CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 70 of 2007

(Arising out of Order-in-Original No. 11/Cus/2006 dated 17.10.2006 passed by Commissioner of Customs, Pune)

Ballarpur Industries Ltd. **.....Appellant**
B-14, Shangrila Gardens, Above ICICI Bank,
Bund Garden Road, Pune-411 001.

VERSUS

Commissioner of Central Excise and Service Tax, Pune-I **.....Respondent**
41-A, ICE House, Sassoon Road,
Pune-411 001.

AND

Customs Appeal No. 71 of 2007

(Arising out of Order-in-Original No. 12/Cus/2006 dated 17.10.2006 passed by Commissioner of Customs, Pune)

Ballarpur Industries Ltd. **.....Appellant**
B-14, Shangrila Gardens, Above ICICI Bank,
Bund Garden Road, Pune-411 001.

VERSUS

Commissioner of Central Excise and Service Tax - Pune-I **.....Respondent**
41-A, ICE House, Sassoon Road,
Pune-411 001.

Appearance:

Shri Lalitendra Gulani, Advocate for the Appellant
Shri Manoj Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87465-87466/2023

Date of Hearing: 10.08.2023
Date of Decision: 10.08.2023

PER : S.K. MOHANTY

The appellants herein, M/s. Ballarpur Industries Ltd. had imported certain consignments of Lutex-701 and Lutex-780 from M/s. LG Chem Ltd., Korea for use as binder in the manufacture of coated paper. The appellants have filed the Bills of Entry (B/Es), classifying the imported goods under CTH 4002 11 00. The department drew representative samples from the impugned goods and sent the same for chemical examination to the Deputy Chief Chemist. The said examiner in its evaluation report dated 09.06.2005 had observed that the sample is in the form of white liquid. On the recommendations of Chief Chemist, the samples were forwarded to the laboratory at Indian Rubber Manufacturers Research Association (IRMRA) for examining the styrene content in the impugned goods. IRMRA vide the report dated 03.03.2006 and 06.03.2006 had observed that the impugned goods are in the nature of Styrene Butadiene Rubber (SBR) of 1900 series. It has further been observed in the said report that total solid content has been stated as 50.12 percent and 50.08 per cent respectively, and styrene content as 76 per cent and 60.06 per cent respectively.

1.2 The Director General of Anti-Dumping Authority vide Notification No. 30/1/97-ADD dated 02.06.1999 found that import of SRB of various grades classifiable under sub-heading 4002 19 of the first schedule to the Customs Tariff Act, 1975 was being dumped in the Indian market, which had caused material injury to domestic market. Accordingly, the said authority had recommended for imposition of anti-dumping duty on import of SBR, 1900 series from Republic of Korea. The Central Government vide Notification No. 73/2000-Cus., dated 29.04.2000 had imposed anti-dumping duty on import of SBR 1900 series classifiable under heading 3903 or heading 4002 of the CTH. Pending the sunset review, the Central Government vide Notification No. 73/2004-Cus., dated 26.07.2004 had extended imposition of anti-dumping duty on the same goods imported from Korea for a further period of 6 months. The Anti-

Dumping Authority vide subsequent Notification No. 15/5/2003-DGAD dated 30.07.2003 had also recommended for continuation of imposition of anti-dumping duty on the said goods imported from Korea. Accordingly, the Central Government had issued the Notification No.100/2004-Cus., dated 28.09.2004 in imposing anti-dumping duty @ USD 0.0689/kg. on import of SBR of 1900 series from Korea.

1.3. On the above backdrop of the issue, the department initiated show cause proceedings against the appellants, seeking for recovery of the anti-dumping duty in terms of the aforementioned notifications. The matter arising out of the SCNs dated 23.05.2006 and 30.06.2006 were adjudicated by the learned Commissioner of Customs, Pune vide the impugned orders dated 17.10.2006. Vide the impugned orders, the learned adjudicating authority has held that since the test reports have conclusively proved that the imported goods were SBR of 1900 series, owing to the styrene content, proposal for imposition of anti-dumping duty is proper and justified. Accordingly, the proposals made in the SCNs were confirmed against the appellants.

1.4 Feeling aggrieved with the impugned orders, the appellants had preferred appeals before this Tribunal which were disposed of vide order dated 27.09.2017 by allowing the appeals in favour of the appellants. Revenue had assailed the said order of Tribunal in filing the appeal before the Hon'ble Supreme Court. Vide judgment dated 21.09.2021 [2021 (378) ELT 86 (S.C.)], the Hon'ble Supreme Court have set aside the order passed by the Tribunal by way of remand. The relevant paragraphs in the said judgments are extracted herein below:

> *"**16.** The Commissioner also recorded in paragraph 6.4 that the importer had also approached IRMRA independently for testing the samples of Lutex 701 and 780 in their control. A similar finding was arrived at by IRMRA from the samples furnished by the importer. Paragraph 6.4 of the decision of the Commissioner reads as follows:*
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> > *"6.4 It may be pertinent to again mention here that the said importer themselves had also approached the IRMRA for an independent testing of the samples of Lutex 701 and Lutex 780 which were in their control and the said IRMRA, vide their Evaluation Report dated 14-9-2006, for the same goods under the control of the said Importer and which are also covered under the First Notice and the*

