CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 88182 OF 2018

[Arising out of Order-in-Original No: 105/2017-18/COMMR/NS-V/JNCH dated 13th February 2018 passed by the Commissioner of Customs (NS-V), Nhava Sheva.]

Ritzy Chemicals Pvt Ltd
703, 7th Floor, DLF Tower-B, District Centre, Jasola
New Delhi – 110 044 … ***Appellant***

versus

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

APPEARANCE:

Shri t Vishwanathan, Shri Akhilesh Kangazia and Ms. Madhura Khandekar, Advocates for the appellant

Shri DS 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: 86335/2025

DATE OF HEARING: 17/03/2025
DATE OF DECISION: 16/09/2025

PER: C J MATHEW

In this appeal of M/s Ritzy Chemicals Pvt Ltd, against order[1] of

[1] [order-in-original no. 105/2017-18/COMMR/NS-V/JNCH dated 13th February 2018]

Commissioner of Customs (NS-V), Nhava Sheva, in dispute is the transformation that is entailed upon appending ‘ortho’ to ‘phthalate’ to distinguish the two and at stake is the consequential recovery of ₹ 8,22,66,315 as duty ‘short paid’ under section 28 of Customs Act, 1962, along with appropriate interest under section 28AA of Customs Act, 1962, saddled on 52 consignments imported between 14th May 2016 and 18th April 2017 stemming from denial of eligibility to exemption notification[2] attending upon goods claimed to be liable to rate of duty corresponding to tariff item 2917 3920 in First Schedule to Customs Tariff Act, 1975.

2. Proceedings were initiated in relation to 58 bills of entry for the period commencing from 23rd June 2015 but the imports effected up to 11th May 2016 were held as being beyond ‘normal’ period of limitation in view of the evident absence of ingredients set out in section 28(4) of Customs Act, 1962. The imports, effected from South Korea were claimed to be ‘dioctyl orthophthalates’ and the benefit of notification, were sought to be charged to normal rate of duty on the premise that, between ‘dioctyl orthophthalates’ and ‘dioctyl phthalate’, the former was not the appropriate description.

3. The show cause notice proceeded on the assumption that ‘dioctyl phthalates’ are plasticizer and, according to chemical structure, are

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[2] [no. 152/2009-Cus dated 31st December 2009]

either ‘ortho’ or meta (ISO)/para (TERE) owing to which the adjudicating authority, relying upon

> *‘3. ....*
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> *f. Board is therefore, of the view that meta and para variety alone of dioctyl-pthalate shall be classified under tariff item --- 2917 39 20. Dioctyl orthophathalate (DEPH) shall continue to be classified under tariff item - - 2917 32 00.’*

in circular[3] of Central Board of Excise & Customs (CBEC) and restricted scope of note 3 in chapter 29 of First Schedule to Customs Tariff Act, 1975, discarded the claimed classification.

4. According to the adjudicating authority the imported goods are, admittedly, not of ‘meta’ or ‘para’ structure and, hence from the report of Deputy Chief Chemist being ‘orthophthalates’ from the technical description as ‘*Bis(2-ethylhexyl) phthalate’* so classifiable. He also placed reliance on ruling[4] of United States Customs to reinforce the conclusion. Thus, we notice that the outcome of adjudication has been built upon the test report, the underlying theme for classificatory disaggregation in the circular and the chemical structure of the imported goods.

5. According to the Learned Counsel for appellant, the adjudicating authority was in error inasmuch as the report was not tenable and the

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[3] [no. 7/2017-Cus dated 6th June 2017]
[4] [N102960 dated 17th May 2010]

challenge thereof, in letter dated 25th October 2016, had been ignored. It is also submitted that the test report was not conclusive as evident from the wording therein and that these could, at best, be restricted to the imports made in November to December 2016 that, as set out by the Tribunal in *Vivek Metals v. Commissioner of Customs Bengaluru (2023 (10) TMIO 1125 – CESTAT BANGALORE]* and in *Commissioner of Customs (Preventive), New Delhi v. Marks Marketing P Ltd [2017 (346) ELT 144 (Tri.-Del.)],* could not be applied to imports prior to the testing window. It is also submitted that the circular relied upon by the adjudicating authority was issued after the period of dispute and hence inapplicable for which reliance was placed on the decision of Hon'ble Supreme Court in *Jai Fibres Ltd v. Commissioner of Central Excise, Mumbai – III [2007 (218) ELT 484 (Hon'ble Supreme Court)]* and in *HM Bags Manufacturer v. Collector of Central Excise [1997 (94) ELT 3 (SC)]*. It is also submitted that the intent of the circular was to dispose off pending assessments, and more particularly, provisional assessments which had no bearing on recovery of duty under section 28 of Customs Act, 1962.

