CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86678 OF 2023

[Arising out of Order-in-Original No: 47/2023-24/Commr/NS-I/CAC/JNCH dated 22nd May 2023 passed by Commissioner of Customs (NS-I), Nhava Sheva.]

Galaxy Surfactants Ltd
C-49/2 Galaxy Research Centre, TTC Indus Area
Pawane, Navi Mumbai - 400703. … ***Appellant***

versus

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

WITH

CUSTOMS APPEAL NO: 86679 OF 2023

[Arising out of Order-in-Original No: 47/2023-24/Commr/NS-I/CAC/JNCH dated 22nd May 2023 passed by Commissioner of Customs (NS-I), Nhava Sheva.]

K Natarajan
Galaxy Surfactants Ltd
C-49/2 Galaxy Research Centre, TTC Indus Area
Pawane, Navi Mumbai - 400703. … ***Appellant***

versus

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

AND

CUSTOMS APPEAL NO: 86680 OF 2023

[Arising out of Order-in-Original No: 47/2023-24/Commr/NS-I/CAC/JNCH dated 22nd May 2023 passed by Commissioner of Customs (NS-I), Nhava Sheva.]

Unnathan Shekhar
Galaxy Surfactants Ltd
C-49/2 Galaxy Research Centre, TTC Indus Area
Pawane, Navi Mumbai - 400703. … ***Appellant***

versus

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

APPEARANCE:

Shri Arjun Raghavendra with Shri Akhilesh Kangsia, Advocates for the appellants

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: 86099-86101/2024

DATE OF HEARING:	27/02/2024
DATE OF DECISION:	26/08/2024

PER: C J MATHEW

It was Henri Poincare who remarked that

'One geometry cannot be more true than another, it can only be more convenient'

and, considering that context and the present circumstances, we cannot but paraphrase the crux of the dispute before us as nothing but persuasion that one plan of an architect is amenable to erection of two different structures and, if that could be, the contours of the demand impugned before us not have been transformed into the controversy that it has become. There are consignments of 'di-methyl lauryl amine (DMLA)' that M/s Galaxy Surfactants Limited had imported on payment of duties as well as against 'advance authorisation' obtained under the relevant scheme in the Foreign Trade Policy (FTP). There is the First Schedule to Customs Tariff Act, 1975, comprising ninety eight chapters in eighteen sections, with elaborate notes attending to both, signifying culmination of international concord on classification, that enumerates all goods known to production centres across the globe and plied, as a matter of course, in cross-border transactions. There is the Customs Tariff Act, 1975, to which this Schedule is appended, that incorporates the General Rules for Interpretation of the Import Tariff with intent of convergence of understanding on distinguishment among the headings of each chapter. And yet, here is a controversy which straddles not just two headings but, unimaginably, two chapters. Apparently and all too unusually, not only has the description of the goods in question been altered but the fitment between

'Amine function compounds'

as description of heading 2921 of First Schedule to Customs Tariff Act, 1975 and

'Organic surface-active agents'

as relevant description of heading 3402 of First Schedule to Customs Tariff Act, 1975, which, additionally, has 'preparations' that the impugned goods, admittedly, were not, had been determined by Commissioner of Customs (NS-I), Jawaharlal Nehru Customs House (JNCH), Nhava Sheva with fiscal and penal consequences in the impugned order[1].

2. It was also not lost on us that neither the original description as declared by the importer nor that transposed by the adjudicating authority are enumerated as tariff lines to beg the question of proximate cause for such divergent fitment by both. But the manner of transposing, by the statutory scheme of classification as well judicial determination of primary responsibility of notice, of tariff lines by sequential fitment, both to fasten differential duty liability – which invariably is the bait that lures the tax collector - and to erase fulfillment of obligation under export promotion scheme contracted by appellant-importer, besides confiscation of goods and imposition of penalties, mandates scrutiny of the substituted claim as being in proper accord with rules of classification. For several of the articles in the First Schedule to Customs Tariff Act, 1975, distinguishment between special purpose to which they are put and its generic form is accompanied by difference in tax burden which, invariably, is source of dispute. This happens to be one such. The dispute is, therefore, down to the wire only with reference to test reports and the interpretative aids afforded by the Customs Tariff Act, 1975. The cross-fire impacted two

[1] [order-in-original no. 47/2023-24/Commr/NS-I/CAC/JNCH dated 22nd May 2023]

individuals too who are also in appeal against detriments rained down on them by recourse to various provisions of Customs Act, 1962. The impugned order has discarded the declared classification for claiming, inaptly, to be akin to the generic description on the basis of technical aspects, chemical composition together with interpretative aids in the relevant chapter and test results besides relying on the very same test results for substitution with alternative tariff line by taking recourse to rule 3 of General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975. The last is significant as recourse to either the first of the rules or that particular rule poses different connotations and to have to resort to the numerically subsequent one signifies uncertainty about applicability of the primary rule to decide upon the appropriate description. In such circumstances, with the adopted tariff line being determined as only the more apt in comparison, the similitude of description corresponding to the declared tariff line is, presumably, not in dispute and, thus, takes the edge of the revision by discounting misdeclaration in the bills of entry.

