that the goods were not only liable to standard rate of duty owing to ineligibility of the re-determined description of the

goods but also, from its origins in the Peoples' Republic of China, liable to anti-dumping duty. As opportunity for cross-examination had not been afforded, the first appellate authority remanded the matter for fresh adjudication. The reiteration of the detriments in the second round was challenged before the first appellate authority and it was thereon that re-test was ordered in view of the deficiency in the test process.

6. According to Learned Consultant appearing for the appellant, the challenge to the impugned order of remand is primarily to retrieve the bad from being made worse. Pointing out that the imported plates had limited life, he argued that, as the test process had been discredited in the impugned order, the declaration should be accepted and goods released to appellant. The comparison of the two reports undertaken by the original authority thus

> *'11. Based on the above discussion it is clear that the TR issued by M/s Alpha Plus which is a private party and the manner and circumstances in which the said TR was prepared and issued is found to be doubtful with its authenticity hence the same is not taken on record for taking any decision about the correctness of the description of good. With regard to the TR issued by the testing lab i.e. IIGT Mumbai which is having affiliation with the TISS, Mumbai, it is found that the authenticity of the same is found to be correct.'*

was, according to him, contrived for confirming the inclination to garner higher revenue by denial of preferential treatment. The discarding of 'certificate of origin', and thereby denying eligibility for exemption and laying the ground for re-determination of origin of the goods, without following the process of verification prescribed in circular no. 31/2016-Cus dated 12th September 2016 despite being brought to the notice of the adjudicating authority as is evident from

> *'13. With regard to the issue of the COO whether the- goods are from China or from Malaysia the importer and their Ld Adv Mr Prashant Patankar has strongly argued that the COO certificate cannot be simply rejected without following the due process of verification of the COO as prescribed in the Board's Circular No: 31/2016-Cus Dt 12.9.2016 and that of the Operational Certification Procedures for The Rules of Origin For The ASEAN-INDlA Free Trade Area (AIFTA) under APPENDIX D Article 7, It is a fact that the said procedure has not been followed in this case but for the reason that there is corroborative evidence on records taken under Section 108 of the Customs Act 1962 which is enough proof that the goods has been imported from China and the payments of which has been sent to the Chinese firm M/s Henan Huida Print All Digital Material Co. Ltd through Malaysia with the help of Mr Jackson of M/s Digital Plates (M) SDN BHD. There are substantiated evidence on records under Annexure 4 of the SCN that approximately 86% (i.e USD 63000 as against the total value of the good of USD 73177) of the payment of the goods under imports was directly forwarded to Chinese firm as referred above which is in contradiction of the column 8 of the COO certificate issued in this case which clearly proved that importer has got the said goods imported from*

China routed thru Malaysia in a complete finished form. The same evidence has been further corroborated with chats on these facts which has been retrieved from the cell phone of the importer's husband Mr Sushil Nalage in his presence during the course of recording of his statement. Therefore the case laws as referred by the importer in the case of Bullion and Jewellers Association V/s UOI reported as 2016(335)E.L.T 639(Del.) and of Mahadev Metalinks Pvt Ltd V/s UOI as reported in 2016(331) E.L.T 424 (A.P) are not squarely applicable in this instant case. Moreover, the export related documents also does not through light about the fact that they have been manufactured and removed from the factory of M/s Digital Plates (M) SDN BHD in Malaysia. Based on the above findings if the procedure with regard to the rejection of country of origion certificate has not been followed then the said Act does not absolve the importer from the mis-declaration which they did so. As the good are imported from the China therefore the same are not eligible for the benefit of the claimed exemption Notfn No; 46/2011 Sr. No: 1182(1) Dt 1.0.2018 and consequently based on the finding of the TR and the cross examination the goods which arc found mis-declared correctly attracts ADD under Notfn No: 51/2012 Cus (ADD) Dt 3.12.2012 8.No: 2.'

was assailed by Learned Consultant.

7. It is also pointed out by him that the first appellate authority had found itself unable to determine the merits of the case owing to

'7.5 Thus there is no reason to accept the conclusion arrived at by the OA in the denovo order-in-original that the goods are CtCIP Plates as the same is based solely on the test

> *report issued by IIGT, Mumbai. The OA should have appreciated that since, the appellant had been maintaining that the goods were 'P S Plates', the testing was a material fact having bearing on the classification, leviability of Anit-dumping Duty, confiscation and related matters. However, the department and relied on the test report given by IIGT. The nature of goods is a fact , ascertainment of which cannot be allowed to be sacrificed on some legal technicalities particularly when the goods are still available with Customs for drawing samples for re-testing. Since, the appellants have been challenging the facts about the nature of testing which is a material fact having bearing on the classification, confiscation and related matters, I think it just and proper that the Customs should again get the testing of the goods done by reputed Govt approved testing laboratory or from any other suitable laboratory or facility if the Govt approved testing laboratory is not available, to ascertain the nature of the goods whether they are "PRE-SENSITIZED POSITIVE OFFSET ALUMINIUM PLATES (FOR OFFSET PRINTING MACHINE)" as declared or "CTcP/Thermal/UV-CTcP" as suspected by the Department. The Department will be at liberty to consider issuing addedndum to the SCN.'*

which is tantamount to re-investigation and institution of fresh proceedings without closure of the pending proceedings. This, according to him, was not within the jurisdictional competence of the first appellate authority. Reliance was placed on the decision of the Tribunal in *Mahindra & Mahindra Ltd v. Commissioner of Central Excise, Mumbai – V [2006 (196) ELT 62 (Tri.-Mumbai)].*