6. It was submitted that there is no difference among various ‘phthalates’ and that, as far as trade parlance or trivial names go, such distinction did not exist. This lack of distinction, according to him, between the various types of ‘phthalates’ was evident from the handling of the product by the Director General of Anti-Dumping in India and

by Director General of Safeguards in India. Furthermore, he contended that the description in the several documents furnished in in support of the import had not been disputed by the customs authorities and, besides which, their classification since 2011 had proceeded without any contest on the part of the assessing authorities. It is also submitted that recourse to rule 3 of the General Rules for the interpretation appended to the First Schedule to the Customs Tariff Act, 1975, which prevailed once the restricted applicability of note 3 in chapter 29 was done with, was not inappropriate as there was no dispute in the applicable heading unlike at the sub-heading level with one of the rival descriptions being residual. Reliance was also placed on the decision of the Tribunal in *Commissioner of Customs, New Delhi v. Vee Kay Polycoats Ltd [2013 (292) ELT 254 (Tri.-Del.)]* in which the interchangeable deployment as trivial names was acknowledged in favour of the classification claimed by them at the time of import. It was also submitted that unqualified acceptance of the ’certificate of origin’, with all the contents therein, precluded any disruption of the assessment already effected.

7. Learned Authorized Representative submitted that the plea of the appellant is not tenable because past clearances need not, necessarily, be guide to recovery of duties of customs and that the existence of two separate descriptions, one at the sub-heading level and the other at the tariff item level, indicates intent to tax separately. It was submitted that

the claim of the appellant on application of rule 3 of General Rules for Interpretation of the Import Tariff appended to First Schedule to the Customs Tariff Act, 1975 is inadmissible as rule 6 therein extended the resolution of classification disputes in the 'three level hierarchy' on identical principles. Our attention was also drawn to note 3 in chapter 29 governing classification to be adopted in the event of amenability of description to more than one heading. It was contended by him that the adoption of classification by other agencies of the Central Government did not in any way signify its acceptance for all time and in all consignments.

8. Amenability of the impugned goods to be in concord with

> *'2917 Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulphonated, nitrated or nitrosated derivatives*
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> *Acyclic polycarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives:'*

is not in dispute which traverses to the several descriptions at the sub-heading level. Insofar as resolution of disputes over classification dispute is concerned, the proposal-in-substitute must not only undergo adherence to General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 but also the onus devolving upon the tax authorities, as set out by the Hon'ble Supreme Court, in *Hindustan Ferodo Ltd v. Collector of Central Excise [1997 (89) ELT*

16 (SC)], this

> *'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)]* 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……'*

must necessarily be discharged.

9. The adjudicatory call essentially lies upon correctness of fitment as 'dioctyl orthophthalates' corresponding to sub-heading 2917 32 of First Schedule to Customs Tariff Act, 1975 also doubling up as tariff item in the revised 'eight digit structure' which the adjudicating authority holds to be apt for all variants of 'phthalates' other than 'meta' and 'para' and 'others' corresponding to sub-heading 2917 39 of First Schedule to Customs Tariff Act, 1975 within which is 'dioctyl

phthalates', the claimed tariff item of the appellant. We find that the adjudicating authority has relied upon the impugned circular of the Central Board of Excise and Customs (CBEC) to proclaim the distinction of 'meta' and 'para' vis-à-vis 'ortho'; we do not find any rational basis for such affirmation inasmuch as the circular has emanated from a doubt stemming from placement of 'orthophthalates' preceding 'dioctyl phthalate' in the tariff. The said circular proceeds on the assumption that the Central Government was bound by the entries as *fait accompli* and it was necessary to 'split hairs' for alleviating distress among assessment authorities; in the process, it was overlooked that 'dioctyl phthalate' was deliberate inclusion at the 'eight digit level' and that 'dioctyl orthophthalate' was essentially a sub-heading. It was for the circular to explain the reasons for the former to be placed under the residual sub-heading and, in the absence of any, the circular lacks validity to guide classification. The lack is evident from the want of any explanation – chemically speaking – for such distinction and from the conclusions drawn thus

> *'3. Board examined the issue and in this regard it is clarified that :*
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> *d. Seemingly, it appears that an entry in the tariff [--- 2917 39 20, dioctyl-pthalate] would appear to cover all three isomers of dioctyl-pthalate as contended by the trade. However, such an interpretation would be erroneous as DEPH (ortho isomer) is already figuring at [- - 2917 32 00] and it is inconceivable that DEPH*

would also be classifiable under [--- 2917 39 20] in the same heading under residuary entry 'other'.

e. *Lastly, in the EN to HSN, there is a mention that phthalic acid is also known as orthophthalic acid, therefore, by this analogy Dioctyl orthophthalate would be same as Dioctyl phthalate and thus tariff item --- 2917 39 20 should prevail as far as classification of DEPH is concerned.*

It is clarified that the HSN does not contain the entry --- 2917 39 20 Dioctyl phthalate. Therefore, this definition shall not be applicable to tariff item 2917 39 20. Classification of DEPH shall remain under tariff item - - 2917 32 00.'

10. We do not consider the circular to be authoritative enough to determine the distinction between two descriptions existing at different levels in the tariff. Moreover, the distinction between the remnant intended, once the descriptions within '*aromatic polycarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives*' put together, to be covered by 'others' as 'sub-heading'-cum-'sub-classification' in heading 2917 of First Schedule to Customs Tariff Act, 1975. The deliberate inclusion of 'dioctyl orthophthalates' in the residuary category must have been motivated by some reason and logic in the light of the structure in the tariff and, especially so, in the context of the '-' and '--' levels. This aspect has not been examined by the adjudicating authority.

11. Moreover, the test report itself does not appear to be conclusive

inasmuch as

> *‘6. The RSSs in respect of Bills of Entry Nos. 7652803 dated 30/11/2016, 7835983 dated 15/12/2016, 7733020 dated 07.12.2016, 7837534 dated 15.12.2016, 7853954 dated 16.12.2016, 7837674 dated 15.12.2016, 7836090 dated 15.12.2016, 7643287 dated 29.11.2016, 7853556 dated 16.12.2016 and 7853614 dated 16.12.2016 were sent to the DYCC for test. DYCC test reports inter alia state that:-*
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> > *"The sample is in the form of clear colourless liquid. It has the Characteristics of Di Octyl phthalate. IUPAC Name-Bis (2-ethyl hexyl) phthalate. CAS No. 117-81-7. It comes under the category of orthophthalate "*
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> *The Test reports clearly state that the impugned goods are of "ortho" structure. Thus, it is crystal clear that the goods have been intentionally mis-classified under CTH 29173920 instead of correct CTH 29173200 in order to evade legitimate customs duty.’*

indicating that ‘orthophthalates’ is, in same manner, related to ‘phthalates’ but without qualifying the set or sub-set. It would appear that the appellant had sought further clarification on the test report *vide* their communication dated 25th October 2016 and it is on record that these had been disregarded by the adjudicating authority.

12. In the circumstances, it would be inappropriate to fasten a classification on the appellant without elimination of hierarchy embedded in the General Rules for Interpretation of the Import Tariff appended to Customs Tariff Act, 1975 and in not discharging the onus devolving on the adjudicating authority to establish that the goods were unambiguously classifiable under the sub-heading ‘dioctyl

orthophthalates' as laid down by the Hon'ble Supreme Court in *re Hindustan Ferodo Ltd* and *re HPL Chemicals Ltd*. The challenge to the test report by the appellant herein has to be addressed; probably, clarification thereof may resolve the muddy waters and, therefore, it would be appropriate to furnish the test report by Central Revenues Control Laboratory (CRCL) to further scrutiny. To enable this, we set aside the impugned order and remand the matter back to the adjudicating authority for a fresh decision.

(Order pronounced in the open court on 16/09/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*