3. But, then, somewhere before that, and probably oblivious of consequence of drawing upon the third rule, the first was also relied upon as conclusive enough to substitute the tariff line for assessing duty short-paid or short-levied requiring us to precede comparative aptness with acceptability of the tariff line proposed in the show cause notice. This is where we encounter an impediment that not any of the

submissions of both sides, steeped in technology and technicalities, can assist us in overcoming. That has all to do with structuring and design of the proposed classification which has everything to do with its adaptability as description of the impugned goods and which appears to have slipped by the adjudicating authority. As referred *supra*, we have heard Learned Counsel for appellants and Learned Authorized Representative at length. It is inevitable that, in submissions on a classification dispute, the technical aspects are very much at a premium but that pre-eminence was never intended to accorded in adjudging aptness. The tariff is intended for the trade and transactional nomenclature must have weighed with designers of the scheme. The tariff is intended for customs officers at the frontiers to undertake assessment and, notwithstanding their years of experience, it should hardly be expected of them to attend to levy of duty as a scientist or academician would to product analysis. Most importantly, and foremost, it is the foundational framework of a nation’s tax policy; had the technical nuances of a product weighed with the policymaker, and with the same concatenation of words and expressions available to the other two stakeholders, it would also have prompted appropriate clarifications and guiderails. The absence of such persuades us that the resolution of this dispute does not lie outside the circumscribing framework of the First Schedule to Customs Tariff Act, 1975 and the appended General Rules for Interpretation of the Import Tariff.

4. It was the import of ‘Farmin DM 2465’ and ‘Fentamine DMA 1268’ from Philippines and Singapore and the characterization, upon import, as ‘dimethyl laurel amine (DMLA)’ corresponding to tariff item 2921 2990 and tariff item 2921 1990 of First Schedule to Customs Tariff Act, 1975 in the bills of entry that was posited as incorrect for actually being ‘cationic surface active agent’ corresponding to tariff item 3402 1200 of First Schedule to Customs Tariff Act, 1975 and sufficing for denial of benefit of exemption in notification no. 46/2011-Cus dated 1st June 2011 that was the genesis of the dispute. At stake is recovery of ₹ 1,27,14,101 on import of 1831.995 metric ton of goods valued at ₹ 28,43,02,017 and of ₹ 11,48,259 on import of 71.744 metric tons of goods valued at ₹ 1,18,04,438 under section 28 of Customs Act, 1962 along with penalties and other detriments. For the imports effected under ‘advance authorization’, drawing upon notification no. 96/2009-Cus dated 11th September 2009 and notification no. 18/2015- Cus dated 1st April 2015, comprising 1517.731 metric tons of the goods valued at ₹ 24,31,51,726, duties of customs of ₹ 6,67,42,032 was ordered for recovery under section 28 of Customs Act, 1962 in addition to penalties and other detriments; furthermore, the export of 5505.100 metric tons of manufactured goods valued at ₹ 64,42,21,665 against 788 shipping bills was held as contrary to Customs Act, 1962 with attendant penalties and detriments.

5. It is on record that the impugned order has relied upon the results

of the tests conducted by the Central Revenue Control Laboratory (CRCL) indicating that they are not describable as ‘separate chemically defined compound’ – or confirming to generic description – but, as ‘function oriented’, is an ‘organic surface active agent’ finding fitment elsewhere. It is at this point that, instead of drawing upon these results and other material supporting the description corresponding to the proposed tariff line in the First Schedule to Customs Tariff Act, 1975, in conjunction with the relevant notes in the proposed chapter of the First Schedule to Customs Tariff Act, 1975, the impugned order has veered from the prescribed path to first discard the declared classification.

6. To start with, the impugned order has presumed that disqualification as ‘separate chemically defined organic compound’ is the first step to moving a product out of the claimed chapter in the First Schedule to Customs Tariff Act, 1975. For this presumption, reliance has been placed on note 1 of chapter 29 of First Schedule to Customs Tariff Act, 1975. It appears to have escaped the eye of the adjudicating authority that ‘use’ is not a criteria for classification except when the intent is, contrarily, set out in the First Schedule to Customs Tariff Act, 1975 and it is to enable that prioritization, based on ‘use’, that this injunction precluding ‘‘use’ defined products’ from taking recourse to generic description owing to tax arbitrage is asserted. There is a larger purpose in the notes of sections and chapters that include or exclude;

essentially, they guide tax policy formulation onto clear paths. Furthermore, to conclude that this proscription is operable, it is no less necessary to demonstrate that the proposed description is 'special class' of the generic description. This should have been evident to the adjudicating authority from the illustration in the extract of the *Explanatory Notes* of the Harmonized System of Nomenclature (HSN). Such an exercise is visibly absent in the impugned order. Instead, the efforts appeared focussed on ensuring exclusion by setting out to establish that these were not 'separate chemically defined organic compounds' without latching the impugned goods to some such compound. The impugned order has ventured a step further, and drawing upon the analogy of 'sacharin', which when mixed with lactose finds specific use as 'sweetening agent' and hence excluded, to suggest that presence of 'myristil' suffices for exclusion overlooking the 'use' function as the distinguishment. Clearly, the intent of the note has been erroneously appreciated in the impugned order. It is also statutorily circumscribed that the goods are to assessed 'as presented' implying that the manufacturing process is not relevant to assessment for duties of customs; it was inappropriate on the part of the adjudicating authority to draw upon a concept relevant to duties of central excise, which is leviable not merely by conformity with description in the Schedule to Central Excise Tariff Act, 1985 but also upon being evidenced as having been manufactured, into customs assessment.

7. We are unable to appreciate the finding that the claim of noticee about solubility of the impugned goods can, by rebuttal, be a ground to discard the declared classification. The contest to solubility appears to have been a counter to the proposed classification. Instead, the adjudicating authority has appropriated one of the parameters of inclusion from the impugned note in the impugned chapter to propose a characteristic that is neither borne out by the note nor from any authoritative text. Clearly, the disjunctive nature of the enumeration in the impugned note to chapter has not impressed itself on the adjudicating authority.

8. The proposed alternative within

> *'Organic surface active agent (other than soap), surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading 3401'*

corresponding to heading 3402 of First Schedule to Customs Tariff Act, 1975 and, in particular at the sub-heading level as 'anionic', 'cationic', 'non-ionic' and 'other', is intended for 'organic surface-active…' as a sub-classification. It is abundantly clear from note 3 of chapter 34 of First Schedule to Customs Tariff Act, 1975 that there are physical characteristics of 'surface active agent' that may be ascertained. The ascertainment was questioned for *bona fides* by the noticee, including the conducting of the prescribed tests. The same taint was attached by the adjudicating authority to the reports submitted during that proceedings. We cannot know for certain that the tests were, acceptably, validated. It was merely the advantages of one over the other that was cited before the adjudicating authority. The call to the adjudicating authority was not to adjudge between the two perceptions but to obtain an acceptable, unbiased report. Such a report, if enlightening upon the samples being 'surface-active agent', would have served the purpose and the doubts raised by the noticee are not, in the light of demonstrated interpretation, to be disregarded casually. A validated test would have served to decide upon the correctness of the classification and also to enlighten others faced with such quandary.

9. The exactitude and rigour of the test is in doubt and, with the test reports furnished by the noticee not having been considered except peripherally, it would be appropriate to send for a further test. This is inescapable as the Hon'ble Supreme Court, in *Hindustan Ferodo Ltd v. Collector of Central Excise [1997 (89) ELT 16 (SC)]*, has held that

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

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

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

to place onus squarely on customs official to propose, with certainty, a classification that fits the description of the impugned goods. The benchmark in note 3 of chapter 34 of First Schedule to Customs Tariff Act, 1975 must not only be there in the test results but must be shown to have been undertaken.

10. To fulfill that requirement, it is necessary to set aside the order for fresh adjudication after considering the test results. Considering the minuteness of the issues involved, it is inconceivable that the two officials could have deliberately applied their mind to weave a conspiracy that avoids a 'residuary' description while adopting a description that has some undeniable connection with the impugned goods to avail the benefits that accrued. The penalties on them are, clearly, not sustainable.

11. In the light of the above findings, we set aside the penalties on the individuals and, as far as the appeal of M/s Galaxy Surfactants

Limited is concerned, we remand the dispute back to the original authority for a fresh adjudication.

(Order pronounced in the open court on 26/08/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*