

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, SOUTH ZONAL BENCH, CHENNAI
COURT HALL No.III**

CUSTOMS APPEAL No.40424 of 2023

(Arising out of Order-in-Appeal No.C.Cus.II No.422/2023 dated 09.06.2023 passed by Commissioner of Customs (Appeals II), 60, Rajaji Salai, Custom House, Chennai 600 001).

M/s. Bubbly Balloons

43, Abbas Garden Second Street,
Luna Nagar, Coimbatore 641 025.

...Appellant

Versus

The Commissioner of Customs

Appeals (II), Custom House,
No.60, Rajaji Salai, Chennai 600 001

...Respondent

APPEARANCE:

Ms. Sobhana Krishnan, Advocate
For the Appellant

Shri R. Rajaraman, Assistant Commissioner (A.R)
For the Respondent

CORAM :

**HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

Date of Hearing :13.02.2024

Date of Decision:01.03.2024

FINAL ORDER No. 40218/2024

ORDER : Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the appellant imported balloons for party decorations, pumps and balloons stands for decoration purposes from M/s. Gemar Balloons, Italy and filed Bill of entry dated

17.08.2022 which was self assessed by their CHA as toy balloons. The total declared value of the goods was Rs.3,77,952/-. On examination, it was noted by the department that the goods do not conform to BIS. Accordingly, the appellant was given a query of the said issue to which the appellant replied stating that the balloons were imported for party decorations and not for use as toys for children. After due process of law, the Original Authority ordered for confiscation of the goods valued at Rs.3,77,952/- with an option to the appellant to re-export these goods within 30 days of the order by payment of redemption fine of Rs.30,000/- under section 125 of Customs Act 1962 or order for the destruction of the same at the cost of the importer as per rules. A penalty of Rs.25,000/- was imposed under Section 112 (a) of the Customs Act 1962. Against such order, the appellant approached the Commissioner (Appeals) who upheld the same. Hence this appeal.

2. The Ld. Counsel Ms. Sobhana Krishnan appeared and argued for the appellant. It is submitted that the appellant is a proprietorship concern with Mr. Belle Krishna as the sole proprietor. The appellant is engaged in providing party decorations using rubber latex and foil balloons. Such decorations are usually made at birthday parties, public and private events or functions.

2.1. In the present case, the appellant imported various sizes of latex balloons, pumps, heart shaped 50 balloon decoration stand, arch shaped balloon decoration stand, star shaped balloon

decoration stand, and round shaped balloon decoration stand and filed Bill of Entry No.2048232 dated 17.08.2022 ("subject Bill of Entry"). The subject goods were classified by the appellant under CTH 9503 in line with the Analytics Report 46/2021-22 dated 29.10.2021 issued by National Customs Targeting Centre, Mumbai ("NCTC") wherein the NCTC had stated that balloons made of latex/rubber or foil /mylar or plastic, commonly known as party balloons, decoration balloons, and toy balloons, are classifiable under CTH 9503.

2.2. In view of the classification adopted, the Department was of the view that the foreign supplier must be registered as per the compulsory registration under Bureau of Indian Standards (BIS) for importing goods in terms of the Toys (Quality Control) Order, 2020 ("TQC Order") issued by Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India ("DPIIT"). On this ground, the shipment was withheld clearance, and a query was raised in the EDI system.

2.3. In response to the query raised, the appellant vide a letter dated 20.09.2022 submitted that the subject goods are intended for party decoration only. Further, given the size of the subject goods, these are not suitable for use by children. It was also submitted that the scope of products from Part 1 of IS 9873 specifically excludes the subject goods, i.e., "holiday decorations that are primarily intended for ornamental purposes". Therefore,

it was submitted that the requirement of compulsory registration under TQC Order does not arise for the import of the subject goods. Hence, it was requested that the subject goods be allowed clearance without insistence on production of BIS certificate.

2.4. Thereafter, an opportunity of personal hearing was granted. The Adjudicating Authority passed Order-in-Original dated 11.11.2022 ("OIO"). In the OIO, the Adjudicating Authority held that since the subject goods were classified as toy balloons under CTH 9503, the supplier needs to be registered under compulsory registration scheme under BIS before completion of import. Consequentially, it was held that the import vide the subject Bill of Entry was in violation of import policy in terms of the TQC Order and hence, the goods were confiscated under Section 111(d) of the Customs Act, 1962. However, it was held that there is no bar for allowing redemption with the condition of re-export. An option was given to re-export the goods on payment of redemption fine of Rs.30,000/-. For the alleged act of improper importation of the subject goods without BIS Certificates, a penalty of Rs.25,000/-.

