

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CUSTOMS APPEAL NO. 01/2019

APPELLANT : Superpack,
A Division of Bajaj Steel Industries Limited.
Having its registered office situated at
Imambada Road, Nagpur-440 018

Versus

RESPONDENT The Commissioner of Central Excise and Customs,
having its office at Kendriya Utpad Shulka Bhawan,
Civil Lines, Telegkhedi Road,
Nagpur-440 001.

Shri Sunil Manohar, Senior Advocate with Shri N.A.Gaikwad, Advocate for
appellant.

Shri S.N.Bhattad, Advocate for respondent

CORAM : A.S.CHANDURKAR and G.A.SANAP, JJ.

DATE ON WHICH THE ARGUMENTS WERE HEARD : 20.10.2021

DATE ON WHICH THE JUDGMENT IS PRONOUNCED : 25.11.2021

JUDGMENT (PER A.S.CHANDURKAR, J.)

Admit. Heard learned counsel for the parties.

2. This appeal filed under Section 130 of the Customs Act, 1962 (for short, the Act of 1962) has been heard on the following substantial questions of law:

(a) In the light of earlier adjudication dated 06.10.2005 pertaining to the same Assessee, whether the Appellate Tribunal erred in not considering the effect of that adjudication ?

(b) Whether in the facts and circumstances of the case, the Appellate Tribunal erred in holding that the extended period of limitation was invocable and upholding the differential duty on that

count ?

(c) Whether in the facts and circumstances of the case, the Appellate Tribunal was correct in confirming the differential duty when the same is available to the appellant as Modvat Credit ?

3. The aforesaid substantial questions of law arise in view of the challenge raised by the appellant-Assessee to the order dated 13.12.2016 passed by the Customs, Excise and Service Tax Appellate Tribunal - Tribunal thereby dismissing the appeal preferred by the Assessee and upholding the order passed by the Commissioner, Central Excise on 20.05.2005. As a result, the show cause notice dated 30.01.2004 proposing the goods covered by bills of entry at serial numbers 1 to 49 were held liable for confiscation under Section 111 (m) of the Act of 1962 for suppression of facts, differential duty on the goods cleared under Section 28 of the Act of 1962, imposition of penalty under Section 112 (b) of the Act of 1962 along with interest at appropriate rate under Section 28 AB of the Act of 1962.

4. The facts in brief giving rise to the present proceedings are that it is the case of the Assessee that it is a Company incorporated under the Companies Act, 1956 and is engaged in the manufacture of master batches that fall under Chapter 39 of the Central Excise Tariff. Calcium Carbonate is one of the items used in the manufacture of the master batches. Since 1997 the Assessee has been importing Calcium Carbonate and the same was being classified and assessed to custom duty under Heading No.25.30 of the

Customs Tariff as “mineral substance not elsewhere specified or included”. In proceedings initiated by the Revenue for re-classification of Calcium Carbonate as imported, the same was classified under the Heading 25.30. The earlier proceedings that commenced pursuant to separate show cause notices concluded by classifying Calcium Carbonate 2T SA under the Head 3824.90. It was also held that by describing the said goods as aforesaid there was no mis-declaration or suppression by the Assessee.

On 30.01.2004 another show cause notice came to be issued to the Assessee by the Commissioner, Customs and Central Excise, Nagpur calling upon it to show cause as to why the goods covered vide bills of entry at serial numbers 1 to 49 during the period from 14.01.2003 to 18.01.2003 be not held liable for confiscation under Section 111 (m) of the Act of 1962 on account of mis-statements and suppression of facts especially by declaring the said goods as falling under CSH 2830.90. Differential duty was also sought to be demanded alongwith penalty and interest. The Assessee submitted an explanation to the aforesaid show cause notice and the Commissioner, Central Excise by his order dated 20.05.2005 recorded a finding that the Assessee had mis-declared the goods by not making any mention of Calcium Carbonate not being coated with stearic acid. This amounted to mis-declaration and suppression of crucial facts thus rendering the imported goods liable for confiscation. On that premise differential duty under Section 28 of the Act of 1962 was demanded alongwith interest and penalty. The Assessee being

aggrieved by the aforesaid order preferred an appeal before the Tribunal. The Tribunal on 01.09.2005 was pleased to waive pre-deposit of duty and penalty and also stayed the recovery of amounts due during the pendency of the appeal. An application preferred by the Revenue for re-consideration of the said order came to be dismissed on 04.08.2006. The Assessee thereafter placed on record its written submissions. The Tribunal on 13.12.2016 after hearing both the sides proceeded to dismiss the appeal. It is the aforesaid order that is the subject matter of challenge in this appeal.

5. Shri Sunil Manohar, learned Senior Advocate for the Assessee submitted that the Tribunal erred in not taking into consideration the earlier orders passed pertaining to the Assessee itself whereby the same product namely Calcium Carbonate described as 2T SA had been held as falling under the Head 3824.90. A clear declaration had been made that the product was coated and there was no question of any intention on the part of the Assessee to suppress the description of the said product. According to him since 13.07.1999 the goods were described as “surface coated” by the Assessee which fact was noticed by the Deputy Commissioner in his earlier order dated 15.10.2004. This relevant aspect was ignored by the Tribunal. According to him while it was the duty of the Assessee to appropriately describe the goods imported, the authorities were required to classify the same appropriately. Classification, if any, mentioned by the Assessee would not be relevant and it

was the description as made by the Assessee that was relevant. He then submitted that the observations as made in the earlier order dated 20.05.2005 by the Commissioner of Central Excise as regards the description in the bill of entry being in conformity with the description in the invoices of the foreign supplier was ignored by the Tribunal. When the show cause notice dated 30.01.2004 was under adjudication, the earlier order dated 22.07.2007 passed by the Commissioner, Central Excise was holding the field. In absence of any contrary classification by the Assessee, there was no reason to proceed against the Assessee. It was not the case of Revenue that the goods in question were not declared as being coated with stearic acid 2T SA. Since the earlier findings were operating which were also binding on the Revenue, there was no legal basis to have issued the subsequent show cause notice. It was also urged that though the Revenue had preferred Customs Appeal No.1 of 2006 against the order dated 22.02.2005 passed by the Tribunal earlier, that appeal came to be withdrawn by the Revenue. The learned Senior Advocate further submitted that the question of suppression of facts would also not arise for the reason that there was a revenue neutral situation in hand. The duty was required to be paid either while importing the goods in question or while clearing the same. The Assessee was infact entitled for MODVAT credit. Even on this count, the impugned order was not sustainable. Since there was no question of mis-description or suppression of facts, the provisions of Section 28 of the Act of 1962 for extending the period of limitation would not

be applicable. In support of his submissions, the learned Senior Advocate placed reliance on the decisions in *Northern Plastic Ltd. Vs. Collector of Customs & Central Excise (1998) 6 SCC 443* and *Nirlon Limited Vs. Commissioner of Central Excise, Mumbai (2015) 124 SCC 798*. He therefore submitted that the order passed by the Tribunal was liable to be set aside.

6. Shri S.N.Bhattad, learned counsel for the Revenue supported the impugned order. According to him the finding that there was mis-declaration and suppression of crucial facts was rightly recorded since the description given by the Assessee did not indicate whether the goods imported were coated with stearic acid or not. He invited attention to the bills of entry in that regard which gave rise to the show cause notice dated 30.01.2004. Since there was mis-declaration by the Assessee, the provisions of Section 28 of the Act of 1962 were attracted and the extended period of limitation was applicable. As regards the proceedings in Customs Appeal No.1 of 2006, it was submitted that the said appeal was not pressed by the Revenue in view of the fact that the tax effect was less than Rs.Twenty lakhs. The Tribunal having considered all relevant aspects, there was no reason to interfere with the impugned adjudication. He therefore submitted that the appeal was liable to be dismissed.

7. We have heard the learned counsel for the parties and we have given due consideration to the respective submissions. Before considering the

challenge to the impugned order passed by the Tribunal on 13.12.2016, it would be necessary to refer to the earlier proceedings between the parties with regard to import of the very same goods by the Assessee. The Assessee had imported 84 metric tons of Calcium Carbonate vide invoice no.853507 dated 18.06.1997. In the bills of entry the goods were classified under Customs Tariff Heading No.2530.90. The Assistant Commissioner by his order dated 19/20.12.1997 directed the said goods to be classified under the Heading 2836.50. This order was challenged by the Assessee before the Commissioner of Central Excise and by its order dated 22.07.2007 it was held by the Commissioner that the goods were liable to be classified under Chapter 25 of CTA 1975. The order passed by the Assistant Commissioner was accordingly set aside. The record indicates that till the year 2003 the goods were being assessed under Chapter 25. In a subsequent bill of entry with regard to 126 metric tons of the material in question, the same was described as “naturally occurring mineral Calcium Carbonate 2T SA”. The Customs Tariff Heading was given as 2530.90. Pursuant thereto a show cause notice dated 21.01.2004 was issued to the Assessee seeking to assess the said goods under CTH 3824.90. The Deputy Commissioner, Central Excise by his order dated 15.10.2004 held that the Assessee had described the goods initially as surface coated but subsequently the said words “surface coated” had been omitted which amounted to mis-declaration of the imported goods. On that basis, it was held that the goods be assessed under CTH 3824.90 and not as

claimed by the Assessee. This order was then challenged by the Assessee before the Commissioner (Appeals) and by the order dated 06.10.2005 it was held that the goods had been described as 2T SA which indicated that they were stearic acid coated. The description was similar to what was given by the importer and hence there was no mis-declaration. Thus while holding that the goods were liable to be classified under Chapter sub-heading 3824.90 it was held that there was no mis-statement or suppression of facts. This adjudication in turn was challenged by the Revenue by preferring an appeal before the Tribunal. The Revenue sought expunging of the observations that there was no mis-declaration on the part of the importer/Assessee. The Tribunal observed that the appellate Authority relied upon the certificate issued by the supplier for holding that there was no question of mis-declaration. After holding that there was no merit in the appeal preferred by the Revenue, the same came to be dismissed. This order dated 13.12.2016 passed in Appeal No.C/02/2006 by the CESTAT Court No.I by a bench of two learned Members, Member (Judicial) and Member (Technical) has attained finality.

8. With regard to subsequent bill of entry for the same material, the description given was naturally occurring mineral Calcium Carbonate 2T SA under the Heading 3824.90. In these proceedings the Additional Commissioner by his order dated 24.12.2003 had directed classification of the

goods under sub-head 3824.90 alongwith confiscation with an option to review the same on payment of fine. Penalty was also imposed under Section 112(a) of the Act of 1962. This order was challenged before the Commissioner (Appeals) and on 29.03.2004 while holding the classification to be under sub-head 3824.90, the order of confiscation and imposition of penalty was set aside by holding that there was no question of suppression of facts by the Assessee. This adjudication gave rise to appeals being preferred by the Assessee as well as by the Revenue being Appeal Nos. C/499 and 620/2004. Before the Tribunal, the Assessee did not contest the classification as made under sub-head 3824.90 and on that count its appeal was dismissed. The appeal preferred by the Revenue against setting aside of the amount of fine and penalty was also dismissed by the Tribunal on 22.02.2005 after holding that since the case related to classification, it was difficult to impute any wilful intention on the part of the Assessee of any mis-representation or suppression. As stated above Customs Appeal No.1 of 2006 preferred by the Revenue against this order was withdrawn on 04.07.2017, albeit for the reason that the tax effect was lower than the prescribed limit.

9. In the aforesaid backdrop, if the challenge to the order of the Tribunal dated 13.12.2016 in Appeal No. C/723/04 passed by the CESTAT, Court No.II impugned in this appeal is considered, it is seen that the order passed by the Tribunal in Appeal Nos. C/499 and 620/2004 on 22.02.2005 as

well as the order passed by the Tribunal in Appeal No. C/02/06 also on 13.12.2016 by Court No.1 have attained finality. As regards the aspect of classification of the product in question, its classification under CTH 3824.90 as directed by the Commissioner (Appeals) on 29.03.2004 was accepted by the Assessee by not pursuing Appeal No. C/499/04 preferred by it before the Tribunal. Similarly, classification of the same product by the Commissioner (Appeals) vide order dated 06.10.2005 under Chapter sub-head 3824.90 was not challenged further by the Assessee. The Revenue had challenged the observations pertaining to mis-description in Appeal No. C-02/06 before the Tribunal but that appeal was also dismissed on 13.12.2016. The classification of the product imported is thus under Chapter sub-head 3824.90 which does not require re-examination.

