

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

REGIONAL BENCH – COURT NO. 2

EXCISE APPEAL NO: 86655 OF 2016

[Arising out of Order-in-Original No: GOA-EXCUS-000-COM-023-15-16 dated 30th March 2016 passed by the Commissioner of Central Excise & Service Tax, Goa.]

J&J Precision Industries

Plot no. 23, D-3/3, Mapusa Indl. Estate
Mapusa, Goa – 403 507

... Appellant

versus

Commissioner of Customs & Central Excise

ICE House, EDC Complex, Patto Plaza, Panaji
Goa – 403 001

...Respondent

WITH

CUSTOMS APPEAL NO: 87940 OF 2022

[Arising out of Order-in-Original No: CC-VA/37/2019-20 Adj.(I) ACC dated 21st February 2020 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Joit Kumar Jain

J&J Electronics Plot No. 24, D-33, Mapusa Indl. Estate
Mapusa, Goa – 403 507

... Appellant

versus

Commissioner of Customs

Air Cargo Complex (ACC)
Mumbai Zone - III

...Respondent

APPEARANCE:

Shri Prakash Shah, Advocate and Shri Mihir Mehta, Advocate, Shri Mohit Raval, Advocate, for the appellants

Shri Mahesh Patil, Joint Commissioner (AR) and Shri D S Maan, Deputy Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85518-85519/2024

DATE OF HEARING:	16/01/2024
DATE OF DECISION:	17/05/2024

PER: C J MATHEW

The cross-currents of two commodity taxation statutes are at odds in these two appeals - one emanating from proceedings under Central Excise Act, 1944 contending that the appellant had manufactured goods but cleared those without payment of duty on the back of exemption that they were not eligible for and the other under Customs Act, 1962 initiated to deny exemption from 'basic customs duty (BCD)' and 'additional duty of customs' availed at the time of import on parts and components stated to be intended for use in that very manufacture – and contrarily enough to confound the direction taken by the other in pursuit of levies peculiar to their respective domains. And, not strangely either, the eddying has complicated the adjudications in 'untrying' to forestall mutual destruction by resort to any, and whatever, foray to assure survival of their respective remits. M/s J & J Precision Industries had established a manufacturing facility

in Goa for production of ‘SD memory card’ which, according to them, involved import of parts and components on which ‘software’ would be loaded to render it deployable in ‘mobile handsets’ manufactured elsewhere.

2. On culmination of proceedings, the imported goods were held to be more aptly conforming to description corresponding to tariff item 8523 5100 of First Schedule to Customs Tariff Act, 1975 with the heading – intended for

‘DISCS, TAPES, SOLID-STATE NON-VOLATILE STORAGE DEVICES, “SMART CARDS” AND OTHER MEDIA FOR THE RECORDING OF SOUND OR OTHER PHENOMENA, WHETHER OR NOT RECORDED....’

in the First Schedule to Customs Tariff Act, 1975, as also of

‘Semi-conductor media’

as one of the two descriptions, at ‘-’ level along side *‘magnetic media’*, being common ground and the controversy edging in between the claim of importer that theirs were *‘smart cards’* of sub-heading 8523 52, and corresponding to the residual tariff item among three of which the other two are *‘SIM cards’* and *‘memory cards’*, while customs authorities were inclined towards *‘solid-state non-volatile storage device’* as description of the impugned goods – a ‘tariff line’ that, oddly, is devoid of the intermediate parentage of a sub-heading.

3. The jurisdiction, inhering from ineligible clearance under section 47 of Customs Act, 1962 to retain authority for 'post-clearance' proceedings for recovery of duties not paid, envisaged in section 28 of Customs Act, 1962, and for confiscation of prohibited or offending goods, envisaged in section 111 of Customs Act, 1962, were, in consequence, brought to bear on past imports while subjecting the 'live' consignments to such, or circumstantially modified, detriments. Additionally, to assure itself of such jurisdiction over past imports, and to alienate alternate jurisdiction adumbrated as defence by the importer, it was also held that misdeclaration of intended 'post-clearance' activity warranted revisit of claim for exemption owing to having been conditionally allowed.

4. In the meanwhile, proceedings initiated by Commissioner of Central Excise & Service Tax, Goa under Central Excise Act, 1944, by notice of 1st October 2014 for recovery of duty liability of ₹ 5,61,89,848 on all clearances valued at ₹ 272,76,62,526 effected between 1st January 2013 and 30th June 2014, were concluded in order holding that 'micro SD memory card' had, by conformity with section 2(f) of Central Excise Act, 1944, been manufactured at their Goa facility and sale in the market, purportedly in breach of

'2. Where such use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure laid down in the Central Excise (Removal of Goods at

Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 is followed'

which was the condition in notification no. 12/2012-CE dated 17th March 2012 subject to which, at serial no. 272

'(a) parts, components and accessories of mobile handsets including cellular phones;

(b) parts, components of battery chargers and hands-free headphones and PC connectivity cables of mobile handsets including cellular phones;

(c) sub-parts of (a) and (b) ...'

of chapter 85 or any other chapter of First Schedule to Customs Tariff Act, 1975, disentitled them to exemption from duties of central excise that, according to appellant, has been erroneously determined. It is on record that the claim for eligibility for exemption, as reported in ER1s, were found to be intended for 'light emitting diodes (LED)' corresponding to tariff item 8541 4020 of Schedule to Central Excise Tariff Act, 1985 which, upon being brought to the notice of assessee, was clarified as typographical error instead of intended serial no. 272 in the same notification and that summons for list of manufacturers to whom the same were cleared against prescribed 'annexure' and details of other sales were responded to with intimation of the entirety of clearances having been for the open market.

5. All of these were yet not on the horizon when appellant imported

220 consignments, valued at ₹ 3,67,30,70,505 and declaring conformity with description corresponding to tariff item 8523 5290 of First Schedule to Customs Tariff Act, 1975, claiming entitlement to avail exemption against notification no. 12/2012-Cus dated 17th March 2012 (at serial no. 431) for

‘....

- (i) *parts, components and accessories for the manufacture of mobile handsets;*
- (ii) *sub-parts for the items mentioned at (i) above;*
- (iii) *parts or components and accessories for the manufacture of battery chargers, PC connectivity cables, Memory Cards and hands-free headphones of mobile handsets; and*
- (iv) *sub-parts for the items mentioned at (iii) above...’*

of any chapter subject to compliance with the condition

‘5. If the importer follows the procedure set out in Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.’

which they, admittedly, had. The goods were cleared accordingly as and when imported.

6. The horsehair that hangs the Damocles’ sword over every clearance, under either of the statutes, surely did, as more often than not, snap when two lots of consignments were entered by the appellant

– one, valued at ₹ 1,88,76,270, *vide* bill of entry no. 8111638/27.01.2015 and another seven, valued at ₹ 12,57,72,694, *vide* bills of entry no. 8070391/22.01.2015, no. 8070568/22.01.2015, no. 80711108/22.01.2015, no. 8110821/27.01.2015, no. 8111639/27.01.2015 no. 8119763/28.01.2015 and no. 8119551/28.01.2015 - for import of goods as before with similar description and classification that came to be examined for assessment and the invoice of the former, as well as the form in which it was presented, mismatched with declaration in the bill of entry while the latter was found to be ‘defective’ and unutilizable for manufacture purportedly carried out by them. Searches and statements followed which elicited information on the limitations of the operation at the Goa facility and that the past imports had been subjected to only such processing as wherewithal permitted before being cleared into the market. The essence of discovery was that completed ‘SD memory cards’, emplaced together in sets of 45 each with marks for disaggregation, had been imported and the only process undertaken after separation were labelling and packing and that no software was required to be loaded thereon for marketability which was evident from lack of any equipment for installation of such at the Goa facility.

7. That did not deter Commissioner of Central Excise & Service Tax, Goa from holding, in order¹ at the conclusion of adjudication of

¹ [order-in-original no. GOA-EXCUS-000-COM-023-15-16 dated 30th March 2016]

show cause notice *ibid*, that, peripheral work on the imported goods, as emerged from investigations *supra* notwithstanding, sufficed for coverage of

‘6. In respect of goods covered by this Section, conversion of an article which is incomplete or unfinished but having the essential character of the complete or finished article (including ‘blank’, that is, an article not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into a finished article or a part into complete or finished article shall amount to ‘manufacture.’ ’

in Notes to Section XVI of Central Excise Tariff Act, 1985 to the activity of assessee not only for conformity with ‘manufacture’ in section 2(f) of Central Excise Act, 1944 but also for venturing further for disallowing claim for exemption to fasten duty liability of ₹ 5,50,55,5701 under section 11A of Central Excise Act, 1944, along with applicable interest under section 11AA of Central Excise Act, 1944, while imposing penalty of ₹ 2,75,27,851 under section 11AC of Central Excise Act, 1944. The first of the determination therein is not in dispute in appeal of the assessee; neither is there any appeal consequent to review by the competent Committee of Chief Commissioners for us to entertain jurisdiction for subjecting that finding to ascertainment of being legal and proper which, needless to say, is crucial to a finding in the other dispute.

