CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO. 2

CUSTOMS APPEAL NO: 85264 OF 2023

[Arising out Order-in-Appeal No: 1061(Gr. IIG)/2022(JNCH) dated 07th December 2022 passed by the Commissioner of Customs (Appeals), Mumbai–II.]

Anmol Ratan Enterprises … ***Appellant***
42, Bunglow Type, Anand Nagar Soc,
Near Swaminarayan School, Morabhaga,
Rander Road, Surat, Gujarat – 395 005

versus

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

APPEARANCE:

Shri N D Goerge, Advocate for the appellant

Shri S K Hatangadi, 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: 85371/2024

DATE OF HEARING: 04/10/2023
DATE OF DECISION: 01/04/2024

PER: C J MATHEW

Among the several goods, falling within chapter 39 of First Schedule to Customs Tariff Act, 1975, that were imported by M/s

Anmol Ratan Enterprises *vide* bills of entry no. 2848026/20.02.2021, no. 2848091/20.02.2021 and no. 2848455/20.02.2021, the dispute is limited to 'plastic regrind', in container nos. EMCU 9444934 and EMCU 9670206 pertaining to the second of the bills and container nos. TGHU 8319814 and TGHU 8781653 pertaining to the third, even as other goods contained therein as well as 'plastic regrind' which container no. BAXU 5050481 exclusively carried were found to be correctly declared and not prohibited for import. In terms of ITC (HS) 2012, Schedule I-Import Policy appended to Foreign Trade Policy (FTP) under the authority of Foreign Trade (Development & Regulation) Act, 1982, import of plastic waste is permissible only against licence issued by Directorate General of Foreign Trade (DGFT) which the 'plastic regrind' imported against the two bills of entry, admittedly, did not have. The culmination of proceedings, initiated by show cause notice dated 22nd December 2021, in order of Joint Commissioner of Customs, Group IIG, JNCH reclassifying the disputed goods against tariff item 3915 1000 of First Schedule to Customs Tariff Act, 1975 from tariff item 3901 1090 of First Schedule to Customs Tariff Act, 1975 as declared, confiscating the disputed goods under section 111(d) of Customs Act, 1962 for having been imported without a valid license issued by the competent authority and under section 111(m) of Customs Act, 1962 for misdeclaration, but allowed to be redeemed under section 125 of Customs Act, 1962 on payment of fine of ₹ 1,25,000 solely for re-export failing which these were to be destroyed at cost to importer, besides imposition of several penalties was challenged in appeal and it is the upholding thereof in order[1] of Commissioner of Customs (Appeals), Mumbai – II that is impugned here.

2. At the outset, we find ourselves unable to concur with the consequence of non-availment of re-export, as stipulated in the order of the original authority and which found approval of the first appellate authority, for being contrary to law and, in fact, tantamount to misappropriation of public property. Customs Act, 1962 does not empower destruction of goods; indeed, it would be anathema to a statute enacted in pursuance of constitutional empowerment to tax to even consider such eventuality. Prohibition, and especially one that emerges from another statute, must be dealt with in terms of delegation of executive authority or by devolution as agency; neither of these have a place in adjudicatory proceedings which are confined to the framework of a show cause notice that did not encompass such proposal. Its illegality is further compounded by the vesting of confiscated goods, *viz.*, either absolutely or those for which offer of redemption has not been availed, in the Central Government under section 126 of Customs Act, 1962. Had the adjudicating authority been possessed of vestment by the Central Government to order destruction

[1] [order-in-appeal no.1061(Gr. IIG)/2022(JNCH) dated 07th December 2022]

of such goods, that should have been cited. Clearly, this is an occurrence of overreach that has to be nipped in the bud.

3. Compounding this misadventure is the lack of detail in the order of the original authority about the composition, and extent, of the allegedly offending article in the four containers. The proposal for confiscation was put forth in the notice without any effort at ascertainment of weight or value of the said goods owing to which the original authority was enabled to set out consequences in a sweepingly general tone that does not sit well with the serious exercise of adjudication. We are unable to fathom the application of mind which enabled quantifying of the redemption fine either.

4. The impugned order has affirmed the manner in which the original authority has concluded that the impugned goods are, indeed, 'waste', that goods conforming to 'waste' corresponding to heading 3915 of First Schedule to Customs Tariff Act, 1975 – either by declaration or by re-classification – are burdened with the onus of complying with the stipulations entailed on such in the Foreign Trade Policy (FTP), that a determination by an official of Central Revenue Control Laboratory (CRCL) suffices for a part of a consignment of 'plastic regrind' to be condemned as 'waste' even in the absence of such by an expert body such as CIPET, that it is quite the thing to fall back on guidelines on 'waste' handling issued by Directorate General of

Foreign Trade (DGFT) and standards conceptualized by the Bureau of Indian Standards (BIS) for dealing with 'waste' as aid in fulfilling the task of assessment or re-assessment of imported goods and that conclusions about deployment of impugned goods having deleterious consequence is in the domain of customs clearance.

5. We have heard Learned Counsel and Learned Authorized Representative at length.

6. There is no doubt that import of 'plastic waste' is restricted by the Foreign Trade Policy (FTP) as provided in paragraph 27(2) of Handbook of Procedures (Vol I) 1992-97 RE: March 1996 and, in pursuance thereof, Public Notice 392-PN was issued by Directorate General of Foreign Trade (DGFT) on 1st January 1997 and, as amended from time to time, governs the handling of 'waste' that, despite being so, may be licensed for import. There are standards, too, prescribed by Bureau of Indian Standards (BIS) of which IS 14534:1998 is referred to in the orders of the lower authorities. Chapter 39 of First Schedule to Customs Tariff Act, 1975, which enumerates 'plastics and articles thereof', comprises varieties of 'plastics' in primary form from heading 3901 through heading 3914 before

'WASTE, PARINGS AND SCRAP, OF PLASTICS'

of heading 3915 appears within which, it is as *'of polymers of ethylene'*

corresponding to 3915 1000 of First Schedule to Customs Tariff Act, 1975 that customs authorities placed 'plastic regrind' contained in two out of the three consignments. All three appear to have influenced the minds of the lower authorities in resolving the assessment and restriction aspect that continues to inform the dispute even now.

7. The entirety of the dispute lies within the entry of goods for import under section 46 of Customs Act, 1962 and to be cleared, in terms of section 48 of Customs Act, 1962, for 'home consumption' subject only to satisfaction of 'proper officer' that duties, as leviable, has been discharged and that goods are not prohibited for import. Duties of customs are assessed as leviable by application of 'rate of duty' – determined by classification within First Schedule to Customs Tariff Act, 1975 – to value as determined by the valuation provisions emanating from section 14 of Customs Act, 1962. The other, *viz.*, 'prohibition', is an entirely different facet of clearance and undertaken as agency function which, though resort is permissible to the Central Government in section 11 of Customs Act, 1962, generally invoke other laws like in the matter before us. The two constitute entirely different, and mutually exclusive, stipulations in clearance for 'home consumption' of imported goods. To us, the findings of the lower authorities appear to have been caught in circular reasoning of cause and effect as re-classification is seen to have been caused by references

to purported restriction on import of 'waste' in Foreign Trade Policy (FTP) and standards formulated by Bureau of Indian Standards (BIS), which the imported goods were held to be, and the restrictions on import of 'waste plastics' brought to bear upon the goods consequent to determination that the goods are 'waste' corresponding to tariff item 3915 1000 of First Schedule to Customs Tariff Act, 1975. It is moot if the different statutes intended 'waste' of plastics to coincide so but that caution does not seem to have impressed itself on the lower authorities.

8. The determination that impugned goods had been misdeclared and prohibited for import is rooted in the purported designating of 'plastic regrind', in two of the three consignments, as 'waste' by the Central Revenue Control Laboratory (CRCL). We are unable to conclude from the test reports if the Deputy Chief Chemist concerned intended this to inform classification exercise or to be acted upon for furtherance of restriction in the Foreign Trade Policy (FTP). Furthermore, we are unable to conclude from

> *'on visual examination, appears to be waste'*

in relation two samples conjoined with

> *'cannot be ascertained'*

in relation to four others, including another of 'plastic regrind', that the claim of the appellant on lack of facility in the laboratory to analyze such goods, noted in public notice no. 96/2019-JNCH dated 23rd

October 2019 and no. 56/2021-JNCH dated 16th February 2021, can be easily discounted. The other report, *viz*., that of Central Institute of Petrochemicals Engineering & Technology (CIPET), has not ventured to declare the samples to be 'waste' at all and the first appellate authority, despite conceding the *bona fides* of import thereon, has distinguished the cleared and impugned goods as attributable to

> *'5.1 …the said goods had visible impurities and were consisting of dirty cut pieces…'*

which evinces ambivalence in sources that were relied upon. Furthermore, there is no discussion on the relevance of such visual evaluation to description corresponding to tariff item 3915 1000 of First Schedule to Customs Tariff Act, 1975 that we have referred to *supra* or to any of notes in chapter 39 of First Schedule to Customs Tariff Act, 1975 to justify re-classification in accordance with the onus devolving on customs authorities as held by the Hon'ble Supreme Court in *Hindustan Ferodo Ltd v. Collector of Central Excise [1997 (89) ELT 16 (SC)]* thus

> *'It is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No. 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.'*

and in *HPL Chemicals Ltd v. Commissioner of Central; Excise, Chandigarh [2006 (197) ELT 324 (SC)]* that

> *'28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue……'*

9. Proceeding in the same circular vein, the impugned order appears to set much store by 'visible impurities' found in literature pertinent to IS 14534:1998. It does appear to us that the lower authorities have not appreciated the lack of relevance to such standards in carrying out statutory responsibility to assess imported goods. The standard itself appears to determine acceptability of a process which is not germane to imported goods that may be required to product specification standard but not to process standard. The standard distinguishes the segregation treatment of different types of plastic waste and it appears that an assumption has been made by the lower authorities that it is the presence of impurities that determines class of 'waste' which is contrary to the categorization in the standard based on source of the 'waste' which, in turn, would determine its potential for recycling without burdening quality of air and water. It is evident that no effort has been made to ascertain the source of the impugned goods without

which the said standard serves no purpose. The standard referred to is not relevant to clearance of goods for home consumption.

10. The reliance placed upon the public notice issued under Foreign Trade Policy (FTP) with reference to

> *'...using standard plastic processing techniques but without involving any process of cleaning whereby effluents are generated..'*

in the impugned order is also demonstrative of lack of appreciation of the intent of the clarification. In the absence of any scrutiny of the manner in which the impugned goods would be dealt with or the effect of 'impurities and dirty…' on further processing in India, the conclusions thereon are not tenable.

11. The onus for displacing the declared classification has not been discharged. The test reports do not lead to the conclusion that classification was to be altered or that the goods are restricted for import. In fact, the entire proceedings are vitiated by lack of any expert ascertainment of the nature of the goods. Such determination, in the absence of deliberate and reliable venture towards that end by customs authorities, is best left to the administrative and enforcement agencies designated for such oversight under the relevant statutes for the good of society at large. Between uninformed zeal and deliberate harassment is a very thin dividing line and no whit is added to the credibility of an

institution when such blurring occurs in patently ill-considered enforcement.

12. The impugned order is not based on appreciation of facts in totality and has not taken the proposals in the show cause notice to legal and logical conclusion. For the reasons *supra*, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 01/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*