10. On the aspect of mis-description or suppression in the matter of classification by the Assessee, the Tribunal in the impugned order has reproduced paragraph 42.3 of the order passed by the Commissioner (Appeals) in the appeal decided on 20.05.2005. In that paragraph the Commissioner (Appeals) had referred to an earlier order passed by the Tribunal dated 22.02.2005 in Appeal Nos. C-499 and 620/2004 and observed that the Department had preferred an appeal against the order passed by the Tribunal on 22.02.2005 in relation to the observations regarding mis-declaration and suppression of facts by the Assessee. Except for reproducing

the contents of paragraph 42.3, there are no independent reasons given by the Tribunal for concluding that there was suppression of facts on the part of the Assessee and hence the aspect of limitation would not preclude the Department from making the demand. It is noted that Customs Appeal No.1/2006 had been preferred by the Revenue against the order dated 22.02.2005 passed by the Tribunal but the same was withdrawn on 04.07.2017 since the tax effect was on a lower side. It was open for the Revenue to have pursued the said appeal on merits on the premise that the observations made in the order of the Tribunal dated 22.02.2005 were likely to have a cascading effect on other proceedings pertaining to the same assessee. It is also to be noted that the proceedings arising out of the earlier show cause notice dated 21.01.2004 were incidentally decided by the Tribunal on 13.12.2016 itself and the appeal preferred by the Revenue seeking expunging of the observations of the first appellate Court as regards absence of mis-declaration on the part of the importer/Assessee came to be dismissed. The Tribunal (Court No.1) while passing this order dated 13.12.2016 found that the first appellate Court had relied upon the certificate issued by the supplier of the goods to come to the conclusion that the charge of mis-declaration did not arise. This order dated 13.12.2016 passed in Appeal No. C-02/06 has attained finality between the parties. It is also relevant to note that the allegation of mis-declaration is based on the same material and it is also not in dispute that the Assessee had declared the said goods as being

coated with stearic acid 2T SA. The Tribunal in its impugned order has not assigned any independent reason for upholding the show-cause notice dated 30.01.2004.

11. Coming to the contention raised by the Assessee that there was a revenue neutral situation in hand and for which purpose various decisions were relied upon, it is seen that the Tribunal has failed to consider this aspect of the matter. The learned Senior Advocate for the Assessee is justified in relying upon the decision in *Nirlon Limited* (supra) for that purpose wherein it was held that when the entire exercise is revenue neutral, the assessee could not have achieved any purpose to evade the duty. There is no loss to the Revenue as the Assessee is entitled to claim MODVAT credit.

12. Once it is found that there was absence of mis-declaration or suppression facts which finding attained finality between the parties pursuant to the order dated 06.10.2005 passed by the Commissioner (Appeals) as affirmed by the Tribunal on 22.02.2005, there would be no occasion to invoke the provisions of Section 28(1) of the Act of 1962 for extending the period of limitation for issuing the show cause notice. This position is undisputed in the light of a plain reading of the aforesaid provision. It is thus found that the Tribunal while passing the impugned order failed to consider the appeal in its proper perspective and ignored the earlier adjudication dated 06.10.2005 when the Commissioner (Appeals) decided the appeal in favour of the

Assessee by holding the goods to be classified under CTH 3824.90. A further finding was also recorded that there was no mis-declaration or suppression of correct description of the goods in question by the Assessee. The substantial questions of law are accordingly answered in favour of the Assessee.

Consequently in view of aforesaid, the order passed by the CESTAT in Appeal No.C-723/2005 dated 13.12.2016 is set aside. The show cause notice dated 30.01.2004 stands dropped. Customs Appeal No.1/2019 is allowed leaving the parties to bear their own costs.

(G.A.SANAP, J.)

(A.S.CHANDURKAR, J.)

Andurkar..