CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 86475 of 2023

(Arising out of Order-in-Appeal No. 511 (Gr. IIC-F)/2023(JNCH)/Appeals dated 10.05.2023 passed by the Commissioner of Customs (Appeals), Mumbai-II)

M M Trading Company **.... Appellant**
1st Floor, Near Ambajivad, Mamakhan,
Dania Road, Bhavnagar, Gujarat- 364 001.

Versus

Commissioner of Customs, **... Respondent**
Nhava Sheva-I
Group 2C-F, JNPT, Custom House,
Nhava Sheva, Raigad- 400 707.

APPEARANCE:

Shri N.D. George, Advocate for the Appellant

Shri Deepak Sharma, 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/87577/2024

Date of Hearing: 30.07.2024
Date of Decision: 29.11.2024

Per: S.K. MOHANTY

Brief facts of the case, leading to this appeal, are summarized herein below:

1.2 The appellants had filed the Bill of Entry No. 6355837 dated 04.01.2020 before the jurisdictional Customs authorities, seeking clearance of imported goods, declared as 'Solvent paint' under CTI 3814 0010 of the First Schedule to the Customs Tariff Act, 1975. However, on testing of the imported goods by Central Revenue Control Laboratory (CRCL), Nhava Sheva, it was reported by the Chemical Examiner that the same were 'Superior Kerosene Oil

(SKO)', which fall under CTI 2710 1932 and import of the same is allowed only by State Trading Enterprises. Since the appellants had imported SKO, which was 'prohibited' for import without any specific authorization from DGFT, the officers in the SIIB (I), JNCH had investigated into the matter and concluded that the appellants had mis-declared the description of the goods as well as the value thereof. Accordingly, proceedings were initiated against the appellants, which culminated into the adjudication order dated 23.11.2020, wherein the proposals made in Show Cause Notice (SCN) dated 14.10.2020 were confirmed. The said adjudication order was appealed against before the learned Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai-II and vide Order-in-Appeal dated 19.05.2021, the appeal was dismissed, by holding that the imported goods as per the B/E were SKO and the appropriate tariff classification would be CTI 2710 1932. Accordingly, the learned Commissioner (Appeals) in the said order dated 19.05.2021 had rejected the declared value; confiscated the imported goods, with option for redeeming the same on payment of redemption fine and imposed penalties on the appellants under Section 112(a) and 114AA of the Customs Act, 1962. Feeling aggrieved with the order dated 19.05.2021, the appellants had preferred appeal before the Tribunal, which was disposed of vide Final Order No. A/85075/2022 dated 04.01.2022, by way of remand to the adjudicating authority, for deciding the matter afresh, after causing re-test of the samples as requested by the appellants.

1.3 Pursuant to the remand directions contained in the order 04.01.2022 of the Tribunal, the department had sent the representative samples to CRCL, New Delhi for re-test. Vide letter dated 05.08.2022, CRCL had communicated the re-test report, contending *inter-alia*, that the samples meet the requirement of Kerosene, as per IS:1459: 2018 and does not meet the requirement of Petroleum Hydrocarbon Solvent as per IS:1745: 2018. On the basis of such re-test report submitted by CRCL, the learned Joint Commissioner of Customs, JNCH, Nhava Sheva had adjudicated the matter and vide order dated 26.08.2022 had changed the classification of goods as SKO falling under CRI 2710 1932; rejected the declared value; confiscated the imported goods, with option to redeem the same on payment of redemption fine and imposed penalties under Section 112(a) ibid and Section 114AA ibid on the appellants. On appeal against the said adjudication order dated 26.08.2022, the learned Commissioner (Appeals) vide the impugned order dated 10.05.2023, has dismissed the appeal, by upholding the order passed by the original authority. Feeling aggrieved with the impugned order dated 10.05.2023, the appellants have preferred this appeal before the Tribunal.