> *Second Notice conveyed the results thereof to the said Importer wherein the Styrene content was observed to be 64.44% and 66.75% respectively for Lutex 701 and Lutex 780."*

In this background, the Commissioner held:

> *"6.5 Thus, It may be seen that when the said Importer got the Impugned goods tested on his own from the same laboratory where the department had sent the goods for ascertaining the Styrene content, in the imported Lutex 701 and Lutex 780, the styrene content was reported to be above, 60%."*

None of the above findings have been displaced in the order of the Tribunal. The tribunal has not looked into the merits of the appeals at all on the facetious ground that the show cause notice did not contain any basis to doubt the classification of the goods and that while issuing the notice, the adjudicating authority had not examined the classification based on the report of the laboratory. The findings of the Tribunal are contrary to the record and cannot therefore be sustained.

17. *At the same time, since the tribunal has not considered the case of the respondent in appeal on merits, we are of the considered view that it would be appropriate to restore the proceedings back to the Tribunal for the purpose. In order to facilitate a fresh decision on remand, we have recorded the broad submissions of the contesting parties on the merits as well but leave open the matter for evaluation by the Tribunal on remand. We accordingly allow the appeals and set aside the judgment of the Tribunal dated 27 September, 2017. Appeal Nos. C/70 & 71/07 arising out of the orders in Original No. II/Cus./2006 and 12/Cus./2006, both dated 17 October, 2006 of the Commissioner of Customs, Pune are restored to the file of the Tribunal for determination afresh."*

2. Learned Advocate appearing for the appellants submitted that the original authority has confiscated the imported goods, imposed redemption fine and confirmed the other adjudged demands solely based on the test reports submitted by IRMRA. He further submitted that the opinion dated 14.03.2007 obtained by the appellants from the Director, Institute of Chemical Technology, University of Mumbai, opining the product as 'Latex' in view of the chemical content therein, has been completely brushed aside by the adjudicating authority. Learned Advocate also submitted that there are discrepancies between the evaluation report and the test reports relied upon by the department in the adjudication proceedings. He further submitted that there is inordinate delay in issuance of the test reports and as such, the same cannot be relied upon in support of confirmation of the adjudged demands on the appellants. Learned Advocate also submitted that the specific request made for cross-

examining the author of the test reports have not been considered by the adjudicating authority. Thus, he submitted that there is gross violation of the principles of natural justice and therefore, the matter should go back to the original authority for a fresh fact finding, upon compliance of the principles of natural justice, by providing opportunity to cross-examine the witnesses involved in this case. To support such stand, the learned Advocate has relied the judgement of the Hon'ble Supreme Court in the case of *Andaman Timber Industries Vs. Commissioner of C.Ex., Kolkata-II* – 2015 (324) E.L.T. 641 (S.C.) and the Order of this Tribunal passed in the case of *Ocean Marketing Vs. Commissioner of C. Ex. & S.T., Jaipur* - 2017 (348) E.L.T. 269 (Tri.- Del.).

3. On the other hand, Learned Authorized Representative appearing for the Revenue reiterated the findings recorded in the impugned orders.

4. Heard both sides and examined the case records.

5. The issue involved in these appeals relates to classification of the product for the purpose of levy of anti-dumping duty. The Appellants have claimed the classification of the products as Lutex 701 and Lutex 780, which was disputed by the department and as a result of the test report dated 03.05.2006, the Learned adjudicating authority has classified the product as "High Styrene Content of Miscellaneous SBR polymer master batches". We find that the impugned orders were passed solely by relying upon the test report dated 03.05.2006 issued by the IRMRA. However, on specific request been made by the appellants for cross-examining such testing agency, the same was not adhered to by the Original authority. Thus, it is clearly evident from the facts of the case that the principles of natural justice have been violated. In context with violation of principle of natural justice, we find that the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) have held that non-observance of such doctrine is fatal and the proceedings cannot be initiated and are liable to be dropped. The

relevant paragraphs of the said judgement are extracted herein below:

'6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two *witnesses was the only basis of issuing the Show Cause Notice.'*

6. In view of the forgoing discussions, we are of the considered opinion that the matter should go back to the original authority for re-consideration of the issues involved in these appeals and for grant of opportunity of cross-examining the authorized officer of the testing agency M/s. IRMRA before passing of the *de novo* adjudication order. Therefore, by setting aside the impugned orders, the appeals are allowed by way of remand to the Original authority. Needless to say that reasonable opportunity of personal hearing should be granted to the appellants before deciding all the issues afresh. This is an open remand and the original authority should consider all the aspects involved in the matter and should pass a reasoned and speaking order after considering the submissions, if any, to be made by the appellants.

7. In the result, the appeals are allowed by way of remand.

(Dictated and pronounced in the open court)

(S.K.Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

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