CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 87004 of 2019

(Arising out of Order-in-Appeal No. 441 & 442(Gr. II H-K)/2019(JNCH)/Appeals-II dated 25.03.2019 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II)

M/s Creative Arts **…. Appellant**
A-601, Dhanashree CHS Ltd.
Plot No. 31, Sector-8, Charkop,
Kandivali (W), Mumbai – 400067.

Versus

Commissioner of Customs,
(Nhava Sheva-I), Mumbai **…. Respondent**
Jawaharlal Nehru Custom House, Nhava Sheva,
District: Raigad, Uran, Navi Mumbai- 400707.

Appearance:

Shri Sanjay Kalra, Advocate for the Appellant

Shri S.K. Hatangadi, Auth. 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/86415/2023

Date of Hearing: 01.06.2023

Date of Decision: 28.09.2023

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Creative Arts, Mumbai (referred herein as 'appellants') being aggrieved against the Order-in-Appeal No. 441 & 442(Gr.II H-K)/2019(JNCH)/Appeals-II dated 25.03.2019 (referred to as 'impugned order') passed by the Commissioner of Customs (Appeals), Jawaharlal Nehru Custom House (JNCH), Nhava Sheva, Mumbai-II.

2.1 Briefly stated, the facts of the case are that the appellants herein have filed Bill of Entry No. 6798627 dated 14.06.2018 for import of goods, namely 'coloured rubber granules of size 2-4 mm' in red, green and blue colour. The goods were self-assessed by the appellants classifying the coloured rubber granules under customs tariff item 4002 19 90. During verification of self-assessment, the assessing officer had sought for further information regarding value and nature of the imported goods and the same was submitted by the appellants. As the department did not agree with the self-assessment made by the appellants in respect of classification of imported goods, a show cause notice dated 02.07.2018 was issued and upon receiving their reply dated 17.09.2018 and after giving the appellants a personal hearing, the original authority had passed an order rejecting the classification under tariff item 4002 19 90 claimed by the appellants and reclassified the goods under Customs tariff item 4004 0000. Further, the original authority vide Order-in-Original dated 09.11.2018 confiscated the imported goods in view of the failure on the part of the appellants to produce an authorisation from DGFT as they did not comply with the Foreign Trade Policy 2015-2020; however, an option to redeem the said goods for re-export purpose on payment of redemption fine of Rs.70,000/- was given and penalty of Rs.1,00,000/- was also imposed on the importer under Section 112 of the Customs Act, 1962.

2.2 Feeling aggrieved of the above order, the appellants had preferred an appeal before the Commissioner of Customs (Appeals), Mumbai-II. Further, the department also filed an appeal against the redemption fine option given by the original authority, seeking for absolute confiscation of the imported goods. The learned Commissioner (Appeals), after giving a personal hearing to the appellants on 21.02.2019, had passed the impugned order dated 25.03.2019, modifying the original authority's order in absolute confiscation of the goods and deleting the option given for redemption fine to the appellants. Further, the order for reclassification of the goods under Customs tariff item 4004 0000 and imposition of penalty on the appellants was upheld. Being aggrieved against the impugned order, the appellants have preferred this appeal before the Tribunal.

3. The learned Advocate appearing for the appellants stated that the imported goods are not 'waste, parings and scrap' as described in Chapter

