CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO.2

CUSTOMS APPEAL NO: 86776 OF 2023

[Arising out of Order-in-Original No: CG-GSS/37/2022-23 Adj (I), ACC dated 30th March 2023 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

R N Chidakashi Technologies Pvt Ltd
Flat No. 4 Stambhtirth Bldg. Plot No. 82,
RA Kidwai Road, Wadala, Mumbai - 400031 … ***Appellant***

versus

Commissioner of Customs (Import)
Air Cargo Complex, Sahar, Andheri (E)
Mumbai -400099 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate and Shri Mihir Mehta, Advocate for the appellant

Shri S K Hatangadi, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85341/2024

DATE OF HEARING: 18/10/2023
DATE OF DECISION: 19/03/2024

PER: C J MATHEW

Both time past and time future cast their shadows on the landscape of this controversy over the 'rate of duty' appropriate to the goods impugned in this appeal of M/s RN Chidakashi Technologies Pvt

Ltd. The landscape itself presents a contrast of youthful ingenuity against conventional instinct by placement of a product of the end of the first quarter of this century onto a template devised at the beginning of the last quarter of the previous century; a brooding presence for five decades and straining to come to terms with disruptive development. This is apparent in the inability of the arms of the Central Government to evolve consensus on its fitment and, even more so, in the contrasting approach of quasi-judicial decision making within the tax administration too. Doubtlessly, they have all taken pains to justify and are full of virtue in defending their respective positions on the issue. And it is all about MIKO II not only being no different from MIKO I – a toy - as asserted by customs authorities but also not comparable to the more advanced MIKO III which conforms to

> *'automatic data processing (ADP) machines and units thereof; magnetic or optical readers, machines for transcribing data on to data media in coded form and machines for processing data, not elsewhere specified or included'*

corresponding to heading 8471 of First Schedule to Customs Tariff Act, 1975, as claimed by the appellant owing to which heading 9503 of First Schedule to Customs Tariff Act, 1975 was held as appropriate by the customs administration. And it is controversial only owing to

> *'8471 All goods'*

being afforded exemption from basic customs duty (BCD) in

notification no. 24/2005-Cus dated 1st March 2005 (at serial no. 8).

2. The appellant is the organism created by, and the impugned article the brainchild of, three young entrepreneurs who, having trained in engineering at a prestigious institution, conceptualized an artificial companion - MIKO – for children which is, currently, in its third version. Manufactured for them in China, at Guangdong by M/s Pacific Industries (Zhongshan) Ltd, to conform to the evocative 'emotionally intelligent companion device' secured by patent no. 302454 issued on 20th October 2016 for twenty years by Controller of Patents, these are sold directly to various importers outside India or are shipped to appellant for sale in India or for further export out of India. 'Automatic data processing (ADP) machines' are required to be registered with Bureau of Indian Standards (BIS) to ensure conformity with IS 13252 and their application dated 3rd December 2018, in relation to the impugned goods, was rejected on advice from Ministry of Electronics and Information Technology (MeitY) that product was not covered by Electronics and Information Technology (Requirements of Compulsory Registration) Order and, hence, not required to be compliant with that standard. The next version, for which application was preferred on 13th January 2022, did obtain registration with Bureau of Indian Standards (BIS) and it is the claim of the appellant the rejection of the earlier version, which was then under import, did not exclude it from 'automatic data processing (ADP) machine' or include it as 'toy' for

customs classification which is to be in conformity with its own convention and rules and that, in any case, MIKO II too was incorporated in the registration on 15th February 2023. That the imports were effected between these developments has impacted the assessment is the claim of the appellant.

3. The dispute covers eight bills of entry – 954496/8.01.2019, 9629097/14.01.2019, 9722930/21.01.2019, 2641031/30.03.2019, 3191478/11.05.2019, 3396396/27.05.2019, 4300256/31.07.2019 and 4641971/26.08.2019 – for import of goods valued at ₹ 3,84,21,981 that were confiscated under section 111(m) and 111(d) of Customs Act, 1962, though permitted for redemption on payment of fine of ₹ 38,00,000, and on which differential duty of ₹ 99,74,345, stemming from adoption of classification proposed in the show cause notice, was ordered to be recovered under section 28(4) of Customs Act, 1962, along with applicable interest thereon under section 28AA of Customs Act, 1962, in order[1] of Commissioner of Customs (Import), Air Cargo Complex (ACC), Mumbai which is under challenge before us. As the goods had been cleared on 'self-assessment' and subject to 'post clearance audit', wide-ranging scrutiny enabled reference to earlier imports from the same source and, in particular, to bill of entry no. 4437266/16.12.2017 which declared it to be 'plastic toys with motor' corresponding to tariff item 9503 0030 of First Schedule to Customs

[1] [order-in-original no. CG-GSS/37/2022-23 Adj (I), ACC dated 30th March 2023]

Tariff Act, 1975 that, upon loading of software, would become functional. Furthermore, customs authorities took note of the description adopted in the impugned bills as being different from that in earlier consignments even as the description in the airway bills and shipping marks, *viz.*, Emotix Miko', remained unchanged to conclude that the same product was being re-classified to take advantage of lower rate of duty. In accordance with procedure, consultative letter granting opportunity to restore good standing by deposit of differential duty was issued on 9th December 2019 but was resisted with definitive assertions to the contrary leading to 'pre notice consultation letter' under Pre-Notice Consultation Regulations, 2018 that, not having been responded to, paved the way for the impugned proceedings through notice dated 4th June 2020.

4. The submission of the importer was all about conformity with note 5A in chapter 84 for heading 8471 in First Schedule to Customs Tariff Act, 1975 to justify claim to be covered by '*other'* corresponding to tariff item 8471 4190 within

> *'Other data processing machines'*

of heading 8471 and further within

> *'Comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined'*

corresponding to sub-heading 8471 41 of First Schedule to Customs

Tariff Act, 1975 and the substantive distinguishment from the earlier version which was more of a toy. Effectively, therefore, the goods were claimed to be 'automatic data processing machine' in heading 8471 of First Schedule to Customs Tariff Act, 1975 other than 'personal computer', machines of less than 10 kg by weight consisting of central processing unit, keyboard and display, microcomputer and large, or mainframe, computer which did not appeal to the wisdom of the adjudicating authority who found the exclusion in note 5E of the chapter to be of significance as also the technical literature and submitted write-up for concluding that the classification proposed in the notice was more apt description of the impugned goods.

5. From the manner in which the adjudicating authority has disclaimed the appropriateness of classification claimed by the appellant before rendering a sketchy justification of conformity of proposed classification for the impugned goods, we find it necessary to deplore the discarding of the onus to be discharged by customs authorities in classification disputes enunciated by the Hon'ble Supreme Court thus

> *'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.'*

in *Hindustan Ferodo Ltd v. Collector of Central Excise [1997 (89) ELT 16 (SC)]* and

> *'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……'*

in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh [2006 (197) ELT 324 (SC)]*. It befalls us to subject the findings in the impugned order to the test *supra*.

6. We have heard Learned Counsel who contended, on behalf of appellant, that the goods are akin to the next version of the product which is far removed from the description corresponding to that favoured by the adjudicating authority. Based on this, he submitted that the Central Government had had a fresh look at the product and that, consequent to recommendation of Principal Scientific Advisor, the Ministry of Electronics and Information Technology [MeitY) and Bureau of Indian Standards had granted approval for registration as 'automatic data processing (ADP) machines', and not just for MIKO III but for MIKO II too, which traces its origins to communication initiated by Chief Commissioner of Customs, Mumbai Zone – II with the Principal Scientific Advisory. It was also brought on record that, for

the subsequent period, with MIKO III as the bone of contention, proceedings were dropped in appeal and that conformity of the two should persuade acceptance of appeal. Arguing that, for all practical purposes, the imported goods are similar to desktops, laptops and other devices classifiable in heading 8471 of First Schedule to Customs Tariff Act, 1975, it was also contended that, having satisfied all the four stipulations in note 5(A) of chapter 84 of First Schedule to Customs Tariff Act, 1975 and the Explanatory Notes pertaining to the heading in Harmonized System of Nomenclature (HSN) for conformity with heading 8471 therein, by receiving of human communication, which is handled by input unit processor – Synaptics CX20921 – for further processing of data in MediaTek SoC MT8167 to generate output as visual image, audio communication or motion, it conforms to the claimed classification. It was argued that the adjudicating authority had misconstrued note 5(E) of chapter 84 of First Schedule to Customs Tariff Act, 1975, intended for other purpose, as excluding their product. It was submitted that descriptions in product literature and marketing platforms cannot determine classification which must be all about features of the product and that, even if user is a child, it is not a toy by default in the face of sophisticated electronic processing carried out by the product. Its multifarious use for statistical analysis and as a driving companion installed by vehicle manufacturers would, according to Learned Counsel, not lend amenability to classification as toy, even for

adults. Reliance was placed on the decision of the Hon'ble Supreme Court in *Commissioner of Customs, Delhi v. Cartier Aircon Ltd [2006 (199) ELT 577 (SC)]*. He also drew attention to Explanatory Notes pertaining to 'other toys' in Harmonized System of Nomenclature (HSN) for derogating resort to that by the adjudicating authority.

7. Learned Authorized Representative who, on behalf of respondent, contended that, without any distinguishable difference from goods imported earlier, *viz*., MIKO I, the appellant sought to place their imports under a heading that would obtain for them substantial exemption from duties of customs. He submitted that, in the context of the response of Ministry of Electronics and Information Technology (MeitY) as well as the technical literature furnished, it could not be held that the goods would fit within 'automatic data processing (ADP) machines' and, relying on the description of the goods in the trade channels as 'electronic toy' intended for children between the ages of 5 and 10, it was contended that, in effect and notwithstanding its redeeming features, it continued to entertain and educate in the same manner that any toy would. He pointed out that, in imports effected in other countries, these are declared as 'toys' and by resort to heading 9503 in the tariff of those countries and that the supplier is also nothing but a toy manufacturer. He argued that, even if both tariff items are found to be equally applicable, the latter of the two would prevail in terms of rule 3 of General Rules for Interpretation of the Import Tariff

in Customs Tariff Act, 1975.

8. The classification adopted in the impugned order has determined the goods to be ‘other toys’ made of plastic even though the description

> *‘tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages; dolls; other toys; reduced size (“scale”) models and similar recreational models, working or not; puzzles of all kinds’*

corresponding to heading 9503 of First Schedule to Customs Tariff Act, 1975 does not elaborate on ‘toys’ and neither do the notes of chapter 95 of First Schedule to Customs Tariff Act, 1975 or, for that matter, anywhere else; there is, thus, no guidance on distinguishment of ‘toys’, as playthings for children, from scaled down or representational models of other articles in the tariff that may or not be playthings either for children or for adults. And yet, in the absence of any elaboration, the adjudicating authority did not hesitate to find that the impugned goods are ‘toys’ and, considering its principal material, classifiable as those of ‘plastic’ corresponding to 9503 0030 of First Schedule to Customs Tariff Act, 1975.

9. The Explanatory Notes pertaining to ‘other toys’ in chapter 95 of Harmonized System of Nomenclature (HSN) specifies that

> *‘This group covers toys intended essentially for the amusement of persons (children or adults)…*
>
> *All toys not included in (A) to (C). Many of the toys are mechanically or electrically operated….’*

followed by enumeration of inclusions. None of those come close enough to the impugned product which is intended as ‘human like’ companion for children and, while ‘toys’ could be ‘mechanically or electrically’ operated, the functions required of MIKO II are dependent on electronics which is just what ‘automatic data processing (ADP)’ is about. The contents of the Explanatory Notes are not sufficient to provide any guidance; nor has the Central Government considered it necessary to detail any for guidance. It is the adjudicating authority who has managed to fit in the voluminous details of a sophisticated gadget operating through processors within that sketchy framework. The justifications offered are, thus, erected in fragile foundations demonstrating conceptual partiality, revenue prejudice and legacy propensity.

10. ‘It looks like a toy and, therefore, is a toy’ is a proposition which, even if superficial, may not be easily dismissed owing to simple appeal to conceptual pre-disposition. Physically, the product is not particularly big and recalls comic book portrayal of engineering fantasy. Conventionally, a toy is a plaything that acts as a prop in childish playacting without capability either for initiative or response. The impugned goods certainly does not conform to such effect notwithstanding which, and in the absence of any standard of measure of ‘toy’, its appeal, or lack thereof, is an uncanny resemblance to that object of childhood fantasy which may have persuaded the adjudicating

authority that re-classification was warranted. It also does not meet with legislative intent as use by a particular age group does not suffice for it to be ‘toy’ and it is certainly not in keeping with sensitivity towards needs of children to proceed in the belief that anything that persons of that age may find attractive are ‘toys’ and nothing more.

11. Tax policy of the government features exemption from basic customs duty that is not available to the goods conforming to description corresponding to the heading within which the adjudicating authority has placed the impugned goods. It is on record that the imported goods consists of components that do not, by a long stretch, find fitment within products of chapter 95 of First Schedule to Customs Tariff Act, 1975. There is no finding in the impugned order that the composition of the impugned goods is not a combination of a central processing unit and units for input and output. We are informed, without rebuttal, the there is some hardware within that processes oral query for response as sound, motion or image and, therefore, not exactly beyond the scope of coverage within the claimed heading. In the absence of such controverting within rule 1 and rule 3 of General Rules for Interpretation of the Import Tariff in Customs Tariff Act, 1975, a finding of conformity of description corresponding to the proposed tariff item that is not followed by resort to rule 3 of General Rules for Interpretation of the Import Tariff in Customs Tariff Act, 1975 places the exercise by the adjudicating authority in serious

jeopardy and motivated by intent to deny duty benefits any which way.

12. It is admitted that MIKO 1 was declared as ‘toy’ but there is no ground to hold fast to the conviction that a subsequent variant, even if conforming to another description, must continue to be classified against an erroneous tariff item. The impugned order has referred to the rejection of application for registration of MIKO 2 under Electronics and Information Technology (Requirements of Compulsory Registration) Order by Bureau of Indian Standards (BIS) owing to expert opinion of Ministry of Electronics and Information Technology (MeitY). It is on record that the registration was subsequently incorporated. It is also contended that MIKO 2 and MIKO 3 are more akin than MIKO 1 is to MIKO 2. None of this alters the onus that devolves on customs authorities in terms of the decisions of the Hon’ble Supreme Court in *re HPL Chemicals* and in *re Hindustan Ferodo*. The lack thereof places the findings in the impugned order in serious jeopardy.

13. The description of the imported goods is not just ‘toys’ made of plastic. That it has capabilities endowed by technological development does set it apart from a toy and, even if does conform to toy, it was necessary to show that the goods do not contain the essentials enumerated in tariff item 8471 4190 of First Schedule to Customs Tariff Act, 1975. Such finding is glaringly deficient in the impugned order.

The classification adopted in other countries may not be a guide for assessment in India when the dispute has its genesis in perceived evaporation of duty; it is inevitable that identical duty rates marginalizes declaration relevance. Reliance thereto will not suffice for the purpose.

14. The claim of technological evolution of product being cause for declaration of another tariff item for assessment would inevitably lead to scrutiny of the departure from the earlier version. The adjudicating authority did take note of

> *'19.3……*
>
> - *Miko is a robotic plastic toy with motor and has a small display of 2.8 inches only. It is battery operated.*
> - *To make this product functional, software is loaded either by the Importer or by the Manufacturer/ supplier. It is an app-enabled Robotic instrument which entertains both as a toy as well as a learning tool. It entertains and teaches children of age group 5 to 10 years.*
> - *It is pre-loaded with over 1000 educational topics, news updates and education game, The parent can download an application onto a Bluetooth Smartphone or tablet that will connect to and communicate with the Miko.*
> - *It can last for multiple hours on a single charge. Inside the said toy, there are wheels, motors, sensors, light sensors LEDs and a USB charging port. There are sensors to interact with kids. Miko uses all these devices*

to make fun interactive play experiences to keep children and wanting to play and learn at the same time.

- *In addition to the educational component, the 'Miko' also operates like any other remote-controlled toy vehicle and provides similar entertainment. It is of the same class or kind as other remote controlled vehicles and is principally designed for the amusement, entertainment and education of children of age 5 years to 10 years.*

- *It is designed to move around the home, giving information as per pre- loaded software/topics on subjects such as word definition, math and biographies etc. It is said to be able to learn unique information about kids and adjust its programming to the user's needs.'*

but failed to compare these with the features of MIKO I and, notwithstanding which, concluded that it was akin to MIKO I. We fail to see the appropriateness of that conclusion when the specifications bespeak otherwise and removes it way beyond the heading adopted by the adjudicating authority.

15. It is seen that the finding

> *'20.2 Thus, from the above HSN notes, the product picture, technical details and features read with the above self-declaration made by the importer for their earlier imports that the impugned goods are plastic toy with motor in semi-finished stage without the inbuilt software and classified under heading 9503 all these aspects is proof enough to ascertain the classification of the impugned product 'Miko 2' under heading*

9503 which has been now imported with the Inbuilt software in terms of Chapter Note 5{E) to Chapter 84.'

based on note in chapter 84, pertaining to claimed classification, is not in consonance with judicial decisions *supra* mandating identification of appropriate classification on its own as a pre-requisite and that

'20.3 Further, as per Note 3 to Section XVI states that "Unless the context otherwise requires, composite machines consisting of two or more machines fitted to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function. I find that the primary function of the subject goods is impart education/knowledge through entertainment etc. primarily for kids of age group 5 to10 years.