2.5. The Ld. Counsel argued that that the balloons under import are only for party decorations and never meant for use in play by children. The shipment contains balloons of size 5 inches, 12 inches and 19 inches. These balloons are for the purpose of decoration only. The balloons of 5 inches are too small a size to be used by children and the 12 and 19 inches are too large and hence can be

used for decoration purposes only. If at all, it can be said that 9-inch balloons are ideal for kids and the shipment doesn't contain this item. In any case, the goods being imported are used only for party decorations and never sold for use as toys to children. Hence, these balloons in the consignment are meant for party decoration only and cannot be considered as Toys.

2.6. It is submitted that the requirement of compulsory registration under BIS is applicable only for toys which are meant for use in play by children and the subject goods are never intended to be used as toys.

2.7. Further, it may be seen from the National Foreword to Indian Standard IS 9873 which is applicable to toys that IS 9873 is identical to ISO 8124-1:2009 of the International Standards Organisation. In other words, IS 9873 is an adaptation of ISO 8124.

2.8. It is submitted that Part 1 of IS 9873 deals with the scope of the products under its coverage. According to it, certain products are not included within the scope of this part and the list of exclusions, inter alia, covers, "holiday decorations that are primarily intended for ornamental purposes". Relevant extracts from IS 9873 are reproduced below:

"Products not included within the scope of this part of ISO 8124 are:

- a) bicycles, except for those considered to be toys, i.e. those having a maximum saddle height of 435 mm*
- b) slingshots;*

.....
k) *holiday decorations that are primarily intended for ornamental purposes;*
l)"

2.9. The TQC Order has classified the toys as non-electric toys such as rattles, dolls, puzzles, etc. and electors which have at least one function dependent on electricity. The balloons cannot be covered under both these categories warranting requirement of license under BIS.

2.10. Further, a perusal of the categories and sub-categories from page 38 to 45 of the PRODUCT MANUAL FOR SAFETY OF TOYS AS PER IS 9873 (Parts 1,2,3,4,7,9) and IS 15644 of BIS available at the official website of BIS, www.bis.gov.in contains nothing related to balloons.

2.11. Pursuant to the introduction of TQC Order, the CBIC has issued instruction No. 6/2023 dated 13.02.2023. In the said instruction, it is stated that to facilitate the verification, the BIS has made available the list of BIS licensees of domestic manufacturers and foreign suppliers in their Website and Mobile App and the flowchart to access details from the BIS website is provided. It is seen from the details available at the BIS website, none of the balloon manufacturers in India and suppliers abroad are registered/ licensed under the prescribed IS Numbers.

2.12. The issue as to whether party items / inflatable balloons for party decoration are covered under the scope of the TQC Order is no longer *res integra* and has been decided by the Hon'ble High Court of Calcutta in the case of ***Commissioner of Customs Port vs. Ess Enn Impex and Another, 2022 (11) TMI 299 Calcutta High Court.*** In the said judgement, it is noted that the DPIIT (the concerned ministry) vide their clarification dated 24th February 2022, had stated that holiday decorations that are primarily intended for ornamental purpose or Christmas decoration are not included in the scope of TQC Order. The Hon'ble High Court had noted the issue has been finally concluded in favour of the importer in view of the said communication by the competent authority of the Ministry of Commerce and Industries.

2.13. The above view has further been reaffirmed in the case of ***In Re: Bharat Balloon House, 2023 (9) TMI 727 - AUTHORITY FOR ADVANCE RULINGS CUSTOMS, MUMBAI.*** Therefore, it is humbly submitted that the ratio of the same is applicable to the present facts and the goods are not liable for confiscation as held in the impugned order.

2.14. The impugned order has also come to the conclusion based on the description of the goods as entered in the Bills of Entry. In this regard, it is submitted that the goods are described as Latex Balloons in the invoice and the classification of the goods is under Heading 9503 of the Customs Tariff which covers,

“Tricycles, scooters, pedal cars and similar wheeled toys; doll’s carriages; other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds”. The subject goods were classified under the residual entry 9503 00 99 under the said heading based on the Analytical Report of NCTC. It is however humbly submitted that the same cannot be a ground to hold that the subject goods require license under BIS.

2.15. Further, the appellant had submitted photographs of balloons in arches and fixtures made by the appellant. On a perusal of the same, it is evident that the subject goods cannot be construed as toys. Thus, viewed from any angle, the subject goods are not liable for confiscation and the impugned order merits to be set aside.

2.16. Without prejudice, the impugned goods are not liable for absolute confiscation and shall be allowed to be redeemed for home consumption. Reliance in this regard is placed on the decision of the Hon’ble Apex Court in ***Commissioner of Customs vs. Atul Automation Pvt. Ltd., [2019 (365) E.L.T. 465 (S.C.)]***.

2.17. Further, in the case of ***CC, Chennai-II vs. Mangal Engg. Tech Private Limited, 2021 (378) 409 (MAD)***, the Hon’ble High Court has categorically held that the condition of re-export cannot

by imposed under Section 125 of the Customs Act and on redemption, the goods are to be released to the importer only.