8. It is his further contention that customs authorities had not been

able to ascertain the feasibility of testing and wherewithal for conclusive outcome in the two years that had elapsed since the direction of the first appellate authority. It is also submitted that as the parameters for the distinguishment of the two goods had not been brought out in the show cause notice, a finding which enunciated these for the first time was tantamount to proceeding against them behind their back. Reliance has been placed on the decisions in *Bullion and Jewellers Association v. Union of Indi [2016 (335) ELT 639 (Del)]* and in *Mahadev Metaliks Pvt. Ltd. v. Union of India [2016 (331) ELT 424 (AP)]*. On the issue of the finding that the 'certificate of origin' was unacceptable, the decision of the Tribunal in *Manishanand Creation v. Commissioner of Customs (Import), Nhava Sheva [2012 (276) ELT 513 (Tri. -Mumbai])]* was cited.

9. According to Learned Authorized Representative, the original authority had framed three issues for consideration and had given detailed findings on each of them. Reliance has been placed on the decision of the Hon'ble Supreme Court in *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) ELT 577 (SC)]* in support of the contention that an ambiguity in the exemption notification does not, by default, favour the importer. He contends that the direction issued by the first appellate authority is implementable and that it is physically, and logically, possible to conduct the re-test. He also contends that, on perusal of the finding of the Director

General of Trade Remedies dated 15th May 2020, coverage of imported goods within the intent to levy anti-dumping duty is amply clear. According to him, Mr Nalage had, in statements dated 3rd November 2017 and 15th January 2018, admitted to the goods having been manufactured in China and that further evidence is not required to substantiate that which has already been admitted.

10. It is seen from the records of proceedings that the sole purpose of the remand is for re-test of the goods owing to lack of sufficient clarity to determine conformity of the goods with the description in the bill of entry. Having found himself unable to proceed further, other findings of the original authority were not taken up for consideration by the first appellate authority. Despite this, Learned Consultant argued elaborately against the findings on those aspects in the order of the adjudicating authority. We are not required to consider those arguments except to the extent that they can be brought to bear on the eligibility for preferential rate of duty claimed in the bill of entry which is what the re-test is all about.

11. Anti-dumping duty is leviable on ‘digital offset printing plates’ within which are three sub-categories, *viz.*, violet, thermal and CtCP. Even if the outcome of the test evidences the impugned goods to be ‘CtCP’, the origin of the goods – both in manufacture and of export – must be from Peoples’ Republic of China for the levy to be valid in

law. It has not been controverted that the goods were not procured from the exporter in Malaysia. The evidence, in the form of ‘whatsapp’ messages and admission in statements, does not discredit the routing through the Malaysian entity as an independent trader in the goods. To take that first step, the ‘certificate of origin’ must be discarded and not by reliance on any circumstantial evidence. Without determination of the authenticity and correctness of the contents of ‘certificate of origin’, the testing of the product is a half measure that may not conclude the proceedings except in circumstances that confirm the declaration of the importer. This should have found a place in the impugned order.

12. The question that follows is whether the first appellate authority, and arising from inability to proceed with determination on merits, is within its competence to direct fresh evidence to be incorporated in the proceedings. We take note that *proviso* to section 128A(3) of Customs Act, 1962 empowers Commissioner of Customs (Appeals) to issue show cause notice subject to conditions prescribed therein and, though rarely resorted to, impliedly authorizes directions, such as re-test of the goods once again for issue of addendum to show cause notice, without compromising principles of natural justice.

13. In the absence of a finding on the nature of the goods, the dispute remains undetermined. The rival claims of feasibility of

testing and the futility of the exercise do not suffice for determination and testing appears to be the only option. Learned Consultant has also not placed any alternative for determination of the nature of the goods. We, therefore, find no reason to direct any other course of action.

14. However, mere re-testing may not culminate in conclusion of proceedings even if the test report is conclusive enough for determination of the nature of the goods. No less critical to the eligibility is the 'certificate of origin' which has also been doubted by the original authority. The first appellate authority has not returned a finding on that aspect which is not dependent on the outcome of the re-test. That lack must be made good. For that additional finding, we remand the matter back to the first appellate authority without disturbing the directions in the order impugned before us.

15. The appeal is, accordingly, disposed off.

(Order pronounced in the open court on 16/12/2021)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*