Note 6 to Chapter 40, inasmuch as these are not arising from the manufacture or working of rubber and rubber goods, that are definitely not usable as such because of cutting-up, wear and other reasons; on the contrary these are produced through a detailed manufacturing process including mechanical process of pulverization, cutting, grinding, shredding, de-beading, extraction etc., thermo-chemical process of devulcanizing rubber, thermal curing process and colour coating to obtain the coloured rubber granules. Hence, he stated that the impugned order classifying the goods under tariff item 4004 00 00 is incorrect. Learned Advocate also cited the Country of Origin certificate issued by the Ministry of International Trade and Industry, Malaysia for the imported goods indicating value addition of 63.64% in support of their claim that it is not waste and scrap, but a manufactured product. On the basis of product catalogue and ISO 9001:2015 certificate of registration of the supplier M/s Veralastic SDN BHD, Malaysia, being a manufacturer of recycled SBR rubber granules, recycled rubber mats/tiles and EPDM granules, they claimed that the classification of imported goods adopted by the appellants under tariff item 4002 19 90 is correct. He also submitted that the concerned Regulating Authority i.e., Ministry of Environment, Forest & Climate Change while dealing with the issue of import of rubber granules of less than 35mm size in the case of one another importer M/s Royal Carbon Black Pvt. Ltd. in 72nd Expert Committee meeting held on 19-20 September, 2016, had decided that rubber crumb/granules are made by processing of used tyre scrap and are thus products made from waste rubber, and these have not been considered as 'waste' under Schedule III of the HW Rules, 2016. Earlier also the Committee had taken this view and stated that import of this material does not need permission from this Ministry. Thus, the learned Advocate claimed that the whole basis of the impugned order categorising the imported goods as 'restricted goods' for absolutely confiscating the same is arising from incorrect understanding of the issue and thus prayed for setting aside the impugned order.

4. Learned Authorised Representative appearing for the Revenue reiterated the findings of the impugned order and stated that since there is mis-classification and mis-declaration of the imported goods, and in the absence of authorisation from DGFT, the imported goods are liable for

absolute confiscation and imposition of penalty. Hence, he stated that the impugned order is sustainable and the appeal is liable to be rejected.

5. Heard both sides and perused the records of the case.

6. In the impugned order, the learned Commissioner (Appeals) has stated that the issue under dispute to be decided by him are as follows: The relevant paragraph 10 of the impugned order, for ease of reference, is extracted as below:

> "*10. I have carefully gone through the appeal papers and submissions made during personal hearing. The issues to be decided in the appeals No.64 & 211/2019 are: (i) whether the imported goods i.e., Colour Rubber Granules are classifiable under tariff item 40021990 as claimed by the applicant or under tariff item 40040000 as ordered by the department. (ii) whether the imported goods fall under the category of 'Restricted goods' as per FTP 2015-20 and (iii) in case of restricted goods, can redemption fine be imposed for re-export only.*"

The learned Commissioner (Appeals) in the impugned order had absolutely confiscated the imported goods and confirmed the reclassification of goods under tariff item 40004 0000, besides upholding imposition of penalties on the basis of following findings:

(i) The imported goods i.e., Coloured Rubber Granules are derived from truck tyres obviously worn-out or not usable and prepared after many processes. Hence, it is clear that the imported goods are not raw rubber in primary form; further they are not just the mixture of natural rubber of heading 4001 with Styrene Butadiene Rubber.

(ii) Imported goods which contain added material like carbon black, pigment etc. cannot be classified under heading 4002. The heading 4004 includes not just waste of rubber but also powders and granules obtained therefrom.

(iii) The imported goods are admittedly obtained from waste tyres (rubber waste) and therefore they are squarely covered by the description of tariff item 4004 0000 requiring authorization from DGFT for its import.

7. In the case before us, the dispute in classification of imported goods is arising on account of the import policy restrictions and there is no dispute in respect of the rate of basic customs duty. Hence, the relevant entries in the ITC HS of the FTP are required to be examined to

decide whether the importation of goods are 'Restricted' or 'Free' depending upon classification of the imported goods under the First Schedule to the Customs Tariff. The relevant tariff entries in the ITC HS are extracted as below for immediate reference:

Product Description and Import Policy

HS Code	***Description***	***Import Policy***	***Policy Condition***	***Notification No. and Date***
4001	*Natural rubber, balata, guttapercha, guayule, chicle and similar natural gums, in primary forms or in plates, sheets or strip.*			
400110	*- Natural rubber latex, whether or not pre-vulcanised*			
…	*…*	*…*	*…*	*…*
4002	*Synthetic rubber and factice derived from oils, in primary forms or in plates, sheets or strip; mixtures of any product of heading 40.01 with any product of this heading, in primary forms or in plates, sheets or strip.*			
…	*…*	*…*	*…*	*…*
400219	*- Styrene-butadiene rubber (SBR); carboxylated styrene- butadiene rubber (XSBR) : -- Other*			
40021910	*--- Oil extended styrene butadiene rubber*	*Free*		
40021920	*---Styrene butadiene rubber with styrene content exceeding 50percent*	*Free*		
40021930	*---Styrene butadiene styrene oil bound copolymer*	*Free*		
40021990	*---Other*	*Free*		
…	*…*	*…*	*…*	*…*
40030000	*Reclaimed rubber in primary forms or in plates, sheets or strip.*	*Free*	*Natural rubber will not be allowed for import in this heading.*	
40040000	*Waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom.*	*Restricted*	*Import of used rubber tyres with one cut in bead wire and import of used rubber tubes cut in two pieces, however, is free.*	

From careful perusal of the legal provisions of the Customs Tariff Act, 1975, it transpires that imported goods are to be classified taking into consideration the scope of headings / sub-headings, related Section Notes, Chapter Notes and the General Rules for the Interpretation (GIR) of the First Schedule to the Customs Tariff Act, 1975. For legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes.

8. We find that the description of the heading for 4001 specify that it covers products of 'natural rubber in primary forms or in plates, sheets or strip'; similarly the description of heading 4002 provides that it covers 'Synthetic rubber and factice derived from oils, in primary forms or in plates, sheets or strip'. Further, heading 4003 covers 'reclaimed rubber in primary forms or in plates, sheets or strip' and heading 4004 covers under its scope 'waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom'.

9. In the impugned order, the contents of the imported goods viz., Coloured Rubber granules are discussed and shown as being derived from truck tyres whose composition comprises of natural rubber (27%), synthetic rubber (14%), carbon black (28%), steel (14-15%) and accelerators, anti-ozonants etc., (16-17%).Though the appellants have claimed on the basis of composition that imported goods contain Styrene Butadiene Rubber for its classification under heading 4002, on account of the condition specified in Chapter Note 5(A) (i), inasmuch as the imported goods contain the 'carbon black', 'accelerators' and 'colouring pigments', it cannot remain classified under heading 4001 or 4002. The extract of the said Chapter Note is given below which excludes its classification under heading 4001 and 4002:

> "*5. (A) Headings 4001 and 4002 do not apply to any rubber or mixture of rubbers which has been compounded, before or after coagulation with:*
>
> *(i) vulcanising agents, accelerators, retarders or activators (other than those added for the preparation of pre-vulcanised rubber latex)*
>
> *(ii) pigments or other colouring matter, other than those added solely for the purpose of identification;*
>
> *(iii) plasticisers or extenders (except mineral oil in the case of oil-extended rubber), fillers, reinforcing agents, organic solvents or any*

other substances, except those permitted under (B);……

Further, in the impugned order it had been elaborately discussed about the production process of imported goods at paragraph 13 to 15, to state that the Coloured Rubber Granules having size of 2mm to 4mm are derived from used truck tyres, by subjecting to various processes explained therein as the truck tyres are cut, ground, shredded; steel and fibre are extracted; after de-vulcanization, carbon black oxide, calcium carbonate curing agent and synthetic rubber are mixed; after thermal process, curing etc. pigment and PH binders are added to make the colourful granules. Further, the imported goods are not just a mixture of Styrene Butadiene Rubber with any other natural rubber of heading 4001. For these reasons the imported goods are to be treated as finished goods instead of raw rubber in any primary forms. Thus by the scope of coverage of the chapter heading 4001 and 4002 and its tariff entries, relative Chapter Note 5(A), inasmuch as there is presence of pigments/colouring matter, carbon black and accelerators in the imported goods, it does not merit classification under heading 4001 as well as 4002.