2. Heard both sides and perused the case records.

3. For the purpose of appropriate classification of the subject goods i.e., whether to be considered as 'solvent paint' under CTI 3814 0010, as claimed by the appellants; or, as SKO under CTI 2710 1932, as asserted by the department, we have examined both the test reports relied upon by the lower authorities in their respective orders. In the first test report dated 10.01.2020, since all the parameters were not tested, the Tribunal in the first round of litigation had remanded the matter back to the adjudicating authority for re-testing of the goods. The samples were sent by the department to CRCL, New Delhi under the cover of letter dated 26.07.2022, which is more than 2 years from the date of drawing of initial samples from the imported goods. Re-testing of samples after such a long passage of time, in our opinion, may not give the accurate results of the parameters or characteristics, which were present at the time of importation of the goods, for arriving at the conclusion that whether the imported goods in question can conclusively be determined as SKO or otherwise. Further, it is an admitted fact on record that the first test report obtained by the department was not free from doubt, which is evident from the fact that the Tribunal vide order dated 04.01.2022 had remanded the matter solely for the purpose of re-testing, which was also accepted by the department. We find that even the re-testing done on various parameters were not in conformity with the prescribed standards under IS:1459:2018 for SKO inasmuch as the report with regard to the 'burning quality' is absent in such report. Further, the test with regard to the 'Sulphur content' and 'Aromatic content' in the imported goods were not tested at the initial round and thus, such

tests done after a lapse more than two years, that too, for the first time cannot be considered as the adequate proof to hold that the product in question is SKO, as claimed by Revenue. From the test reports obtained by the department, it is evident that all the parameters prescribed under IS:1459:2018 have not been tested and reported by the government laboratory, in order to conclusively claim that the product is SKO and should fall under CTI 2710 1932. It is evident that in both the test reports, all the parameters prescribed under IS:1459:2018 have not been complied with. The chemical examiners' jurisdiction is confined only to give composition of the goods sent for analysis, which is absent in the present case. Thus, the basic functions assigned have not been fulfilled and without obtaining the requisite test results on all laid down parameters, such testing agency cannot comment on the classification of the goods, contrary to the claim made by the appellants.

4. We find that in an identical situation, this Tribunal in the case of M/s *M.V.B. Enterprises Vs. Commissioner of Customs, Nhava Sheva-I,* vide Final Order No. A/86236/2023 dated 18.08.2023, has held that the parameters prescribed under IS:1459:2018 should be strictly adhered to and in absence of test of the prescribed parameters, the report obtained from the laboratory cannot be considered as proper and justified for change in classification of the goods. The relevant paragraphs recorded in the said order of the Tribunal are quoted herein below:

> *"5. We find that the Department has proceeded against the appellant mainly based on the test report dated 15.01.2020 furnished by the CRCL, certifying the imported goods to be of Kerosene (SKO). However, we find that while testing the imported goods, the said agency has not confirmed to the IS 1459:2018 by testing all the ten parameters specified therein; instead they tested only few of such specified parameters for giving the technical opinion that the sample is Kerosene. We further find that by relying upon the test report in respect of product in question, this Tribunal in the case of Shri Jethan and Rohra (supra) has set aside the adjudication order. The relevant paragraphs in the said order are extracted herein below:-*
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> > *"27. Having considered the rival contentions, we find that the issue involved in these appeals is whether the Revenue was correct in re classifying the imported goods declared as "Mineral Hydrocarbon Oil-CTH 27101988 and Mixed Mineral Hydrocarbon*

Oil-CTH 27101990" as diesel under CTH 27101944 and as Superior Kerosene Oil under CTH 27101932.

28. It is admitted position of law that for a product to be classified under CTH 27101944/27101932 as SKO, it has to meet with the specifications in Supplementary Note- (C) under Chapter 27 which reads as under:- "Superior Kerosene Oil (SKO)" means Hydrocarbon Oil Confirming to Indian Standards Specification of Bureau of Indian Standards IS 1459 : 1974(reaffirmed in 1996)."

29. Thus, the product or material shall consist of refined petroleum distillates. It shall be free from visible water sediments and suspended material. The material shall also comply with the requirements given in Table-I, when tested according to the appropriate method prescribed under 'P' Series of IS:1448, reference to which is given in Col.4 of the Table-I (provided at para-37 below). 30. It is also not the case of the Revenue that the said three parameters can be established by any inferential process or otherwise. So far as sulphur is concerned, though no testing has been undertaken, we, for the sake of discussion, assume that the said parameter have been met, as the same forms a part of the suppliers' test reports and is within the parameters specified in IS 1459:1974."

6. In view of the fact that the investigation has not been properly conducted to ascertain the nature of goods imported by the appellant and in absence of proper substantiation of test report by CRCL, we are of the view that the adjudged demands confirmed on the appellant cannot be sustained for judicial scrutiny…."

5. In view of the foregoing discussions, we do not find any merits in the impugned order dated 10.05.2023 passed by the learned Commissioner of Customs (Appeals), Mumbai-II, in so far as it has upheld the adjudged demands confirmed on the appellants. Therefore, the impugned order is set aside and the appeal is allowed in favour of the appellants.

(Order pronounced in open court on 29.11.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

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