CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86805 OF 2022

[Arising out of Order-in-Appeal No: 478 & 479 (Gr.V)/2022(JNCH)/Appeals dated 26th May 2022 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Super Sonic Impex
Plot No. C, 10/5/6 Gr Floor, Somakanji
Opp: Shanidev Mandir, UM Road, Surat – 395 017 … ***Appellant***

versus

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

APPEARANCE:

Shri Jhamman Singh, Advocate for the appellant

Shri Ram Kumar, 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: 85835/2024

DATE OF HEARING: 14/02/2024
DATE OF DECISION: 13/08/2024

PER: C J MATHEW

In this appeal against the order[1] of Commissioner of Customs

[1] [order-in-appeal no. 478 & 479 (Gr.V)/2022(JNCH)/Appeals dated 26th May 2022]

(Appeals), Mumbai – II, M/s Super Sonic Impex assails the disposal of their challenge to the detriments fastened on one of the goods imported against bill of entry no. 3843791/02.11.2017 by re-classification against description corresponding to tariff item 8452 3090 of First Schedule to Customs Tariff Act, 1975 as well rejection of declared value by recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2017 with attendant consequence of confiscation under section 111(m) of Customs Act, 1962 and option to redeem solely for re-export besides imposing penalty under section 112 of Customs Act, 1962. Learned Counsel for appellant submitted that this issue is before us for the second time as, on the earlier occasion, the order of the first appellate authority had been set aside by order[2] of the Tribunal to facilitate *de novo* proceedings arising from the common ground of ‘embroidery needles’ being distinct from ‘sewing machine needles’ but not having subjected the impugned goods to test for ascertainment of the correct application.

2. In fresh proceedings, the original authority was not satisfied by the conclusiveness in the report of Manmade Textile Research Association (MMTRA), Surat and, after further testing of representative samples of the impugned goods at National Institute of Fashion Technology (NIFT), Mumbai, rejected the declaration of coverage by tariff item 8448 5190 of First Schedule to Customs Tariff Act, 1975 in

[2] [final order no. A/85521/2019 dated 19th March 2019 in appeal no. C/88581/2018]

the bill of entry with consequent detriments. Upon appeal by the importer as well as at the instance of the jurisdictional Commissioner of Customs, the impugned order, while acknowledging the lack of fault in the order under challenge, was inclined towards imposition of fine for redemption of confiscated goods and for re-determination of values well as plea for clearance for home consumption.

3. We have considered the rival submissions of Learned Counsel and Learned Authorized Representative at length. The dispute essentially revolves around the applicability of 'anti dumping duty (ADD)' to the impugned goods declared to be valued at ₹ 6,53,962.18 owing to imposition thereof on 'sewing machine needles', in sub-heading 8452 30 of First Schedule to Customs Tariff Act, 1975, by notification no. 31/2017-Cus (ADD) dated 22nd June 2017. The appellant had claimed coverage against tariff item 8448 5190 of First Schedule to Customs Tariff Act, 1975. The original authority relied upon test report of National Institute of Fashion Technology (NIFT), resorted to on the acknowledged inconclusiveness of the report of Manmade Textile Research Association (MMTRA), and the finding thereof

> *'14.2. I find the above mentioned report given by NIFT, which is an institution under Ministry of Textile, Government of India as conclusive. Being a Government of India institution, the authenticity of report is beyond doubt. This is a very categorical report which confirms that the said goods are*