10. In order to examine the scope further chapter headings for determining the correct classification, we refer to chapter heading 4003 which covers '*Reclaimed Rubber in primary forms or in plates, sheets or strip'* and chapter heading 4004. The description of the chapter heading 4004 clearly specify that it covers '*Waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom*'. In this regard, it is important to note that Chapter Note 6 to Chapter 40 specify the meaning of the phrase 'waste' as follows:

> "*6. For the purpose of heading 4004, the expression 'waste, parings and scrap' means rubber waste, parings and scrap from the manufacture or working of rubber and rubber goods definitely not usable as such because of cutting-up, wear or other reasons*".

Further, the Harmonized System of Nomenclature of WCO explains the scope of chapter heading 4003 and 4004 in detail as follows:

> *"40.03 - RECLAIMED RUBBER IN PRIMARY FORMS OR IN PLATES, SHEETS OR STRIP.*
>
> *Reclaimed rubber is obtained from used rubber articles, especially tyres, or from waste or scrap, of vulcanised rubber, by*

softening ("de-vulcanising") the rubber and removing some of the unwanted matter by various chemical or mechanical means. The product contains residues of sulphur or other vulcanising agents in combination and is inferior to virgin rubber, being more plastic and more tacky than virgin rubber. It may be put up in sheets dusted with talc or separated by polyethylene film.

This heading covers reclaimed rubber in primary forms or in plates, sheets or strip, whether or not mixed with virgin rubber or other added substances, provided that the product has the essential character of reclaimed rubber."

"40.04 –WASTE, PARINGS AND SCRAP OF RUBBER (OTHER THAN HARD RUBBER) AND POWDERS AND GRANULES OBTAINED THEREFROM

The expression "waste, parings and scrap" is defined in Note 6 to this Chapter.

The heading covers:

(1) Rubber waste, parings and scrap from the manufacture or working of unvulcanised or vulcanised rubber (other than hard rubber).

(2) Goods of rubber (other than hard rubber) definitely not usable as such because of cutting-up, wear or other reasons.

This category includes worn-out rubber tyres not suitable for retreading and scrap obtained from such worn-out rubber tyres, usually by the following processes:

(a) Cutting the tyre, with a special machine, as close as possible to the tringle bead wires or the heel.

(b) Splitting to remove the tread.

(c) Cutting into pieces.

The heading excludes used tyres suitable for retreading (heading 40.12).

(3) Powders and granules obtained from goods of (1) and (2) above.

These consist of ground waste of vulcanised rubber. They may be used as a filler in road surfacing materials or in other rubber based compounds or for moulding directly into articles not requiring great strength.

The heading also excludes waste, parings, scrap, powders and granules of hard rubber (heading 40.17)."

11. As the imported goods are derived from used tyres, these are definitely not obtained from the manufacture or working of rubber so as to consider classifying the first category of goods explained at (1) above under HS explanatory notes to chapter heading 4004. Further, as the imported goods are admittedly in the nature of finished rubber granules obtained through a series of manufacturing process, these are not covered under the second category of goods of rubber, explained at (2) above as these are not worn out rubber tyres or scrap obtained therefrom, but product arising from further manufacture of such products. The third category of goods consist of ground waste of vulcanized rubber, which are used as a filler in road surfacing materials or in other rubber based compounds or for moulding directly into articles not requiring great strength. Considering the detailed manufacturing process indicated in the impugned order covering mechanical processing of used truck tyres by pulverisation/reduction, cutting/ grinding/shredding/de-beading for further extraction of steel by magnets, fibres by vibrators, de-vulcanisation, mixture of calcium carbon, black carbon oxide, curing agent, synthetic rubber and blending and rolling, kneading to make sheets and further thermal curing process for brining into blocks/bales before finally crushing through granulator for obtaining the rubber granules, it could be easily concluded that these are not ground waste of vulcanized rubber or the granules made therefrom. We also find that while arriving at the conclusion for classifying the goods under chapter 4004, no detailed conclusion has been given by the learned Commissioner (Appeals) except for the reasoning that the imported goods are admittedly obtained from the waste tyre (rubber waste) and it includes not just waste of rubber but also powders and granules obtained therefrom.

12. In the HS explanatory notes to chapter heading 4003, it is specifically stated that it covers rubber obtained from used rubber articles, especially tyres, by softening/ devulcanizing the rubber and removing some of the unwanted matter by various chemical or mechanical means. Further, it allows the presence of other vulcanising agents, pigments etc., [which otherwise excludes the product from classifying under Chapter heading 4001 and 4002 as per Chapter Note 5(a)]. In simple words, Reclaiming is a procedure in which the scrap rubber is converted, using mechanical and thermal energy and chemicals, into a state in which it can be mixed, processed and vulcanized again. Though technically reclaimed

rubber and recycled rubber may be used in different context, to put it simply, recycled rubber is something that is put to use in an entirely different way, whilst reclaimed rubber refers to something that is either reused in its same form for either a new purpose or exactly what it was originally intended for. In terms of Chapter Note 3 to Chapter 40, primary forms applies only to specific forms of rubber and this includes 'granules'. The extract of the said Note is below:

> *"3. In headings 4001 to 4003 and 4005, the expression "primary forms" applies only to the following forms:*
> *(a) Liquids and pastes (including latex, whether or not pre-vulcanised, and other dispersions and solutions);*
> *(b) Blocks of irregular shape, lumps, bales, powders, granules, crumbs and similar bulk forms."*

The imported goods is presented in granules of size 2mm to 4mm which is one of the primary form and are being used for outdoor rubber tiles, indoor rubber mats, rubber pavers etc. and thus are covered under chapter heading 4003. The relevant import policy for goods of chapter heading 4003 are 'Free' and there are no restrictions on import. Thus, the impugned order proposing absolute confiscation of imported goods classifying the imported goods under tariff item 4004 0000 is not legally sustainable.

13. It is also of importance to note that reclaimed rubber is extensively used in the manufacture of many rubber goods. This is used alone or in combination of natural and SBR type of synthetic rubbers. Considering the increasing use of reclaimed rubber in the rubber industry the BIS has also prescribed a standard for testing the products under IS 6303:1971. According to ASTM Standard Classification for Rubber Compounding materials, Recycled Vulcanizate Particular Rubber (ASTM D 5603-01) recycled rubber is defined as recyclable, vulcanized rubber that has been processed to give particulates or other forms of different shapes, sizes and size distributions. The imported product fits into above explanation. Thus, on the basis of the above discussions, we are of the considered view that the imported goods are rightly classifiable under chapter heading 4003 0000 as reclaimed rubber.

14. Further, as the appellants have cited the decision of the Ministry of Environment, Forests and Climate Change (MoEFCC) for their claim that the imported goods are not 'waste' we have also examined the restrictions placed for import of hazardous waste as prescribed by the Ministry of Environment, Forests and Climate Change under the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 (HW Rules), which also specify the goods the importation of which are restricted. We find that "*Waste parings and scrap of rubber*" finds specific mention as one of the waste under 'Part B of Schedule III' for which such Rules apply and hence the procedure prescribed hereunder has to be necessarily followed in case all import transactions. The extract of the procedure to be followed by an importer as per the said Rules is extracted below:

"*13. Procedure for import of hazardous and other wastes.-*

(1) Actual users intending to import or transit for transboundary movement of hazardous and other wastes specified in Part A and Part B of Schedule III shall apply in Form 5 along with the documents listed therein, to the Ministry of Environment, Forest and Climate Change for the proposed import together with the prior informed consent of the exporting country in respect of Part A of Schedule III waste, and shall send a copy of the application, simultaneously, to the concerned State Pollution Control Board for information and the acknowledgement in this respect from the concerned State Pollution Control Board shall be submitted to the Ministry of Environment, Forest and Climate Change along with the application.