Reliance is placed on the decision of Hon'ble Supreme Court in the case of Commissioner of Customs, Bangalore Vs. N.I. Systems (India) P.Ltd. - 2010 (256) ELT 173 (SC) wherein H'ble S.Court held that PXI Controller which was a computer based instrumentation product and capable of being controlled by a Personal Computer/Laptop but is not a PC/laptop - principal function of controllers is executing control algorithms for real-time monitoring and control of devices- controller performs functions in addition to data processing - what is imported is a system- containing an ADPM and if the contention of the importer herein is accepted, it would mean that every machine that contains an element of ADP would be classifiable as an ADP machine under Chapter 84 which would completely obliterate the specific function test and the concept of functional unit. Hon'ble Court upheld the classification of

> *the department and held that goods were rightly classified under Chapter 90. The same principle applies to this case.*

is a finding without a foundation inasmuch as the adjudicating authority has isolated a function in pursuit of a principle that is intended to identify tariff item most appropriate for composite machines without justifying its utility for the impugned goods. Moreover, that identified function is not a description that fits in the proposed heading either. Furthermore, the decision cited has been misconstrued by the adjudicating authority as the impugned goods is a self-contained gadget that does not have to be attached to a 'automatic data processing (ADP) machine' to be functional.

16. The finding that

> *'20.4 In view of the above, the subject goods cannot be considered as an Automatic Data Processing machine under CTH 8471. It is pertinent to mention here that even Cellular Android Phones do incorporate all the functions of an ADP machine yet the same is classified under cellular phones as the primary function is communication. Applying the same analogue, I find that the principle function of the impugned goods "Miko 2" is to impart education through entertainment and hence classifiable under sub-heading 95030090 as electronic toys. Also kids playing with robots cannot be termed ADP machines. ADP machines refer to computerized systems or machines that are designed specifically for the purpose of processing and managing data automatically. While robots can be programmed to perform certain tasks automatically, they are not typically classified as ADP machines, as their primary function is to interact physically with their*

> *environment and perform a variety of functions beyond just data processing.'*

is specious analogy as the principles governing classification is not about pattern and template but enshrined in the General Rules for Interpretation of the Import Tariff in Customs Tariff Act, 1975. This may, at best, serve to confuse an assessing authority who is bound by the Rules thus

> *'Children playing with toys like in this instance Miko are simply engaging in play and interaction with a toy. While this toy robot itself may have some level of programming or automation, it is not performing complex data processing tasks in the same way that an ADP machine would. Instead, the robot is likely designed to respond to certain stimuli or commands in a pre-programmed manner, providing a fun and interactive experience for children.'*

We fail to perceive the dearth of complexity that may justify shift of classification from within heading 8471 to heading 9503 of First Schedule to Customs Tariff Act, 1975. The findings are conjectures and assumptions that are not backed by authoritative texts, notes or definitions in law or even logical sequencing. These are not tenable in a classification exercise.

17. The impugned order has not established the primacy of heading 9503 of First Schedule to Customs Tariff Act, 1975 nor the inappropriateness of heading 8472 of First Schedule to Customs Tariff Act, 1975. The rules of engagement enunciated by the Hon'ble

Supreme Court for altering classification has not been followed by the adjudicating authority. The facts, indelibly clear, does not controvert conformity with the essential requirements set out in note 5(A) in chapter 84 of First Schedule to Customs Tariff Act, 1975 There is no finding that the impugned goods, by incorporating or working in conjunction with 'automatic data processing (ADP) machines', performs the function of 'toys' which should be the consummation of resort to note 5(E) in chapter 84 of First Schedule to Customs Tariff Act, 1975 and such finding is well nigh impossible in the absence of any authoritative guidance on 'toys' and its intended functions. A thought process conditioned by one's own childhood or parenting experience is not a tenable substitute. Even if this note comes into play insofar as the impugned goods are concerned, the impossibility of appending 'toys' renders the claimed classification to be the only one remaining in the ring. Consequently, the classification claimed must remain. The impugned order is set aside to allow the appeal.

(Order pronounced in the open court on 19/03/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*