Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

CUSTOM Appeal No. 10967 of 2018 -DB

(Arising out of OIO-KDL-COMMR-SKA-23-2017-18 dated 30/01/2018 passed by Commissioner of Customs-Kandla)

Aspam Petronergy Pvt Ltd **…….. Appellant**
Resham House, Farm No.9/1 Amaltas Avenue,
West End Green Society, Shamlaka,
New Delhi

VERSUS

C.C.-Kandla **……Respondent**
Custom House,
Near Balaji Temple,
Kandla, Gujarat

With

i. **Custom Appeal No. 10820 of 2018- DB (Shri Anil Karia)**
ii. **Custom Appeal No. 10968 of 2018- DB (Shri Ayush Goel)**
iii. **Custom Appeal No. 10969 of 2018- DB (Shri Binoy Abraham)**
iv. **Custom Appeal No. 10970 of 2018- DB (Winstrol Petrochemicals Pvt Ltd)**
v. **Custom Appeal No. 10971 of 2018- DB (Ravi Suri)**

Appearance:
Shri Salil Arora, Advocate and Shri Sudhanshu Bissa, Advocate for the Appellant
Shri Ashok Thanvi, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 10668-10673/2024

DATE OF HEARING: 08.01.2024
DATE OF DECISION: 21.03.2024

RAMESH NAIR

1.1 This group of appeals are preferred against the common impugned Order-In-Appeal KDL/COMMR/SKA/23/2017-18 dated 03.01.2018 passed by the Learned Commissioner (Appeals) wherein he upheld the classification of Rubber Processing Oil (RPO) under Chapter heading 27079900 of Custom Tariff Act and enhancement the value of imported RPO. The Learned Commissioner (Appeals) further upheld that the appellant mis-declared the country of origin in the bills of entry. Consequently, the Learned Commissioner (Appeals) upheld the finding of the Adjudicating Authority and

dismissed the appeal preferred by the appellant. Therefore, the present appeals.

1.2 The following four issues are involved in the present appeals:-

(i) Whether the Rubber Processing Oil imported by the Appellant is classifiable under Chapter Heading No. 27101990 as classified by the Appellants or under Chapter Heading No. 27079900 as classified by the Revenue.

(ii) Whether the value of the imported RPO can be enhanced based on the consent letters given by the directors of the Appellants at the time of release of the goods, without following the due process of law as contemplated under Section 14 of the Customs Act read with Customs (Determination of Value of imported value) Rules, 2017.

(iii) Whether the Appellants mis- declared the Country of Origin in the Bills of entry filed by them.

(iv) Whether the quantum of penalties and redemption fine imposed disproportionate to differential duty involved in the matter

1.3 The order of the Adjudicating Authority was based on the test report of Custom House Laboratory at Kandla. Few test reports of Custom House Laboratory, Kandla and the statements of the Director of the appellant M/s. Aspam Petronergy Pvt Ltd and statements of CHA.

2. Shri Salil Arora, Learned Counsel along with Shri Sudhanshu Bissa, Learned Advocate appearing on behalf of the Appellant submits that the Custom Department has relied upon the Chapter Note 2 of Chapter 27 for rejecting the classification under Chapter Heading 27101990. He submits that the revenue has wrongly classified the RPO under Chapter Heading 27079900 the custom department distinguishes the appellant’s case from Shah Petroleum Ltd. vs. Commissioner of Customs – 2017 (358) ELT 483 (T) stating that

product in Shah Petroleum was classified as Raw RPO whereas the Appellants goods do not meet the requirement of RPO. He further states that the Appellants test report result clearly states that the sample has characteristics of aromatic type petroleum based oil for Rubber Industry thus takes support of the case of Commissioner of Customs, Kandla vs Rajkamal Industrial Pvt Ltd 2022 (381) ELT 318 wherein it was held that so long as the department has been able to establish its case with such a degree of preponderance, the existence of a fact could be said to have been proved.

2.2 As regard the enhancement of the value of the goods, he submits that both the lower authorities enhanced the value based on the consent letters by the director of both the importers. It is settled law that the burden lies upon the revenue to show that the value declared by the importer is incorrect. Once, it is found that value declared by the appellant is incorrect, proper methodology as provided under Section 4 read with Customs Act read with Customs (Determination of Value of Import Goods) Rules, 2007 is to be followed for ascertaining correct value of the imported goods. The lower authorities ought to have ascertained value of the contemporaneous goods before relying upon the consent letters given by the directors of the appellant. He takes support of the following judgments:-

- Sumeet Exports India vs. Commissioner of Customs – 2019 (370) ELT 423
- Shalin Enterprises vs. Commissioner of Customs – 2017 (357) ELT 230

2.3 As regard the issue of mis-declaration of Country of Origin , he submits that both the lower authorities held that the appellants have mis-declared the country of origin in the bills of entry as UAE whereas the goods were originated from Iran. He submits that the appellant had no deliberate intention not to declare the correct country of origin, the appellant declared country of origin based on documents received from the supplier. He takes

support in case of BEL India trade Pvt. Ltd. vs. Commissioner of Customs 2007 (216) ELT 441.

2.4 Without prejudice to the aforesaid, he further submits that even though if the appellant accepts the finding of both the lower authorities, penalties and redemption fine imposed on the appellants are disproportionate to the differential duty amount involved in the impugned proceedings. Without prejudice to the aforesaid, it is also submitted that there is no intention on the part of the appellant or the director to evade custom duty, the appellant have classified the disputed goods under Chapter Heading No. 27101990 based on valuation under same heading and the decision of Sah Petroleum Ltd (Supra) however, value ought not to have been enhanced on the basis of the Consent letters. There is no undue benefit in declaring another country of origin. Therefore, he prays that the appeals may be allowed with consequential relief.

3. Shri Ashok Thanvi, Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the main issue to be decided in the present case is the classification of Rubber Processing Oil imported. The lower authorities have decided the classification under Chapter Heading No. 27079900 on the basis of a test report of Custom House Laboratory, Kandla. The basis of department's claim for classification of RPO is the chapter note 2 of chapter 27 of Customs Tariff Act which is reproduced below:

> *"2. References in heading 2710 to "petroleum oils and oils obtained from bituminous minerals" include not only petroleum oils and oils obtained from bituminous minerals but also similar oils, as well as those consisting mainly of mixed unsaturated hydrocarbons, obtained by any process, provided that the*

weight of the non-aromatic constituents exceeds that of the aromatic constituents."

As per above chapter note goods of chapter 27.10 should have non aromatic contents more than the aromatic contents. In the instant case though the Custom Laboratory's test show the non-aromatic content less than the aromatic content, the department has rejected the classification under 27.10. However it is fact on record that the method specified under BIS has not been adopted. Therefore the test report on the face of it cannot be accepted. Accordingly, the claim of the department to classify the RPO under 27.07 fails.

Here, it is pertinent to note that in the case of Amit Petrolubes Tribunal's final order No. 12761-12762/2023 dated 15.12.2023 the fact of testing of the identical goods i.e. RPO and in the present case is same. In Amit Petrolubes (Supra) this Tribunal passed the following order:

" *The following issues are involved in the present appeals:*

i. Classification of Rubber Processing Oil (RPO) whether under CTH 27101990 as claimed by the appellant or under CTH 2707 99 00 as per final assessment ordered by the department.

ii. The dispute about country of origin whether the same is Singapore or UAE where the appellant has not claimed any preferential rate of duty.

iii. Enhancement of declared value twice, from USD 500 PMT(C &F Kandla) to USD 531.500 PMT(C & F Kandla) and therefore, further enhancement to USD 585 on the basis of the copy of invoice received from shipping agent.

1.1 The brief facts of the case are that the appellant filed Bill of Entry No. 7638694 dated 11.08.2012 with Custom House, Kandla for clearance of 198 MT Rubber Processing Oil for assessment on first check basis. The appellant has classified goods under CTH 27101990. The appellant presented Quality Certificate No. TOP 2012/COQ-148 dated 28.08.2012 received from overseas supplier M/s. The Oceanic Petroleum Source Pvt. Ltd, Singapore showing among other parameters, Aromatic content as 33.8% measured by adopting ASTM D 2140 method. Geo Chem laboratory vide report dated 06.10.2012 as per which reported the aromatic content of 35%. The claim of the appellant is that aromatic content was less than the non-aromatic

content. The goods were assessed provisionally and clearance was permitted. The test report dated 26.09.2012 issued by custom laboratory, Kandla in respect of sample drawn by customs reported aromatic content as above 50% i.e. more than non-aromatic constituents. On the basis of this test report, balance quantity of 63.600 MT were placed under seizure on 19.09.2012. On the basis of the customs laboratory report classification declared by the appellant was rejected and has ordered for final assessment by classifying the goods under CTH 2707 99 00. Due to change of classification as per the department goods attract basic custom duty @ 10 % as against 5%. In the final assessment order the value of the goods which was enhanced from USD 500 PMT to USD 531.500 PMT and thereafter on the basis of one invoice obtained from the shipping agent the value was further enhanced to USD 585 FOB Kandla.

1.2 It was also alleged by the department that there is incorrect declaration of county origin in as much as in the invoice the country of origin was shown as UAE. Accordingly, the Adjudicating Authority passed the order in original dated 23.09.2013 whereby the following order was passed:-

i. Classification of goods is held under CTH1707 9900.

ii. The country of origin as UAE was rejected and the same was held to be Malaysia.

iii. The value of 198 MT of Rubber Processing Oil (RPO) declared in Bill of Entry No. 7638694 dated 11.08.2012 USD 500 PMT was rejected and redetermined the same USD 585 PMT. Ordered for confiscation of Rubber Processing Oil with the option for redemption on payment of fine of Rs. 5,00,000/-, ordered for payment of differential duty amounting to Rs. 24,74,446/- and the same was ordered to be adjusted and appropriate from the amount of Rs. 1491186/- which was already paid by the appellant. Penalty of Rs. 24,74,446/- was imposed under Section 114A of the Customs Act ,1962. Penalty of Rs. 2,50,000 each was imposed on Shri Hemant Raghunath Shah under Section 112(a) and 114AA of the Customs Act, 1962 respectively. The penalty of Rs. 50,000/- was imposed on M/s. Reshikiran Roadlines, Gandhidham under Section 112(a) of Customs Act ,1962, and penalty of Rs. 50,000/- was imposed on Shri Dinesh Nauratmal Gupta under Section 112(a) of the Customs Act, 1962, as well as penalty of Rs. 50,000/- under Section 114A of Customs Act. Being aggrieved by the said Order-in-Original, Appellant have filed aappeal before Commissioner (Appeals) wherein learned Commissioner (Appeals) reduced redemption fine of Rs. 50,000/- and penalty of Shri Hemant Shah was reduced to Rs. 25,000/- each under Section 112(a) and Section 114AA. However, remaining portion against present appellants were upheld. Therefore, the present appeals filed by the appellants.

2. Shri Vikas Mehta, learned Consultant appearing on behalf of the appellant filed a synopsis dated 22.11.2023 which is taken on record, wherein he made detailed submission on facts and merit of the case. He also placed reliance on the following Judgments:-

- *Sah Petroluems Ltd. V/s. Commr. Of Cus. (Import) JNCH, Nhava Shev - 2017(358) ELT 483 (Tribunal - Mumbai)*
- *Agrawal Industrial Corporation Ltd. v/s. Commissioner Of Customs, Manglore, 2020 (373) ELT 280 (Tri.- Bangalore)*
- *Surbit Impex Ltd.-2012(283) ELT 556 (Tri.- Mumbai)*
- *Mittal International -2018 (359) ELT 527 (Tri. -Del)*
- *Jay Kay Exports -2003 (161) ELT 443 (Tri. -Kol)*

3. On the other hand Shri Ajay Kumar Samota, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered submissions made by both the sides, and perused the rerecords. In the present appeal, issue to be decided by us in the appeal filed by M/s. Amit Petrolubes Pvt Ltd are as under :-

i. Classification of Rubber Processing Oil (RPO)
ii. Country of origin of said goods
iii. Enhancement of declared value twice.

4.1. As regards classification of Rubber Processing Oil (RPO), we find that was held by the revenue under CTH 27079900 treating the parameters of aromatic constituents is 50% i.e. more than non-aromatic constituents on the basis of test report dated 26.09.2012 issued by Customs laboratory.

4.2. The submission of the appellant is that test report of Customs laboratory, Kandla does not mention, the method adopted by customs laboratory for testing the sample. Therefore, the said test report cannot be qualified as evidence to decide the classification. We find that as against the above test report dated 26.09.2012. The Quality Certificate No. TOP 2012/COQ-148 dated 02.08.2012 provided by the supplier M/s. The Oceanic Petroleum Source Pvt Ltd., Singapore shows aromatic content as 35.8 measured by adopting ASTM D2140 method. Moreover, accredited laboratory namely Geo Chem also vide report dated 06.10.2012 reported aromatic content is 35% and since 50% shown by the custom laboratory test report which does not mention method of testing sample, preference has to be given to the Geo Chem test report dated 06.10.2012 coupled with Supplier's quality certificate according to which the aromatic content being 33.08% - 35% is less than the non-aromatic content.

Therefore, in our considered view the Rubber Processing Oil (RPO) is correctly classified under CTH 27101990.

4.3. The issue regarding classification of Rubber Processing Oil (RPO) is claimed by the appellant is supported by this Tribunal decision, in the case of Sah Petroleum Ltd v/s. Commissioner of Custom(import) JNCH, Nhava Sheva,2017 (358)ELT 483 (Tri.- Mumbai). Considering the fact in the present case and taking support of the aforesaid Tribunal Judgment which was upheld by the Hon'ble Supreme Court, we hold that the appellant's imported goods Rubber Processing Oil (RPO) is correctly classified under CTH 27101990 and not under CTH 2707 9900 as proposed by the revenue.

4.4. As regard the issue of country of origin, we find that the appellant had placed order with Oceanic Petroleum Source Pvt. Ltd, Singapore, who had shipped the goods from Malasiya. The Country of origin was shown in the invoice as UAE. The same was held as Malasiya by the lower authority, by relying on statement of Shri Hemant Shah, Director of appellant. We find that, it is submitted that the appellant has not claimed any preferential rate of duty on the basis of declaration regarding country of origin.

4.5. We are of the view that, without going into the fact that, which is the correct county of origin, since the appellant has not claimed any concession on the basis of country of origin the issue is only of aromatic content and having no revenue implication. Therefore no consequential penalty is sustainable. The very identical issue has been considered by the Tribunal in Agrawal Industrial Corporation Ltd. v/s. Commissioner Of Customs, Manglore, 2020 (373) ELT 280 (Tri.- Bangalore), whereby the Hon'ble Tribunal has set aside the redemption fine and penalty imposed under Section 112(a) and 114AA of Customs Act, 1962 on the ground that the country of origin was mis-declared in the bill of entry by taking note of the fact that the importer had not claimed any preferential rate of duty on this basis.

4.6. Considering the said decision of the Tribunal and fact of the present case, we hold that no penalty is sustained on this ground.

4.7. As regards the 3rd issue i.e. enhancement of the value of the imported goods twice, we find that once the value was enhanced from USD 500 PMT to USD 515 PMT , which was accepted by the appellant. However, the value was further enhanced to USD 585 only on the basis of one invoice bearing No. TOP SPL /CP/34 dated 09.07.2012 produced by the shipping agent.

4.8. On this basis, the assessable value is determined by adding freight @20 % and insurance @ 1.125%. We find that the appellant tendered copy of Bill of Lading No. MYPKGINIXY517631 dated 12.07.2012 for the subject goods confirming that freight was pre-paid. Therefore, when the freight is pre-paid and inclusive in the price, there is no requirement to add element of freight @20% for USD 585.

4.9. It is also observed that about the aforesaid invoice produced by the shipping line, the appellant had no knowledge and it is not also known when such invoice was produced before custom authority at the port of export. Hence, we are of the view that, it cannot be said that the same represent true and correct transaction value. Moreover, it is admitted fact that, no evidence was placed on record to show any extra payment made by the appellant over and above declared value USD 500 PMT C & F Kandla. No Contemporaneous import at USD 585 FOB Kandla was cited. Therefore, we are of the view that, enhancement of the value from USD 531 to UD 585 is without any basis and the same is not sustainable.

4.10. We find that as regards, the issue of classification of Rubber Processing Oil, when the classification is determined on the basis of test report, the order for confiscation by alleging mis-declaration and imposing penalty are not warranted. This proposition is supported by the following judgments:-

- *Surbit Impex Ltd.-2012(283) ELT 556 (Tri.- Mumbai)*
- *Mittal International -2018 (359) ELT 527 (Tri. -Del)*
- *Jay Kay Exports -2003 (161) ELT 443 (Tri. -Kol)*

5. In view of our above observation the impugned order so far it is against the appellant is set aside and consequential penalty imposed on Shri Hemant Shah, Director is also set aside. Accordingly, the appeals are allowed with consequential relief in the above terms.

From the above judgment of this Tribunal, it can be seen that in the identical fact the department's claim of classifying the RPO under 27.07 was rejected. Therefore in view of our above discussion and with the support of the above referred judgment and particular facts of the present case, the impugned order on the issue of classification is not sustainable.

4.2. As regard enhancement of the valuation, we find that the enhancement was made merely on the consent letters given by the directors of the appellant. In our view on hearsay from director valuation, the transaction value cannot be decided. If there is any doubt on the valuation, the due process of law as contemplated under Section 14 of the Customs Act read with Customs (Determination of Value of imported value) Rules, 2017 must be complied with. However, in the present case neither any contemporaneous value was adopted nor any method as prescribed

under Section 14 read with Custom Valuation Rules, 2007 was followed. Therefore, merely on the basis of statements of director valuation cannot be enhanced. Therefore, the enhancement of the value is not sustainable in the facts of the present case. This similar issue has been considered in the case of Guru Rajendra Metal Alloy wherein the tribunal held that only on the basis of the consent letters of the importer enhancement of valuation cannot be made. The case of Guru Rajendra supra is based on the Hon'ble Supreme Court judgment in the case of Century Metal Recycling Pvt. Ltd. Vs. Union Of India reported at 2019(367) ELT 3 (SC). Therefore, as per settled law on the facts of the present case, the enhancement of the value by the lower authorities is without any legal basis. Hence, the same will not sustain and accordingly, the enhancement of the value done by the Revenue is set aside.

4.3 As regard the issue of mis-declaration of Country of Origin in the bills of entry filed by the appellant, the material information declared in the bill of entry mainly corresponds to the goods that are under import and mis declaration of country of origin is immaterial towards the valuation, description and other such particulars concerning the goods, and the appellant would have gained nothing as no preferential rate of duty was claimed by the appellant. We find that without prejudice, mis declaration of origin being an issue technical in nature does not seem to form any implication towards the revenue. Therefore, if there is a mis-declaration of country of origin the appellant being not the party to make any incorrect declaration cannot be held responsible and no consequential penalty can be imposed on the appellant. This identical issue has been considered by this Tribunal in the case of Agarwal Industrial (Supra) wherein the Tribunal has passed the following Judgment:-

> *"**6.** After considering the submissions of the both the parties and perusal of the material on record, I find that in the present case there is no dispute that the impugned goods i.e., bitumen is not prohibited goods either under the Customs Act*

or Foreign Trade Policy or any other law in force at the time of importation of goods and the Customs in the show cause notice has admitted this fact. It is also a fact that there is no prohibition of impugned goods from Iran either under the Customs Act or Foreign Trade Policy. Further, I find that the only allegation against the appellant in the present case is that in the bill of entry filed by them, they have wrongly mentioned the 'country of origin' as "UAE" whereas in fact the 'country of origin' is from Iran. After perusal of various statements made by the various persons during the course of investigation including that of the appellant, I find that nobody has spoken against the appellant that the appellant is in any way involved in the manipulation of changing the 'country of origin' documents. The appellant has filed the bill of entry and showed the 'country of origin' as "UAE" on the basis of documents supplied to him by the supplier based at UAE. Further no document has been produced by Revenue on record to show the involvement of appellant in any way in the said misdeclaration. Further, I find that in the present case the appellant has not claimed any preferential rate of duty. After examining the provisions of Section 111(d) and 111(m), I find that both the provisions are not applicable in the fact and circumstances of this case. Further, I find that no mala fides has been brought on record on the part of appellant so as to impose penalties on the appellant under Section 112(a) and Section 114AA of the Customs Act, 1962. Further, I find that in the case of Oriental Containers Limited v. Union of India (cited supra), the Hon'ble High Court of Bombay in para 9 has observed as under :

"9. Having heard the Counsel on both the sides, we are of the opinion that in the present case, it is admitted by the Customs authorities that the petitioners are not party to the fraud and there was no mala fide intention on the part of the petitioners in importing the Tin Plate/Waste instead of Tin Plate Prime. In fact, the petitioners have paid to the foreign supplier the price of tin plate prime and in return got tin plate waste. The petitioners have paid the customs duty payable on Tin Plate Prime. Under the circumstances, when the petitioners are innocent victims of the fraud played by the foreign supplier and the petitioners have suffered double jeopardy by paying the price and the duty payable on Tin Plate Prime, on account of the fraud committed by the foreign supplier, the petitioners could not be held to be guilty of violating any of the provisions of the Act and hence confiscation of the goods is not justified. It is pertinent to note that the rate of customs duty on Tin Plate Prime is higher than the rate of customs duty payable on Tin Plate/Waste. As soon as the petitioners came to know about the fraud played by the foreign supplier, they have taken effective steps and have cleared the goods on furnishing licenses which permit clearance of Tin Plate waste. When the petitioners had placed an order for import of tin plate prime and have paid the price for Tin Plate Prime, no fault could be found with the petitioners in furnishing Bill of Entry and licences for clearance of tin plate prime. In the present case, when the petitioner has been given a clean chit and there is no violation of the provisions of the Customs Act committed by the petitioners and no revenue loss is caused by wrong supply of goods by the foreign supplier, the Collector of Customs was not justified in confiscating the goods."

6.1 *Further in the case of Shree Ganesh International (cited supra), the Tribunal in para 8 has held as under :*

"8. We, however, agree with the Learned Advocate that the impugned goods are not liable for confiscation. It has not been denied by the Revenue that the appellants have made the declaration on the Bills of Entry on the basis of documents received by them from their foreign suppliers. The test report of the foreign supplier is dated 9-8-2003 which clearly mentions that the goods are non-texturised fabrics. They have also claimed that a similar consignment imported by them from the same supplier had earlier been cleared as non-texturised polyester fabrics which gave them the bona fide belief that the present consignment would also be of non-texturised variety. In similar situations, the Supreme Court has held in the case of Northern Plastics Ltd. (supra) that the declaration is in the nature of

a claim made on the basis of belief entertained by the Appellants and therefore cannot be said to be misdeclaration under Section 111(m) of the Customs Act. It has also been held by the Tribunal in the case of Jay Kay Exports and Industries (supra) that finalisation of Tariff Heading under which the goods will fall is the ultimate job of the Customs authorities and if the Appellants have claimed wrong classification according to his limited understanding of the Customs Law, mens rea cannot be attributed to him. Accordingly, we hold that in the present matters, it cannot be claimed by the Revenue that the Appellants have deliberately misdeclared the goods with a view to avail the benefit of lesser rate of duty. We, therefore, set aside the confiscation and consequently the redemption fine imposed on them in both the appeals as well as the penalty."

7. *In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore I set aside the impugned order in totality and allow the appeal of the appellant with consequential relief, if any."*

4.4 From the above decision it can be seen that in identical circumstances, this Tribunal held that for incorrect mention of country of origin, the importer cannot be penalized. Accordingly, in the present case also considering overall facts and the fact of incorrect declaration, if any, regarding country of origin in the Country of Origin Certificate, the appellant is not liable for any penalty or fine.

4.7 As regard the appeals filed by individuals as observed by us above, since there the impugned order against the main appellants is not sustainable, there is no reason to continue the personal penalty upon the individuals co- appellants.

5. In result, the impugned order is set aside. Appeals are allowed.

(Pronounced in the open court on 21.03.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Arpita