> *sewing machines needles by basic design. Only with modification in machine setting, some industries may use it in embroidery machine. I also find that the said goods are sewing machine needles can also be verified from the catalogue of manufacturer M/s Jiangsu Flying Tiger Needles Co. ltd., wherein it is clearly mentioned that DB X 196 X 1 needle is a Lock Stitch sewing machine needles. Description and model no. of other sewing machine needles was also verified from catalogue of manufacturer M/s Jiangsu Flying Tiger Needles Co. ltd and M/s Organ Needle company ltd. and all the needles mentioned in the above table are found to be sewing machine needles imported from China. The said manufacturers catalogue is corroborated by the report from NIFT, Navi Mumbai. In view of above along with the explanatory notes to CTH 84.48, I have no hesitation in holding that the said goods are sewing machine needles classifiable under CTH 84523090. I find from manufacturers catalogue as well as the test report from NIFT that there was deliberate mis-declaration by the importer and hence I hold that the said goods are liable for confiscation under Section 111(m) of the Customs Act 1962 and by this act of commission, the importer is liable for penalty under Section 112(a) of the Customs Act 1962. The importer's representative have requested for re-export if the department is not in agreement with their classification. I accept this request for re-export.'*

was concurred with in the impugned order to disturb the declared classification. Indeed, that would appear to have been the only recourse to charge differential duty.

4. In addition, the request for cross-examination of the author of the test report was rejected thus

'15. I find that the Test Report of NIFT was communicated to the importer vide letter F no S/26-Misc-3947/2019r20 Gr V dated 08/04/2020 and asked him for suitable dated for personal hearing. Vide email dated 21/04/2020, the authorized representative of the importer, Shri Jhamman Singh has asked for cross examination of Professor Dr Pawan Godiawala, the author of NIFT test report in this case. He also requested that the personal hearing with the prior confirmation from Dr Pawam Godiawala for cross examination after third week of May 2020 citing COVID-19 lockdown. In this regard, I find that the request of conditional cross examination is not acceptable as the report submitted by the NIFT, a recognized Government of India institution, is corroborating with the manufacturers catalogue. In view of above, I reject the submission of the importer as I find that the said request is nothing but delaying the adjudication of case remanded by CESTAT. The personal hearing granted on 24/10/2019 and documents/submission were taken on have been analyzed and no further factual submission were made consequent to NIFT Test Report. Reliance is placed on Circular No. 1053/02/2017-CX dated 10/03/2017 issued by CBIC and para 14.9 thereof wherein it is mentioned that when corroborative evidence is available, the request of cross examination can be denied. There are catena of judgements of higher judicial for a on this issue.'

5. The imposition of anti-dumping duty and re-assessment was founded upon re-determination of the classification. The Tribunal, on the earlier occasion, had found itself unable to determine the difference between 'embroidery needle' and 'sewing machine needle', and naturally so, as the tariff lines do not offer any assistance in identifying the former. It was expected that test reports would be with reference to

the various tariff lines but, in the final analysis, both lower authorities failed to accord primacy to the First Schedule to Customs Tariff Act, 1975. Test reports from an authoritative source have persuasive value but not at all if out of the context of the tariff lines in dispute. Try as we did, we are yet to identify 'embroidery needles' therein with any certainty and it would appear that the framework of the dispute was designed solely around the description of the impugned goods in the bill of entry. For re-classification to have validity, the General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 should have been resorted to. Moreover, the Hon'ble Supreme Court in *Hindustan Ferodo Ltd v. Collector of Central Excise [1997 (89) ELT 16 (SC)]* has set out of the rules of engagement 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.'*

as also 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……'*

6. We hold that the basis of re-classification is not in accord with the above framework. While the specifics of liability to 'anti dumping duty' on enumerated description within a broad, and undisputed, description, at the heading or sub-heading level, may turn on expert opinion, disputed classification would be validated only in accordance with the interpretative rules, as enacted, and principles, as judicially determined. We, thus, find that the terms of our remand have not been complied with by the original authority and, to the extent that it was upheld in the impugned order, was not evaluated by the first appellate authority. We are, therefore, left with no option but to set aside the impugned order and direct the original authority to adjudicate the matter afresh, *in toto*, in the light of the test report, after giving an opportunity for cross-examination as sought by the importer, and discharge of onus by customs authorities as set out *supra*.

(Order pronounced in the open court on 13/08/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*