8. The proximate consequence of re-classification in order² of Commissioner of Customs, Air Cargo Complex (ACC), Chatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai was the fastening of duty liability of ₹ 32,08,966 on the 'live consignment', valued at ₹ 1,88,76,270, attended upon by the usual detriment of confiscation subject to redemption on payment of fine of ₹ 20,00,000, and imposition of penalty of like amount under section 114A of Customs Act, 1962 while the seven defective consignments, valued at ₹ 12,57,72,694 on which exemption had been sought, were subjected to confiscation under section 111 of Customs Act, 1962 for breach of Hazardous Waste (Management, Handling and Trans-boundary Movement) Rules, 2008 following negative report from Maharashtra Pollution Control Board but allowed for re-export on payment of fine of ₹ 1,00,00,000 even as, strangely, duty liability of ₹ 2,13,81,357 was fastened along with penalty of like amount under section 114A of Customs Act, 1962. This, along with fastening of duty liability of ₹ 62,44,21,986 on the 'past imports', valued at ₹ 3,67,30,70,505, under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, besides the confiscation under section 111 of Customs Act, 1962 with fine of ₹ 30,00,00,000 in lieu thereof despite goods not being available, and imposition of penalty of like amount under section 114A of Customs Act, 1962 is the proximate

² [order-in-original no. CC-VA/37/2019-20 Adj.(I) ACC dated 21st February 2020]

cause for cavil in the appeal of Shri Joit Kumar Jain.

9. Learned Counsel for appellant submitted that the impugned order was a consequence of revisit by the adjudicating authority upon directions of Hon'ble High Court of Bombay and that, at no stage, had it been controverted that the goods were ultimately to be transformed as 'memory cards' which should suffice for proceeding directly to the most akin description in the relevant heading 8523 in First Schedule to Customs Tariff Act, 1975. He argued that reliance could not be placed on circular no. 12/2012-Cus dated 1st May 2012 which discussed the technology that substituted 'printed circuit board (PCB)' with 'substrate' to hold that the intent of a separate tariff line in 'solid-state non-volatile storage device' is not negated by such substitution and that, in the absence of finding that the impugned goods was such, the conclusion in the impugned order is erroneous. It was further contended that the notion of finished goods having been imported by appellant is patently erroneous as the imported goods do undergo processes as held by the Commissioner of Central Excise. He submitted that it was not open to two authorities to hold, for the purpose of levy, that there was no manufacture and that there was manufacture. He further argued that the common finding of 'no software' in the finished goods was incorrect as the jurisdictional Commissioner of Central Excise has conceded that 'formatting' did occur and that, with 'computers' available in the factory, it certainly could not be held that wherewithal

for loading of ‘software’ did not exist. It was also contended that, in the event of duty foregone becoming recoverable, the authority for recovery vested with Commissioner of Central Excise in accordance with the Rules for which decisions of the Tribunal in *Cosmo Ferrites Ltd v. Commissioner of Central Excise, Chandigarh* [2014 (308) ELT 633 (Tri-Del)] and in *Samtel Color Ltd v. Collector of Central Excise, Meerut* [2000 (126) ELT 1256 (Tri)] – both of which were affirmed by the Hon’ble Supreme Court – and in *PCS Industries Ltd v. Commissioner of Customs, Pune* [2014 (311) ELT 111 (Tri-Mumbai)] were cited. It was further contended that the casual negation of coverage by these judgments was not in conformity with the remand directions of the Hon’ble High Court. Furthermore, it was pointed out that the disregard of request for cross-examination on the ground that failure to take up rejection thereof in appeal precluded recourse to such in *de novo* proceedings is erroneous.

10. According to Learned Authorized Representative, the impugned order of Commissioner of Customs has addressed all the relevant issues, viz., jurisdiction by drawing support from judicial pronouncements in *APP Enterprises v. Commissioner of Customs, Chennai* [2008 (231) ELT 110 (Tri-Chennai)], in *APP Enterprises and others v. Commissioner of Customs, Chennai* [2012-TIOL-1074-CESTAT-MAD], in *NB Footwear v. Commissioner of Customs, Chennai* [2007 (209) ELT 102 (Tri-Chennai)], in *Havells India Ltd v.*

Commissioner of Central Excise & Service Tax, Chennai [2018 (364) ELT 488 (Tri-Del)] and in *Shilpi Cables Technologies Ltd v. Commissioner of Central Excise, Alwar [2018 (363) ELT 938 (Tri-Del)]*, the revision in classification, the misdeclaration of intended activity at the factory coupled with search having exposed lack of facilities thereto as well as the validation for invoking the extended period. He placed reliance on decisions of the Tribunal in *Allied Electronics & Magnetics Ltd v. Commissioner of Customs (Exports), New Delhi [2017 (350) ELT 433 (Tri-Delhi)]* and in *Pramod Kumar v. Commissioner of Customs, New Delhi [2018 (363) ELT 411 (Tri-Del)]* to justify revision in classification and on the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal [2010 (260) ELT 3 (SC)]* which held that actual compliance of essence of the intent is warranted and not attempted compliance.

11. Commissioner of Customs, Mumbai has erected jurisdictional validity for recovery of duty and confiscation, attended upon with penal consequence, upon two pillars – erroneous classification of goods at the time of import and erroneous declaration of intended use of imported goods – and either of these, to the extent acknowledged by law, suffices for affirmation of the consequential detriment. It has been set out in the impugned order that, stemming from lack of conclusive compliance with the either or both of the contingencies spelt out in section 47 of

Customs Act, 1962 for permitting clearance of imported goods by 'proper officer', duty liability of past clearances could be re-determined for recovery under section 28 of Customs Act, 1962 and that erroneous declaration of intended use in the claim for exemption from duties of customs on past imports merited revocation of that privilege. On the first, there can be no doubt as admittance of 'tariff line' declared in the bill of entry by the 'proper officer' under section 17 of Customs Act, 1962 does not, owing to the deemed tentativeness of clearance under section 47 of Customs Act, 1962, preclude demand arising from revision of classification. Nonetheless, the proposition for resort to tariff item 8523 5100 of First Schedule to Customs Tariff Act, 1975 in the show cause notice must, necessarily, conform to the General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 and judicial determination 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)]*, thus

‘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.....’

of onus devolving on the ‘proper officer’ – under section 17 of Customs Act, 1962 in relation to ‘live’ consignment and under section 28 of Customs Act, 1962 in relation to past imports - and, thus, constituting the test to be applied by us for affirmation or discard of findings. The rationale for the placement of such onus was necessitated by the framework of the law, as enacted in Customs Tariff Act, 1975, that permitted discard of claimed classification by recourse to comparison only under rule 3 of the said ‘interpretative rules’ implying lack of incorrectness in declaration of importer as well as conformity of the counter-proposition with rule 1 of the said ‘interpretative rules’ simultaneously and, therefore, warranting ‘tie breaker’ for zeroing in on the more apt description. Conversely, disabusing of the tariff line proposed in the show cause notice for not being in conformity with rule 1, to start with, validates the declared classification without having to subject it to the same test of the ‘interpretative rules’ as, in the event of failure prompting search for another, adjudicatory exercise would then traverse the confines of the show cause notice.

12. The proposition in the show cause notice that the impugned goods conformed to tariff item 8523 5100 of First Schedule to Customs Tariff Act, 1975 appears to have had its genesis in the goods comprising the ‘live’ consignment – and in uncut form – being ‘memory cards’ presented as sheets of 45 nos. each and, therefore, conforming to

‘(a) Solid-state non-volatile storage devices (for example, - flash memory cards or flash electronic storage cards) are storage devices with a connecting socket, comprising in the same housing one or more flash memories in the form of integrated circuits mounted on a printed circuit board. They may include a controller in the form of an integrated circuit and discrete passive components, such as capacitors and resistors. ...’

in Note 4 of chapter 85 of First Schedule to Customs Tariff Act, 1975. No further elaboration of the characteristics of the impugned goods suggesting conformity with, or approximation to, this description of storage device has been offered as justification in the impugned order. Implicit in the said description is its ready amenability, *via* socket, for incorporation in intended equipment; the description of the impugned goods in the adjudication order makes no mention of ‘housing’ containing ‘integrated circuits (IC)’ mounted on ‘printed circuit board (PCB)’ and socket either. The onus devolving on the adjudicating Commissioner has not been discharged in conformity with law, as legislatively enacted and judicially established. And as the ‘past imports’ were fastened with liability for being akin to the ‘live’

consignment, the discharge of 'live' consignment from description corresponding to the proposed tariff item applies likewise to 'past imports' as sufficing to restore the declaration in the bills of entry.

13. Learned Authorized Representative urged us to acknowledge the influence of the *Explanatory Notes* to the Harmonized System of Nomenclature (HSN) pertaining to two of the three groupings within 'storage solutions' that were produced from 'semi-conductors', viz., solid-state devices and "smart cards", which, he suggests, rules out conformity of the impugned goods with the latter. For this, he relied on the authority of circular no. 12/2012-Cus dated 1st May 2012 of Central Board of Excise & Customs (CBEC) upon which the Tribunal had based the decisions in *re Allied Electronics & Magnetics Ltd* and in *re Pramod Kumar*. Learned Authorized Representative also relied upon nomenclature of 'parts', 'components' or 'spares' in the Foreign Trade Policy to suggest that the claim of intended manufacture did not bear true as the impugned goods were not in conformity thereof. Needless to state, these submissions of Learned Authorized Representative are not part of the proceedings before the original authority whose finding on proposed revision of classification is limited to

'46.13 In the instant case it is seen that the importer had mis-declared the goods as components for memory card-micro SD connector board", whereas these are finished goods. At the factory no loading of software was being done, and no facility for same was available. Further Commissioner Central Excise

Goa has observed in his order that loading of software is not being done by them. What has been imported are E-waste materials without any actual use. Hence classification under heading 85235290 is correct.'

a more cryptic assertion, and certainly one at variance with the one resorted to for final outcome, that has had the effect of fastening a huge duty liability may yet remain to be recorded. This is certainly not the determination, either for recovery of duty 'not paid' envisaged in section 28 of Customs Act, 1962 insofar as the 'past imports' are concerned or for fastening duty liability by 'proper officer' assessing the 'live' consignment in accordance with section 17 of Customs Act, 1962, obligated under section 12 of Customs Act, 1962. More so as the inference of the goods being 'finished', without need for further processing, does not preclude conformity with the immediately preceding tariff line to nudge resolution of the dispute for comparison in terms of rule 3 of General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 and, therefore, requiring evaluation of "smart cards" which the show cause notice omitted to. We cannot but be struck by the 'confusion most confounded' manifest in such finding to suffice for setting aside the revised classification.

14. Notwithstanding the valiant attempts by Learned Authorized Representative to demonstrate the thinking behind the peremptory finding *supra*, the lack of such foray in the impugned order relegates these propositions to academic significance. The pleadings on behalf of

the respondent-Commissioner also do not further the proposition for subjecting the impugned goods to the rate of duty corresponding to tariff item 8523 5100 of First Schedule to Customs Tariff Act, 1975. Implicit in the defence for adoption of that particular tariff item by relying upon circular no. 12/2012-Cus dated 1st May 2012 of Central Board of Excise & Customs (CBEC) is the suggestion that we are bound by the precedent of decisions in *re Allied Electronics & Magnetics Ltd* and in *re Pramod Kumar*. The decisions of the Tribunal do not aid the cause of Revenue as the dispute therein was not on conformity of the tariff line relating to goods impugned therein with the General Rules for Interpretation of the Import Tariff but of the circular of Central Board of Excise & Customs (CBEC) binding lower authorities. The contours of those disputes did not present the Tribunal with occasion to consider placement of goods impugned therein within the peculiar construct of storage devices made of semiconductor media. The circular, too, purports to be nothing but a considered response to a particular situation that happened to foster doubts among some field formations; effectively, the circular intends that ‘substrata’ in lieu of ‘printed circuit boards (PCB)’ and ‘pin’ in lieu of ‘socket’ should not deter classification as ‘solid-state non-volatile storage devices’ in the First Schedule to Customs Tariff Act, 1975. That circular would acquire resolving strength in a dispute in which conformity with description in note 4(a) of chapter 85 of First Schedule to Customs Tariff Act, 1975,

but for ‘substratum’ and ‘pin’, is not in controversy. In the order impugned before us, such deviations in description of the impugned goods had not been enunciated let alone the rest of the characteristics being common ground. The circular serves no contextual purpose here. We are similarly unable to fathom either the contextual relevance of meaning assigned to ‘parts’ and ‘components’ in the Foreign Trade Policy (FTP) which has no bearing on classification that, under the mandate of section 12 of Customs Act, 1962 for determination of ‘rate of duty’, accesses Schedules to Customs Tariff Act, 1975 or its legal influence on enumerations in notification issued under section 25 of Customs Act, 1962.

15. According to Learned Counsel, even if the declared classification is to be substituted, and on the purported finding of the goods being finished, with the sole description available for recourse thereby, viz., ‘memory cards’, the consequence, in terms of the benefit of impugned notification, would not vary as far as the jurisdiction of the adjudicating authority is concerned. The appellant had claimed coverage of description corresponding to tariff item 8523 5290 in First Schedule to Customs Tariff Act, 1975 which is required to undergo evaluation for aptness only when, owing to operation of rule 3 of General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975, goods under dispute are held as conforming to more than one tariff line. Else, it behoved customs authorities to first demonstrate that

the proposed tariff line, on its own standing, offers apt description of the goods.. It is common ground that the imported goods are storage device on semiconductor media and, thereby, fences in the sub-classification under heading 8523 of First Schedule to Customs Tariff Act, 1975 as the battleground. In the context of the submission made by Learned Authorized Representative, the sub-classification comprises three sub-headings - ‘solid state non-volatile storage device’, ‘“smart cards”’ and ‘others’ – in Harmonized System of Nomenclature (HSN) with the entirety of the sub-classification elaborated upon in the *Explanatory Notes* thereto and it is the first portion thereof that he has harped upon as having prompted revision. The *Explanatory Notes* of the Harmonized System of Nomenclature (HSN) do have persuasive value but only for the purpose of classification upto the sub-heading (or six digit) level for, beyond that, national descriptions are inserted. The peculiarity of heading 8523 of First Schedule to Customs Tariff Act, 1975 is that, at least, two of the sub-headings – one of which is in the impugned sub-classification (or ‘-’ level) – were appropriated as tariff lines unattached to any sub-heading: it is, thus, that ‘solid state non-volatile storage device’ finds itself unmoored under the heading and corresponding to tariff item 8523 5100 of First Schedule to Customs Tariff Act, 1975, thereby obviating the relevance of the *Explanatory Notes* emphasized by Learned Authorized Representative. Moreover, the definition of the expression, incorporated as note 4(a) in chapter 85

of First Schedule to Customs Tariff Act, 1975, is restricted to the latter portion of the relevant *Explanatory Notes* owing to which fitment therein would have to depend exclusively on note to chapter without assistance from the rest of the Harmonized System of Nomenclature (HSN). No such proposition is forthcoming either in the impugned order or in the submission of Learned Authorized Representative.

16. Legislative wisdom has emplaced ‘memory cards’ as tariff line below ‘ “smart cards” ’ corresponding to sub-heading 8523 52 of First Schedule to Customs Tariff Act, 1975 which could, at best and if so proposed in the show cause notice, have been a tenable substitute if only owing to being specific and, owing to comparability permitted only at like levels, without having to pass muster at the preceding level. That, however, is academic for the purposes of this dispute. Accordingly, with the alternative classification not conforming to legislative and judicial mandates, the declared classification remains undisturbed to set aside the consequential demand and detriment flowing from fitment against tariff item 8523 5100 of First Schedule to Customs Tariff Act, 1975 in the impugned order.

17. We may, as well, take note here of another aspect, viz., breach of principles of natural justice in the proceedings, which impacts the propriety of recovery in both orders and marks a yawning chasm over which both have leaped to conclusions that stand deprived, thereby, of

the ‘saving grace’ of preponderance of probability. That the ‘past imports’ were the same as the ‘live’ consignment and that the only work rendered on them after import was that of disaggregation, printing and packing relies entirely on statements which the Commissioner of Customs found to suffice for revising the classification to revisit assessment for securing jurisdiction and also for discarding the claim of these goods having been subjected to ‘manufacture’ which, re-classification notwithstanding, may yet have entitled the assessee to be freed from recovery of duty. The goods imported in the past were not available for verification and the charge of ‘software loading’ not having occurred has its foundation only in the statements relied upon in the impugned orders with the Commissioner of Central Excise & Service Tax having adopted the search records to that end. This aspect was particularly relevant in the light of claim of the assessee that, post-June 2014, ‘memory cards’ loaded with ‘software’ were being imported.

18. The appellant has contested the correctness of reliance on such untested statements as they had been denied opportunity to cross-examine the deponents. The adjudicating authority, adducing several circumstances that absolved him of statutory obligation devolving from section 138B of Customs Act, 1962, brushed aside the request and, more tellingly, with the assertion that

‘46.15....but there are impeccable evidence in the shape of search panchnamas and independent expert opinion from

institutions of eminence which buttress the Revenue's case about the lack of equipment for loading software and import of defective / non-functional goods in the guise of electronic components...'

which clearly overlooks the 'tentativeness' of evidence in a 'panchnama' – as mere record of oral narration of the optics in search – that is 'firmed' up only in statements of 'panch' witnesses tested in cross-examination and that independent 'expert opinion' – such as it is – attains eminence only upon being subjected to professional counter-scrutiny. In any case, the 'expertise' – such as it is – has been brought to bear only on the 'live' consignment which was yet to be cleared for being subjected to manufacture and, thereby, is of no significance beyond the charge of incorrect classification. These are not only not tenable as reasons for depriving cross-examination of deponent of statements relied upon for fastening detriment but also unappreciative of the limited value of statements as mere bridges between documentary evidence and acts of omission and commission and not as autonomous foundation upon which conclusion of taxability or other detriment may rest. That is the common thread running through the case law drawn upon in the impugned order which, by placing emphasis on the availability of solid evidence, enabled acceptance of untested statements as adjuncts. The 'bias' in adjudication, too, is evident in the justification offered for discard of the request: that the denial on former occasion of adjudication – which was invalidated by the Hon'ble High

Court – not having been agitated in appeal then stripped the noticee of such rights in *de novo* proceedings and that the previous track record of the noticee militated against being recipient of such gracious gestures from a Commissioner of Customs. These are sufficiently repugnant to rule of law, as well as judicial admonition to deem each adjudication as limited to the breach intended to be plugged, as to merit further attention of ours. We, therefore, limit ourselves to discard of the statements, to the extent not evidenced by alternative facts, from consideration in disposal of these appeals.

19. Consequent to validation of description as ‘unprocessed memory cards’, doubting of intention to process the impugned goods for conformity with notification no. 12/2012-Cus dated 17th March 2012 (at serial no. 431) lacks support. The adjudicating authority, however and in response to the reply to notice that referred to determination of ‘manufacture’ in adjudication proceedings before Commissioner of Central Excise & Service Tax, Goa, did draw sustenance from the finding therein that ‘software’ was not to be loaded, as well as from search evincing that facility for such uploading did not exist at the premises, to conclude that not only had ‘manufacture’ not occurred but also that the misdeclaration of process to be undertaken conferred jurisdiction for denial of exemption. ‘Manufacture’ is not an expression that was found contextually necessary to levy of duties of customs and the domain for conclusive determination of such goes hand-in-hand

with levy of duty of central excise. Though the Commissioner of Customs did refer to ‘manufacture’, as set out in Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996, as empowerment for determining ‘manufacture’, we find that to be misplaced inasmuch as the ‘proper officer’ is required to administer notification no. 12/2012-Cus dated 17th March 2012, issued under the authority of section 25 of Customs Act, 1962, which merely makes compliance with eligibility for operation under the said Rules as the sole condition for permitting clearance of goods without payment of duty at the threshold.

20. The Rules are, of themselves, self-contained and intended to transmit authority for oversight to enable proper usage failing which recovery of duty foregone is to be effected by the empowered central excise officer; a definition therein does not confer the authority of domain claimed by Commissioner of Customs. The substantive distinction between recovery envisaged in the Rules and in section 28 of Customs Act, 1962 is the re-determination of duty liability that is empowered by the latter as a prelude to recovery whereas the said Rules do not supplant the assessment already effected under section 17 of Customs Act, 1962 that proceedings under section 28 of Customs Act, 1962 is intended for. Therefore, neither by concept nor by design is recovery under section 28 of Customs Act, 1962 warranted for non-compliance with the Rules. The threshold entitlement to exemption

under notification no. 12/2012-Cus dated 17th March 2012 is not to be denied in these facts and circumstances. Even if the actual processing does not include loading of software, eligibility is not altered as that was not the sole processing to be undertaken on the impugned goods and, even without such loading, activity of ‘manufacture’ has been held to have occurred; the eligibility for exemption is not contingent either on a specified process or conformity with declared process and, indeed, there is neither provision in the Rules nor condition in the notification for such declaration to be relevant to assessment.

21. We must necessarily address the reference in adjudication order to decisions of the Tribunal that were said to support the appropriation of authority by customs officers to determine finding on ‘manufacture’ that impugned goods, cleared under claim for exemption, were subjected to. The two decisions in *re APP Enterprises* were for disposal of miscellaneous applications and the interim orders arising thereby are bereft of value as precedent. In *re NB Footwear*, the observation on jurisdictional competence is more in the nature of *obiter dicta* inasmuch as the dispute over denial of exemption to imported goods at the threshold by customs authorities was upheld by the first appellate authority solely by dismissal on ground of limitation that came to be affirmed by the Tribunal. In *re Havells India Ltd*, the proposal to vary the assessment, effected under section 17 of Customs Act, 1962 at the time of import, in proceedings under rule 7 of Customs (Import of

Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 was disapproved of and, furthermore, in the context of recourse merely for by-passing the limitation in section 28 of Customs Act, 1962 when another show cause notice for later period had been issued under Customs Act, 1962 and proceedings concluded thereto. Likewise, in *re Shilpi Cables Technologies Ltd*, the primacy of customs authorities was upheld in the context of variation in assessment from re-classification. On recourse to re-classification, we have affirmed jurisdiction of customs authorities but we have, for lack of merit, dismissed the confirmation of that proposal in the show cause notice by the adjudicating authority. None of these decisions have held that customs authorities are competent to decide on ‘post-clearance’ denial of exemption by determining that no ‘manufacture’ had been undertaken on imported goods which, after setting aside the re-classification, is all that remains in the show cause notice for recovery of duty liability.

22. The recovery of duty foregone at the time of import is not within the jurisdictional competence of Commissioner of Customs. Determination by Commissioner of Central Excise of ‘manufacture’ having occurred suffices for retention of entitlement to claim exemption from duties of customs that was permitted at the time of import. The ‘live consignment’, too, is not handicapped by the finding of misdeclaration. The seven consignments that were found to be

‘defective’, too, were, similarly, not misdeclared. Being ‘defective’, these may well be covered by Hazardous Waste (Management, Handling and Trans-boundary Movement) Rules, 2008. There is no evidence that these had been deliberately imported with full knowledge of defect for some illicit purpose. The importer has sought ‘re-export’ while the goods are yet in ‘customs control’ and we concur with the adjudication order to that extent; however, no purpose is served by confiscation merely for redemption on payment of fine because non-redemption for any reason would saddle the customs authorities with the trouble and cost of destruction. In view of re-export permitted in the impugned order, and on request of noticee, confiscation of the ‘defective’ goods is set aside as is the penalty under section 114A of Customs Act, 1962.

23. The detriment to M/s JJ Precision Industries stems from direct sale to traders having been undertaken after manufacture during the disputed period and which, according to the impugned order, is in breach of condition in notification no. 12/2012-CE dated 17th March 2012. Inherent to the finding is the premise that the said notification intends, in much the same way as the erstwhile scheme of ‘captive consumption’ did, for duty to be temporarily deferred till completion of the ‘finished goods’ on which full liability was to be discharged without having to meander through dispensable duty levy at each stage for adjustment at the next with the *caveat* that intermediate product would

be liable to duties of central excise should the next stage be not so. The manner in which serial no. 272 has been carved out in the impugned notification does not validate such a premise and, entirely, from overt lack either in such design or of such assertion, therein. There is no principle of interpretation that permits such intendment to be assumed after rescinding of the earlier notification. Here the adjudicating authority concluded that the exemption could not be extended to clearances for lack of evidence – either within the design of exemption or in the facts of sale to dealers as admitted by the assessee – of clearances to eligible buyers registered under Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001. There is no finding that the goods to be manufactured from the impugned goods were exempted from duties of central excise to devolve liability on the appellant and the premise that, in the absence of exemption, parallel consequence may lie when such duty cannot be collected, owing to clearance made to entities not conforming to the impugned Rules, fails to find traction.

24. We are constrained to hold so in the light of the finding, in the order pertaining to M/s JJ Precision Industries, that

‘20.13..... I find that in Serial No.272 of the notification, in the description of the goods viz. “the part, component and accessories of mobile hand set or cellular phones” referred to in the notification are “Micro SD Memory Cards” which are the finished goods of the Assessee. There is no dispute that the

said finished goods viz. “Micro SD Memory Cards” are used generally in mobile handsets/cellular phones. This fact is also admitted and not disputed by the Assessee. I further find that the Assessee is not manufacturing any “mobile handsets or cellular phones”. Hence they are not in a position goods ...captively and have cleared their entire production to their dealers for sale in the open market.’

wherein the implied intent of further use envisaged by the Central Government in issue of notification for strict observance thereto stands in stark contrast with the acknowledgement in the impugned order that, irrespective of the next destination of clearance, whether it be dealer in ‘memory cards’ or manufacturer of mobile handsets/cellular phones, deployment in mobile handsets or cellular phones is the eventual fate of the impugned goods. That these were not captively used or established as having been sent to manufacturer of mobile handsets/cellular phones has no bearing, therefore, on duty liability which, if any, will be borne by the last manufacturer in the production chain by including the value of the impugned goods and which, if exempt, does not – through the impugned notification, at least – place the burden on the impugned goods. The overreach of the proposition of liability in the impugned order, engendered by an inapplicable premise, is bereft of legal authority.

25. It is also settled law that mere non-observance of procedural stipulation does not impede substantive benefit available to an assessee.

There is no quarrel that the procedure stipulated in Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 was not conformed with but, in the light of such settled law and the acknowledged end use of the impugned goods, it was incumbent upon the adjudicating authority to establish that the ‘SD memory cards’ cleared by the appellant herein did not find use in mobile handsets or cellular phones for the trajectory of that logic to be validated in law. Else, the only conclusion is that the impugned goods were used in ‘duty paid’ mobile handsets or cellular phones with no ground – either from the specifics in the notification or from evinced diversion – to demand duty on the impugned goods.

26. It has been pointed out by Learned Counsel, and to the exclusion of the enumerated reasons for invalidation *supra* of the demand in the impugned order, that the particular enumeration in the impugned notification also did not envisage responsibility of the manufacturer to ascertain, and subject their clearances to, ‘end use’ after removal from their factory. In support thereof, he drew our especial attention to the schema of the notification which overtly stipulated such ‘end use’, in tandem with the same impugned condition, in several other enumerations. Learned Authorized Representative submitted that, bereft of deemed stipulation of ‘end use’ in the impugned enumeration, restricting applicability of condition only on clearances to manufacturers is a purposeless exercise. The lack of stipulation in the

impugned entry of the notification renders the condition, while observable in the contingency specified therein, to be unrelated to the exemption which does not prescribe specified destination for the specified goods. It is not our place to fill in such additions merely from a desire on the part of central excise authorities. Such 'free floatation' of a particular contingency or apprehension cannot alter the contours of an interpretation in the manner in which the adjudication order did contrive to. That would be tantamount to legislative wisdom being complemented by executive determination which is repugnant to the rubric of adjudicatory empowerment. There is, thus, no ground on which the order of Commissioner of Central Excise & Service Tax, Goa can be permitted to survive.

27. We find that the order of the Commissioner of Central Excise, Goa has held that appellant had utilized the goods impugned in order of Commissioner of Customs, Air Cargo Complex (ACC), Chatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai for manufacture of excisable goods. Compliance with 'manufacture' is ascertainable only within the domain of central excise jurisdiction; the claim that the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2017 also defines 'manufacture' does not advance the case of Revenue inasmuch as the proper authority for enforcing compliance thereto is the jurisdictional central excise officer. Therefore, denial of exemption on the ground of

manufactured goods having been imported is without jurisdiction and, consequently, the order charging duties of customs is set aside. To the extent that the appellant had sought re-export, the same is permitted without any detriment attaching to the goods. As far as the leviability of duties of central excise is concerned, the contents of the relevant notification, which enjoins compliance with the condition of use in manufacture of excisable goods, makes it clear the compliance with the said Rules is a condition which, in the lack of prescription of actual deployment having to be ascertained by appellant, the manufacturer stands released from obligation of ensuring actual use. Accordingly, the impugned orders are set aside and appeals allowed.

(Order pronounced in the open court on 17/05/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)