2.18. Further, the element of *mens rea* is absent in the present case and the actions of the appellant were *bona fide*. Accordingly, penalty is not imposable in terms of Section 112(a) of the Customs Act. It is prayed that the appeal may be allowed.

3. The Ld. AR Shri R. Rajaraman appeared and argued for the department. The appellant had declared the goods as "Toy Balloons" under CTH 95030099. The contention of the appellant that these are not used for toys and are meant for decoration purpose cannot be accepted. Since the goods are declared as Toy Balloons, the law requires compliance of BIS markings on the goods reported on the goods is crucial and therefore the Original Authority has correctly confiscated the goods and given an option for re-export of the goods.

4. The Govt. of India vide S.O. 853 (E) published in the Gazetted of India on 25.02.2020 notified the 'Toys (quality control) ordered 2020 which mandates the product or material designed or clearly intended whether or not exclusively, for use in play by children under 14 years of age or any other product as notified by Central Government from time to time to confirm to standard (IS 9873) by Notification dated 15.09.2020 SO 3146 (E) the same was made effective from 01.01.2021.

5. The case is gross violation of import policy. It is hazardous for use by little children as Toys. The decision relied by appellant cannot be applied to this case as the Balloons in the said case was of foil material whereas in the present case it is of latex material which is more dangerous. The Ld. AR submitted that the appeal may be dismissed.

6. Heard both sides.

7. The appellant has classified the imported balloons under CTH 9503 as Toys and balloons for the reason that as per Analytics Report 46/2021-22 dated 29.10.2021 issued by National Customs Targeting Centre, Mumbai, wherein it is stated that balloons are to be classified under CTH 9053. The said report did not make any distinction between toy balloons and decoration balloons. As per the Toys (Quality Control) Order 2020 issued by Department for Promotion of Industry and Internal Trade, Ministry of Commerce (DPIIT) applies to Toys designed or clearly intended or not exclusively for use in play by children under 14 years of age. In the present case, the appellant has consistently from the very beginning contended that they are engaged in the business of decorations using balloons, and the goods (balloons) imported were intended to be used only for decoration. The department has not been able to establish otherwise. As per the list of items shown in the IS 9873 (Part I): 2012 item at (k) shows that holiday

decorations that are primarily intended for ornamental purposes are excluded. Thus goods used for decoration is excluded. The said item at (k) does not make any distinction or differentiation based on the material used in for the balloon. Further, in the present case the appellant offered to test the goods as to the nature of the material used. The department did not conduct any test.

7.1. In the case of ***Commissioner of Customs (Port) Kolkatta Vs M/s. ESS ENN Impex of M/s. International*** (supra) the Tribunal considered a similar issue and held that as per clarification issued by DPIIT, the balloons used for decorations are outside the purview of the requirement to satisfy BIS registration as these are not intended to be used as toys. The relevant para reads as under:

“We find that the report contains that the impugned goods are party decoration inflatable item, but classifiable under CTH 9503 instead of declared CTH 3926 and held attract BIS Registration. The said report is inconclusive as no detailed analysis has been placed on record. Further, we find that the respondent sought clarification on the import of inflatable Party decoration inflatable item from the Ministry of Commerce and Industry, Government of India and a clarification was received from the Department of Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India vide F.No.14031/47/2020-CI dated 24.02.2022.

7.2. The Hon'ble High Court of Calcutta in the case of ***CC Vs. ESS ENN Import and Others 2023 (384) E.L.T. 180 (Cal)*** after observing that the Commissioner (Appeals) allowed the appeal of the importer referring to clarification issued by DIIPT the goods

were ordered to be released to the appellant. Relevant para reads as under:-

“We agree with the submission of Mr. Maiti under normal circumstances but however, the facts of the case on hand permit us to take a different view. The Commissioner of Appeals allowed the appeal filed by the respondent by referring to clarification issued by the Ministry of Commerce and Industry, Department for promotion of Industry and Internal Trade, Government of India dated 24th February 2022. The clarification was sought for by the respondent with regard to merit of inflatable party items / party decoration foil items. The clarification sought for was whether the said items would fall within the scope of the Toys Quality Control Order, 2020. By clarification dated 24th February, 2022 the said authority had stated that the holiday decorations intended for ornamental purpose of Christmas decoration are not included in the scope of the Toys (Quality Control) Order. Further, it was informed that the product imported by the respondent / writ petitioner under HSN Code 39269099 / 95059090 are not covered under the Toys (Quality Control) Order, 2020”.

8. From the above, after appreciating the facts and following the decision as above, we are of the considered opinion that the order passed by original authority confiscating the goods and directing for re-export cannot be sustained. The impugned order is set aside. The goods are to be released to the appellant on payment of applicable duty, if any. The redemption fine is also set aside.

9. In the result, the appeal is allowed with consequential reliefs, if any.

(Pronounced in court on **01.03.2024**)

(VASA SESHAGIRI RAO)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

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