(2) For the import of other wastes listed in Part D of Schedule III, the importer shall not require the permission of the Ministry of Environment, Forest and Climate Change. However, the importer shall furnish the required information as per Form 6 to the Customs authorities, accompanied with the following documents in addition to those listed in Schedule VIII, wherever applicable. For used electrical and electronic assemblies listed at serial numbers 4 (e) to 4(i) of Schedule VIII (Basel No. B1110), there is no specific requirement of documentation under these rules: (a) the import license from Directorate General of Foreign Trade, if applicable; (b) the valid consents under the Water (Prevention and Control of Pollution) Act, 1974 (25 of 1974) and the Air (Prevention and Control of Pollution) Act, 1981 (21 of 1981)and the authorisation under these rules as well as the authorisation under the E-Waste (Management and Handling) Rules, 2011, as amended from time to time, whichever applicable; (c) importer who is a trader, importing waste on behalf of actual users, shall obtain one time authorisation in Form 7 and copy of this authorisation shall be appended to Form 6.

(3) For Part B of Schedule III, in case of import of any used electrical and electronic assemblies or spares or part or component or consumables as listed under Schedule I of the E Waste (Management and Handling) Rules, 2011, as amended from time to time, the importer need to obtain extended producer responsibility-authorisation as producer under the said E Waste (Management and Handling) Rules, 2011.

(4) Prior to clearing of consignment of wastes listed in Part D of Schedule III, the Custom authorities shall verify the documents as given in column (3) of Schedule VIII.

(5) On receipt of the complete application with respect to Part A and Part B of Schedule III, the Ministry of Environment, Forest and Climate Change shall examine the application considering the comments and observations, if any, received from the State Pollution Control Boards, and may grant the permission for import within a period of sixty days subject to the condition that the importer has - (i) the environmentally sound facilities; (ii) adequate arrangements for treatment and disposal of wastes generated; (iii)a valid authorisation and consents from the State Pollution Control Board; (iv) prior informed consent from the exporting country in case of Part A of Schedule III wastes.

(6) The Ministry of Environment, Forest and Climate Change shall forward a copy of the permission to the concerned Port and Customs authorities, Central Pollution Control Board and the concerned State Pollution Control Board for ensuring compliance with respect to their respective functions given in Schedule VII.

(7) The importer of the hazardous and other wastes shall maintain records of the hazardous and other waste imported by him in Form 3 and the record so maintained shall be made available for inspection.

(8) The importer of the hazardous and other wastes shall file an annual return in Form 4 to the State Pollution Control Board on or before the 30th day of June following the financial year to which that return relates.

(9) Samples of hazardous and other wastes being imported for testing or research and development purposes up to 1000 gm or 1000 ml shall be exempted from need of taking permission for import under these rules.

(10) The Port and Customs authorities shall ensure that shipment is accompanied with the movement document as given in Form 6 and the test report of analysis of the waste, consignment, wherever applicable, from a laboratory accredited or recognised by the exporting country. In case of any doubt, the customs may verify the analysis.

SCHEDULE III [See rules 3 (1) (17) (iii), 3 (23), 12, 13 and 14]

Part A

List of hazardous wastes applicable for import and export with Prior Informed Consent [Annexure VIII of the Basel Convention]*

……..

Part B

List of other wastes applicable for import and export and not requiring Prior Informed Consent [Annex IX of the Basel Convention]*

Basel No.	***Description of wastes***
(1)	*(2)*
B1	*Metal and metal-bearing wastes*
B2	*Wastes containing principally inorganic constituents, which may contain metals and organic materials*
B3	*Wastes containing principally organic constituents, which may contain metals and inorganic materials*
B3080	***Waste parings and scrap of rubber”***

From the plain reading of the entry in the restrictions placed under Basel No. B 3080 of Part-B to Schedule III, it is clear that this entry do not cover the granules of rubber derived from truck tyres. The Prior Informed Consent procedure and permission to be obtained by the importer is applicable only to 'waste, parings and scrap of rubber'. Hence, even otherwise, irrespective of the policy condition not being applicable to imported goods of chapter 4003, there is no restriction from the point of HW Rules, 2016.

15. In view of the above detailed discussions and the conclusions arrived at paragraphs 12, 13 and 14, we set aside the impugned order passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II and allow the appeal in favour of the appellants.

(Order pronounced in Court on 28.09.2023)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha