CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 85881 of 2023

(Arising out of Order-in-Appeal No. 1060 (Gr.IIG)/2022(JNCH)/Appeals dated 07.12.2022 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II)

A-1 Impex **.... Appellants**
15,Ground Floor, Bombay Market Apts.
Tardeo, Mumbai – 400 034.

Versus

Commissioner of Customs, Nhava Sheva-I **.... Respondent**
Jawaharlal Nehru Customs House (JNCH),
Nhava Sheva, Taluka – Uran, District – Raigad,
Maharashtra – 400 707.

Appearance:

Ms. Deepali Kamble, Advocate for the Appellants

Shri Krishna Murari Azad, 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/85810/2024

Date of Hearing: 25.04.2024

Date of Decision: 26.08.2024

PER: M.M. PARTHIBAN

The appeal has been filed by M/s A-1 Impex, Mumbai (herein referred to as 'the appellants' for short) assailing the Order-in-Appeal No. 1060 (Gr.IIG)/2022(JNCH)/Appeals dated 07.12.2022 (referred to, as 'the impugned order')passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II.

2.1 Briefly stated, the issue involved in the present appeal relates to the dispute regarding classification of the imported goods and whether the same is permissible for importation into the country, in terms of Foreign

Trade Policy. The appellants had imported 'HDPE Regrind' by classifying the same under Customs Tariff Item (CTH) 3901 2000 vide three Bills of Entry (B/Es) No.2277341 dated 08.01.2021, 2302559 dated 11.01.2021 and 2320232 dated 12.01.2021, on First Check basis, requesting for prior examination of the goods. Accordingly, the imported goods covered under the said B/Es were examined by respective JNCH Customs Docks officers and representative samples were drawn for testing the same by M/s Envirocare Labs Pvt. Ltd., which is a NABL accredited laboratory. The test reports given by M/s Envirocare Labs on the representatives samples of imported goods drawn by JNCH Customs officers are given below in TABLE-I:

TABLE-I

Parameters	B/E No. 2277341 dated 08.01.2021	B/E No. 2302559 dated 11.01.2021	B/E No. 2320232 dated 12.01.2021
Nature	Primary form of brownish coloured plastic material in irregular shapes and sizes	Primary form of mixed coloured plastic material in irregular shapes and sizes and found soaked with oil	Primary form of blue and natural coloured plastic material in irregular shapes and sizes and found soaked with oil
Composition	FTIR spectra indicates the material is HDPE	FTIR spectra indicates the material is HDPE	FTIR spectra indicates the material is HDPE
Regrind/Grindings	Visual appearance and physical properties indicated the material is regrind	Visual appearance and physical properties indicated the material is regrind	Visual appearance and physical properties indicated the material is regrind
Single Thermoplastic/Not	Single Thermoplastic	Single Thermoplastic	Single Thermoplastic
Specific Gravity	More than 0.940	More than 0.940	More than 0.940
Whether the results for above tested parameters within limits as per Hazardous Waste Rules, 2016	Yes	Yes	Yes

2.2 During examination by JNCH Customs Docks officers, as they found that the imported goods appeared to be of plastic waste, they referred the matter for further investigation by Special Intelligence & Investigation Branch (SIIB) -Imports, for further investigation. SIIB of JNCH-Imports undertook further investigation of the imported goods pertaining to the said three B/Es imported by the appellants under panchanama proceedings dated 22.01.2021, 23.01.2021, 25.01.2021 and 27.01.2021. During such examination by SIIB of JNCH-Imports, in respect of imported goods covered under B/E No. 2320232 dated 12.01.2021 and 2302559 dated 08.01.2021,it was found that there were small flakes of dirty and oily used plastics having mixed colours and irregular shapes; the said goods appeared visibly dirty and of used plastic products. Further, in respect of imported goods pertaining to B/E No. 2277341 dated 08.01.2021, these were found to be small bits of hard plastics having brownish colour and irregular shapes. On the importer's request, SIIB of JNCH-Imports vide letter dated 27.01.2021 and 28.01.2021 had allowed for warehousing of the said imported goods, in terms of Section 49 of the Customs Act, 1962, subject to certain terms and conditions specified therein. Accordingly, the importer warehoused the said goods. Further, representative samples pertaining to said three B/Es were drawn by SIIB of JNCH-Imports and forwarded to Central Revenues Control Laboratory (CRCL) at JNCH. Observations made by CRCL of JNCH in its test reports dated 19.02.2021 are as mentioned below in TABLE-II:

TABLE-II

Parameters	**B/E No. 2320232 dated 12.01.2021**		**B/E No. 2277341 dated 08.01.2021**	**B/E No. 2302559 dated 11.01.2021**
Container No.	**GESU6436001**	**VSBU9000003**	**MAGU5606090**	**BWLU5101463**
Nature of the sample	In the form of heterogeneous mixture consisting of dirty cut pieces of different coloured shapes and sizes together with small cut pieces of plastic film.	In the form of heterogeneous mixture consisting of dirty and oily whitish translucent cut pieces of different coloured shapes and sizes together with small cut pieces of plastic film.	In the form of brown coloured cut pieces of different shapes and sizes.	In the form of heterogeneous mixture consisting of dirty and oily cut pieces of different coloured shapes and sizes together with small cut pieces of plastic film.
Composition of the sample	Pigmented Polyethylene	Polyethylene	Pigmented Polyethylene	Pigmented Polyethylene
Whether the sample can be called as waste ?	On visual examination, appears to be waste.	On visual examination, appears to be waste.	Cannot be ascertained	On visual examination, appears to be waste.
Whether the sample can be called as regrind ?	Cannot be ascertained	Cannot be ascertained	Cannot be ascertained	Cannot be ascertained
Whether the sample contain any hazardous substance ?	Cannot be ascertained	Cannot be ascertained	Cannot be ascertained	Cannot be ascertained

2.3 On the basis of the importer's request vide letter dated 16.03.2021 for re-testing of the samples in a different laboratory, representative samples were again drawn by JNCH customs and sent the same for re-testing by Central Institute of Petrochemicals Engineering & Technology (CIPET), Aurangabad which is premier national institution under Dept. of Chemicals & Petrochemicals, Ministry of Chemicals & Fertilizers, Govt. of

India. Upon testing the samples, CIPET, Aurangabad vide test report dated 19.04.2021 stated that sample material is found to be 'HDPE regrind'; further, they informed that there was no methodology/standard available to clarify the waste material. Again when the matter was taken up by JNCH customs with CIPET vide letter 04.06.2021 it was replied by the CIPET, Aurangabad that "no methodology / standard available to clarify the waste material".

2.4 Therefore, the JNCH customs interpreted that the CIPET re-test report sought on specific request by the importer has not categorically ruled out that the imported goods is to be waste, pairings and scrap of plastics and that on visual appearance, said imported goods appeared to be dirty, oily and of post-consumer plastics. Thus, JNCH customs concluded that the imported goods fall under the category of plastic waste/scrap and are restricted for import, unless import authorization (license) was granted by DGFT. Therefore, JNCH customs had initiated show cause proceedings proposing for rejection of classification adopted by the appellants importer, for confiscation of imported goods under Section 111(d) and 111(m) of the Customs Act, 1962 and for imposition of penalty under Sections 112(a) and 114AA ibid on the appellants.

2.5 The Show Cause Notice (SCN) dated 20.12.2021 was adjudicated by the Joint Commissioner of Customs, NS-I, JNCH, Nhava Sheva vide Order-in-Original dated 17.05.2022 in re-classifying the imported goods under CTI 3915 1000; ordering confiscation of imported goods and allowing the same for re-export on payment of redemption fine of Rs.2,25,000/- under Section 125 ibid; and imposing penalties of Rs.50,000/- under Section 112(a) ibid and Rs.50,000/- under Section 114AA ibid on the appellants. Being aggrieved with the said order, the appellants had filed an appeal before the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II. In the said appeal proceedings, the learned Commissioner (Appeals) vide impugned order dated 07.12.2022 had upheld the order of the original authority and rejected the appeal filed by the appellants. Feeling aggrieved with the impugned Order-in-Appeal dated 07.12.2022, the appellants have preferred this appeal before the Tribunal.

3.1 Learned Advocate for the appellants at the outset has submitted that appellants importer have rightly classified the imported goods under CTI 3901 2000 and the classification adopted by the department under CTI 3915 1000is incorrect, as the Chapter Note 7 to Chapter 39 specifically excludes the waste, parings and scrap of a single thermoplastic material which are transformed into primary form, as in the case of the imported goods which are of HDPE plastic regrind. He further stated that the said fact has also been confirmed in the test reports of the CIPET, Aurangabad, a Government laboratory and Envirocare Labs Pvt. Limited, which is a NABL accredited laboratory, both of which also specifically provide that the specific gravity of the imported goods is more than 0.940. Therefore, learned Advocate stated that the imported goods are not covered by the restrictions of DGFT provided under Public Notice No. 392(PN)92-97 dated 01.01.1997, and thus there is no requirement of DGFT license for the imported goods.

3.2 Learned Advocate also stated that the conclusions arrived by the learned Commissioner (Appeals) in the impugned order on the basis CRCL test report is not legally sustainable, as it is stated in the Public Notice No.96/2019-JNCH dated 23.10.2019 issued to the trade, that the said CRCL laboratory at JNCH do not have the facility for testing of co-polymers and reprocessed/recycled plastics falling under chapter 39. Hence, he submitted that the impugned order in upholding the original order for reclassification of the goods, confiscation of imported goods, imposition of redemption fine on such goods and penalties on the appellants, is not legally sustainable.

3.3 Further, learned Advocate further submitted that in identical matter, the Coordinate Bench of this Tribunal in the case of *Commissioner of Customs Ahmedabad Vs. Surya Exim Limited* – 2015 (323)E.L.T.585 (Tri.-Ahmd.), have held that regrind granules cannot be considered as waste & scrap for which DGFT restriction in Public Notice No.392 (PN)/1992-1997 dated 01.01.1997 apply. Hence, he submitted that the impugned order is liable to be set aside on the basis of the above order of the Tribunal.

3.4 Learned Advocate also relied upon the following case laws in support of their case:

(i) *Ideal Sheet Metal Stamping & Pressing Pvt. Ltd. Vs. Commissioner of Customs, Ahmedabad* – 2001 (133) E.L.T. 807 (Tri.-Mumbai)

(ii) *Commissioner of Customs, New Delhi Vs. Bhartiya Plastic Udyog* – 1999 (107) E.L.T. 161 (Tribunal)

4. Learned Authorised Representative (AR) reiterated the findings of the Commissioner (Appeals) in the impugned order. He further submitted that

as the JNCH Customs authorities have found that there were visual impurities, and the imported goods were dirty and soaked with oil. Accordingly, the imported goods were construed as post-consumer plastic waste/scrap. The importer had also accepted that they had quality issues and the goods were dirty and soaked in oil. Therefore, he claimed that the original authority has rightly classified the goods under CTI 39151000 and given an option to the importer to redeem the goods on payment of redemption fine for purpose of re-export and imposed penalty on the appellants which was upheld by appellate authority and thus the impugned order is sustainable. Therefore, Revenue humbly prays that the appeal filed by the appellant may be dismissed.

5. Heard both sides and perused the records of the case. We have also considered the additional written submissions given in the form of paper books by learned Advocate for the appellants as well as Authorised Representative for the Revenue.

6. The short issue for determination before us is regarding correct classification of imported goods and examining whether the impugned order, in upholding the confirmation of confiscation of imported goods, imposition of redemption fine for re-export and imposing of penalty on the appellants by the original authority is legally sustainable or not.

7. From the facts of the case, it is seen that the appellants importer have filed the B/Es by declaring the imported goods as 'HDPE Regrind' and by classifying the same under Customs Tariff Item (CTH) 3901 2000 and sought for its prior examination by the customs authorities on 'First Check basis', as stated in paragraph 2 of the original order dated 17.05.2022. The said request has been permitted by the jurisdictional JNCH customs authorities and the imported goods were examined by JNCH docks examination officers and representative samples were drawn and rightly sent to the NABL approved laboratory for chemical testing. Further, in terms of second proviso to Section 46 of the Customs Act, 1962, when the importer does not have full information/particulars of the imported goods, he can seek for prior examination and the proper officer of customs may permit him to examine the goods in the presence of the customs officer. Hence, it is not clear when such permission for prior examination was permitted by the departmental authorities, how mis-declaration can be proposed on the appellants importer under Section 111(m) ibid and for its

confirmation in the original order and the same was upheld in the impugned order. Thus, such confirmation in the impugned order dated 17.05.2022 is not proper and justified.

8.1 On perusal of the case records and the impugned order along with original order, it transpires that the imported goods have been tested by three laboratories viz., (i) CRCL JNCH laboratory, which is also known as DYCC, JNCH laboratory, is an in-house customs testing facility; (ii) Government laboratory of CIPET, Aurangabad, and (iii) Envirocare Labs Pvt. Limited, which is a NABL accredited laboratory. As regards CRCL JNCH laboratory, we find that the Commissioner of Customs, NS-V, JNCH had issued Public Notice No.56/2021 dated 16.06.2021 informing the importers, exporters and the EXIM trade that the said laboratory cannot analyse/test certain 20 specified goods due to non-availability of facility in that laboratory. This list of goods, *inter alia*, include polymers/plastics whether reused/ reprocessed/recycled/ sweeping falling under Chapter 39 and it is stated therein that the same are not analysed. Hence, it is not proper and justifiable to rely upon the CRCL, JNCH laboratory test report in respect of imported HDPE Regrind covered under Chapter 32. Further, on perusal of the test report given by CRCL, JNCH laboratory, it transpires that it is given mainly on the basis of visual examination and the nature of constituent material could not be ascertained by them. Hence, such test reports of CRCL, JNCH laboratory cannot be relied upon as it does not have any legal basis.

8.2 From the records of the case, it is seen that the test reports dated 15.01.2021 and 18.01.2021 provided by M/s Envirocare Labs Pvt. Limited, being a NABL accredited laboratory,are reliable and the summary of the results as given below:

(a) Sample material is found to be HDPE Regrind;

(b) Sample is composed of single thermoplastic material;

(c) Specific Gravity of the sample material is more than 0.94;

(d)Results for tested parameters are within limits as per Hazardous Waste Rules, 2016; and

(e)All the samples were found to be in primary form of plastic material in irregular shapes and sizes. Further, samples pertaining to Bills of Entry No. 2302559 dated 11.01.2021 and 2320232 dated 12.01.2021 were found soaked with oil.

8.3 Further, the Government laboratory of CIPET, Aurangabad, is functioning under the Dept. of Chemicals & Petrochemicals, Ministry of Chemicals & Fertilizers, Govt. of India and it is a laboratory accredited by National Accreditation Board for Certification Bodies (NABCB), New Delhi as per ISO/IEC 17020 as Type "A" Inspection Body for Plastics, Rubber & allied products / materials. Thus, the test results of such laboratory as per their report dated 19.04.2021 are also reliable and the summary of test results are as below:

(a) Sample material is found to be HDPE Regrind;

(b) Sample is composed of single thermoplastic material;

(c) Specific Gravity of the sample material is more than 0.94 g/cc;

(d)No methodology/ standard available to clarify the waste material; and

(e) All the samples were found to be coloured regrind in irregular shapes and sizes.

Further, we also find that upon specific query from JNCH customs authorities, when the matter was again taken up by them on 04.06.2021,the laboratory of CIPET, Aurangabad had categorically replied that there was no methodology or standard available to clarify that the tested material is the waste material.

8.4 The above test reports of two recognized laboratories clearly provide that the imported goods, are HDPE Regrind which is composed of single thermoplastic material. These reports also categorically state that the imported goods are not waste, inasmuch as the same having been tested for prescribed parameters proved to be within limits as per Hazardous Waste Rules, 2016. The imported goods being in different colour and in irregular shapes and size, being soaked in oil do not *per se* categorize it as plastic waste and scrap. In this regard, it is seen that the BIS standard in IS 14534:1998 *inter alia* prescribe only post-consumer waste, in-house scrap for the purpose of monitoring the quality and for facilitating identification of the basic raw material. In such context, there is a mention of 'visible contamination' with respect to post-consumer plastics which have been elaborated in Annexure-A to such Standard, as goods covering trash/carry bags, Carry bags, non-food containers, office supplies, municipal supplies, building products, pipe and fittings of PP, PE, nylon etc., Thus, it is clear that in terms of BIS standard, the imported product do not quality as plastic waste/scrap.

8.5 The import restrictions are imposed by the DGFT in Public Notice No.392(PN) 1992-1997 dated 01.01.1997, which specify that import of plastic waste/scrap (except PET bottle waste/scrap) shall be permitted only against a license. As seen from the above discussion, the imported goods have been tested by two accredited laboratories and have reported that these are not waste/scrap. Thus, we find that such restriction placed by DGFT does not apply for the imported goods in this case.

9.1 In respect of the issue on proper classification of the imported goods we find that the contending classification as claimed by the importer is under CTI 3901 2000 whereas the SCN had proposed for classification under CTI 3915 1000 of the First Schedule to the Customs Tariff Act, 1975. The contending entries under the above two CTH are as below:

"3901 I. PRIMARY FORMS POLYMERS OF ETHYLENE, IN PRIMARY FORMS

3901 20 00 - Polyethylene having a specific gravity of 0.94 or more

&

3915 II. –WASTE, PARINGS AND SCRAP; SEMI-MANUFACTURES; ARTICLES

3915 10 00 - Of polymers of ethylene"

In arriving at the proper classification of imported goods under the Customs Tariff, in terms of Section 2 of the Customs Tariff Act, 1975, the General Rules for the interpretation of the Schedule is adopted. Accordingly, for legal purposes, the classification of the goods is determined according to the terms of the headings and any relative Section or Chapter Notes. In this regard, we find that the description provided under 3901 2000 as '*Polyethylene having a specific gravity of 0.94 or more'* were tested and certified by both CIPET, Aurangabad laboratory and Envirocare Labs Pvt. Limited, in their test reports as discussed above.

9.2 Further, in terms of Chapter Note 6 and Note 7 to Chapter 39 provide as follows:

> *"6. In headings 3901 to 3914, the expression "primary forms" applies only to the following forms: (a) liquids and pastes, including dispersions (emulsions and suspensions) and solutions; (b) blocks*

of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.

7. Heading 3915 does not apply to waste, parings and scrap of a single thermoplastic material, transformed into primary forms (headings 3901 to 3914)."

It is seen that the test results specifically provide that the imported goods are HDPE Regrind and these are composed of single thermoplastic material. Inasmuch as the 'primary forms' under heading 3901 to 3914 include blocks of irregular shapes and different forms, in terms of Chapter note 6 and that waste/scrap of single thermoplastic material does not gets covered under heading 3915 in terms of Chapter note 7, the correct classification of the imported goods shall be under CTH 3901 and not under CTH 3915. Further, since the imported goods conform to the requirement of description of the tariff entry '*Polyethylene having a specific gravity of 0.94 or more*', the imported goods are correctly classifiable under CTI 3901 2000.

9.3 It is also found that the impugned order have recorded that on the basis of the test reports and internal communication between the JNCH Customs authorities with Directorate General of Valuation, they had decided that in respect of single thermoplastic material, it has to be classified in CTH 3901 to 3914 and not under 3915 and the restrictions of DGFT prescribed in Public Notice no. 392 (92-97) RE dated 01.01.1997 is not applicable. Further, it is only on the basis of the visual examination of the goods being termed as dirty and soaked in oil, the impugned order had come to the conclusion that they are waste and scrap. The relevant paragraphs of the impugned order in this regard is extracted and given below:

"16.1 I find from the CIPET Test Certificates and Test Reports of Envirocare Labs Pvt. Ltd. that the impugned goods are HDPE regrind of single thermoplastic material. Further, as per Para 3(ii) of the letter dated 09.07.2015 issued by the Commissioner of Customs, NS – III, JNCH, Nhava Sheva from F. No. S/26-Misc-5633/2010-11 Gr. IIG and addressed to the Commissioner, Directorate General of Valuation, Mumbai, plastic regrind, if on test is found to be of single thermoplastic, it is required to be classified as primary from under CTH 3901 to 3914 depending upon the composition and such single thermoplastic of primary from cannot be classified as a waste/scrap and thereby is not an item which is restricted for import in terms of Public Notice no. 392 (92-97) RE dated 01.01.1997 issued by DGFT. This shows that the department is of the view that plastic regrind of single thermoplastic material cannot be classified as a waste/scrap and thereby is not an item which is restricted for import in

> *terms of imported vide Bill no. 2277341 dated 08.01.2021 were released subject to payment of duty. However, in case of Bill of Entry no. 2320232 dated 12.01.2021 and 2302559 dated 11.01.2021, issue is a bit different. It is a fact that as per CPET test reports and Test Reports of Envirocare Labs Pvt. Ltd., impugned goods (i.e., goods imported vide Bill of Entry no. 2320232 dated 12.01.2021 and 2302559 dated 11.01.2021) are "HDPE regrind", but it is also a fact that during physical examination of the impugned goods, it was found that the said goods had visible impurities, were dirty and composed of used plastic products that were soaked in oil as observed by the OA in Para 20(ii) of the impugned order.*
>
> *xxx xxx xxx xxx*
>
> *16.4 It is a fact that the impugned goods were found dirty and soaked in oil and hence, cannot be recycled into viable commercial products using standard plastic processing techniques without involving process of cleaning whereby effluents are generated. Hence, these goods do not fit in the description/definition of the plastic waste/scrap given in the said notification and hence, ordinarily not permissible for import. …"*

Thus, the impugned order upholding confiscation of goods on the basis of violation of DGFT's Public Notice requiring an import license in respect of the imported goods, is not proper and justified.

9.4 Further, on careful examination of the facts as recorded in paragraph 21.3 of the original order, provide that out of the total 1866 bags of HDPE regrind, it is only 27 small gunny bags and 2 jumbo gunny bags were found to contain with small flakes of plastic which were found to be sticky and had traces of oil on them, during the examination conducted by SIIB of JNCH - Imports under the panchanama proceedings. Thus, even on factual basis, the conclusion arrived at by the authorities below, that the entire imported goods having been violative of the import restrictions is not proper and is contrary to the facts as evidenced herein above.

10. We further find that the Co-ordinate Bench of the Tribunal, in the case of Suriya Exim Limited (supra) have held that regenerated granules made from single thermoplastic material known as Regrind granules are correctly classifiable under CTH 3901 and not under CTH 3915, and therefore do not gets covered under the scope of DGFT's Public Notice dated 01.01.1997. The relevant paragraph of the said order is extracted herein below:

> ***"4.** Heard both sides and perused the case records. The imported material has been classified by the Department under CTH 3901 which is meant for plastic materials in primary form. As per the opinion dated 21-9-2011 given by CIPET, Ahmedabad also the imported material represent 'Regrind Granules' produced from scrap products. In view of the facts*

> *available on records, it is observed that imported material is regenerated granules made from single thermoplastic material which has been classified in the CTH 3901. Such regenerated/Regrinded Granules cannot be considered as waste & scrap to which P. No. 392 (PN)/1992-1997, dated 1-1-1997 is applicable. Department is not seeking change in the classification of the imported goods under CTH 39.15."*

In view of the above, we are of the considered opinion that we cannot take a different stand on the matters involving similar set of facts and circumstances.

11. In view of the foregoing discussions and analysis, and on the basis of the above referred order of the Tribunal, we are of the considered view that the impugned order dated 07.12.2022passed by the Commissioner of Customs (Appeals), JNCH, Mumbai-IIis not legally sustainable and the therefore the same is set aside.

12. In the result, by setting aside the impugned order dated 07.12.2022, we allow the appeals in favour of the appellants.

(Order pronounced in open court on 26.08.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha