
(2023) 04 CESTAT CK 0036

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 50049 Of 2020

M/S Nanz Med Science Pharma Pvt. Ltd And Others

APPELLANT

Vs

Commissioner Of Customs (Appeals) Commissioner Of
Customs (Appeals) And Others

RESPONDENT

Date of Decision : 18-04-2023

Acts Referred:

Customs Valuation Rules, 2007 — Rule 2(2), 2(2)(i), 2(2)(v), 3, 4, 12
Customs Act, 1962 — Section 17(4), 108, 111(i), 111(m), 112(a)(ii), 114AA

Citation : (2023) 04 CESTAT CK 0036

Hon'ble Judges : P.V. Subba Rao, Member (T); Binu Tamta, Member (J)

Bench : Division Bench

Advocate : Vandana Singh, B.K. Singh, Rakesh Kumar

Final Decision : Dismissed

Judgement

P.V. Subba Rao, Member (T)

1. M/s. Nanz Med Science Pharma Pvt. Ltd. Nanz , filed appeal C/50049/2020 to assail the Order-in-Appeal Impugned order dated 15.10.2019 passed by the Commissioner of Customs (Appeals), New Delhi upholding the Order in original dated 20.12.2018 passed by the Additional Commissioner. Shri Lakhwinder Singh Puri filed appeal C/50050/2020 and Shri Manmit Singh Malhotra filed appeal C/50051/2020 to assail the imposition of penalties on them in the same impugned order. The operative part of the order-in-original is as follows:

“(i) The declared assessable value of the goods imported under the Bill of Entry No. 8120923 dated 09.01.2017 i.e. Rs. 6,33,897.33 is rejected under Rule 12 of Customs Valuation Rules, 2007 read with Section 17 (4) of the Customs Act, 1962 and ordered to be re-assessed at Rs. 1,45,58,787/-(34260 kgs. @ Rs. 424.95) under Rule 3 and 4 of the CVR, 2007 with consequential duty liability and interest, if any.

(ii) I order for confiscation of the impugned goods under section 111 (i) & (m) of

the Customs Act, 1962 with an option to redeem the same on payment of Redemption Fine of Rs. 15,00,000/-.

(iii) I impose a penalty of Rs. 5,00,000/- under Section 112 (a)

(ii) and Rs. 5,00,000/- under Section 114AA of the Customs Act, 1962 on M/s Nanz Med Science Pharma Pvt. Ltd.

(iv) I impose a penalty of Rs. 5,00,000/- under Section 112 (a)

(ii) and Rs. 5,00,000/- under Section 114AA of the Customs Act, 1962 on Shri Manmit Singh Malhotra, Director of M/s Nanz Med Science Pharma Pvt. Ltd.

(v) I impose a penalty of Rs. 5,00,000/- under Section 112 (a)

(ii) and Rs. 5,00,000/- under Section 114AA of the Customs Act, 1962 on Shri Lakhvinder Pal Singh Puri, Director of M/s Nanz Med Science Pharma Pvt. Ltd."

2. Nanz imported guar gum (Hydroxypropyl Trimonium Chloride) and declared it to be of Technical Grade, Not for Pharma /food grade and declared a value of Rs.19.264 per kg. It declared the quantity of the guar gum imported against the Bill of Entry in two containers is as 16200 kg + 16380 kg = 32,580 kg. It further declared that the overseas supplier and itself were not related buyers.

3. Doubting these declarations, the officers of the department checked and found that the actual quantity of guar gum imported was 17380 kg+ 16880 kg =34260 kg against 32,580 kg declared in the Bill of Entry, i.e, there was an excess quantity of 1,680 kg. After further enquiries and after recording the statements, it was found that the overseas supplier and Nanz were related buyers. The fact that the actual quantity imported was more than what was declared in the Bill of Entry is not disputed. The fact that the overseas supplier and Nanz were related is also not disputed before us. The nature of the relationship was described in the impugned order as follows:

"I find that the submission of Shri Manmit Singh Malhotra, Director of the Company is not sustainable in light of the CRCL report.

In reply dated 16.04.2018, the party has submitted that the department, while invoking Rule 2 (2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, has failed to specify the particular clause that is applicable in the instant case. I find that the party is putting forward a very weak defense against the violation committed by it. Rule 2 (2) of the CVR, 2007 is very clear that persons shall be deemed to be related only if they fall under the category of anyone of the sub-clauses. Rule 2 (2) (i) stipulates that the persons are related if they are officers or directors of one another's businesses. I find that Shri Manmit Singh Malhotra, Director of the Company in his statement dated 30.01.2017 had stated that Shri Lakhvinder Pal Singh was the President of M/s MS Intermediate and Chemical INC., Canada (Supplier) and he was also the Director-cum-Chairman of M/s Nanz Med Science Pharma Pvt. Ltd. (Importer). Hence, I find that the importer and their foreign supplier are related in terms of

Rule 2 (2) (i) of CVR 2007. Further, I find that the parties are related in terms of Rule 2 (2) (v) also as far as one of them directly or indirectly control the others, which has been repeatedly stated by Shri Manmit Singh Malhotra in his various statement recorded under Section 108 of the Customs Act. I find that in his statement dated 15.03.2017, Shri Manmit Singh Malhotra, director of the Company has clearly stated that the requisition for the goods was conveyed to Shri Lakhvinder Singh Puri and he would in return tell them whether the item was available in CANADA with their sister concern or had to be procured from other vendor/s. He further stated that it was Shri Lakhvinder Singh Puri who negotiated and decide on the prices, which prima facie proves his indulgence and influence in day to day working of the firm. Further I find that Shri Manmit Singh Malhotra, Director of the Company in his voluntary statement dated 19.04.2017 has stated that no order telephonic or otherwise was placed for import of the said consignment as the consignment was for trading purpose only. He further stated that purchase of goods for trading was solely done by Shri Lakhvinder Singh Puri which further strengthens the allegation leveled against the party in the Show Cause Notice that the parties are covered by Rule 2 (2) of the CVR, 2007 in terms of sub-rule (v) as Shri Lakhvinder Singh Puri directly controls the importer company as well as the foreign supplier”.

4. Doubting the declaration that the guar gum imported was not of Pharma grade and was also not of food grade, samples were drawn by the departmental officers and sent for testing to the Central Revenue Control Laboratory CRCL which reported that the guar gum was of food grade. Nanz requested the officers to get the samples re-tested indicating some tests to be conducted. Accepting the request, the department sent samples for re-testing to the CRCL. Since the CRCL did not have the facilities to conduct the tests which were required, it sent the samples to a private laboratory M/s. AES Laboratories AES Pvt. Ltd. for testing. The fee towards these tests was also paid by Nanz. After conducting the tests, AES reported that the guar gum was of food grade. Based on this report, the department re-assessed the amount of duty payable based on the contemporaneous imports of the guar gum based on the data available in the National Import Data Base NIDB, and the actual quantity imported. A Show Cause Notice SCN dated 26.2.2018 was issued to the appellant which culminated in the order-in-original and the impugned order.

5. We have heard Ms. Vandana Singh, learned counsel for the appellants and Shri Rakesh Kumar, learned authorised representative for the Revenue and perused the records. Learned counsel for the appellants made the following submissions.

a) The imported goods were not of food grade or pharma grade as they had bacterial contamination and hence they were imported at a low price. b) Revenue relied on the test report of AES. The appellant itself had sent samples for testing to another private laboratory M/s Balaji Test Lab, Pvt. Ltd. Balaji a copy of whose report is presented to the bench. This report, clearly shows that the guar gum had heavy bacterial contamination and hence it cannot be considered as of food

grade or pharma grade.

c) Since there are two reports, the one favourable to the importer should be considered.

d) NIDB data should not have been considered as the appellant purchased these goods at a very low price and that transaction value must be accepted. Copies of emails between the company which originally sold these goods and the first buyer are enclosed in the appeal. She, however, fairly accepts that these emails was not the correspondence between Nanz and the overseas supplier.

e) Therefore, although the overseas supplier and Nanz were related parties, such relationship cannot be held to have affected the price.

f) When goods are valued, if the prices of contemporaneous imports are considered, they must be only of identical goods and cannot be even of similar goods.

g) Even if the valuation and demand of duty are decided against the importer, there is no case to impose penalties on Shri Puri and Shri Malhotra.

h) In view of the above, all three appeals may be allowed and the impugned order may be set aside.

6. Learned authorised representative supported the impugned order and submitted as follows:

a) This is not merely a case of difference of views on the grade of the guar gum imported but is a case where Nanz mis-declared several aspects which came to light only on investigation.

b) The quantity of the goods imported itself was mis-declared to the extent of 1,680 kg.

c) A very important factor in determining the value of the imported goods and if they are related parties, it is a very significant factor. The appellant mis-declared that the overseas supplier and Nanz are not related. On investigation, when a statement was recorded, Shri Manmit Singh Malhotra clearly admitted that they were related parties.

d) The price of guar gum was Rs. 424.95 per kg as per the NIDB data but the appellant declared only Rs. 19.264 per kg which is over 22 times lower.

e) The appellant declared the guar gum to be of not food grade and not pharma grade. However, both CRCL in its initial report and AES in its report have confirmed that it was, indeed of food grade.

f) The importer's reliance on the test report of Balaji cannot be accepted for several reasons. Firstly, it is not clear as to how the sample was drawn by whom and which sample was tested. The test report is as good as the sample. While the department drew samples as per the standard procedure in the presence of

the importer and witnesses and has a paper trail of which samples were sent for testing, the report of Balaji cannot be correlated with any specific sample. No sample to be sent to Balaji was drawn in the presence of officers. Although learned counsel for the appellant submitted a declaration (although called as an affidavit but is not on any stamp paper or notarised) by Shri Sunil Sharma, Director of Balaji, it simply states that Customs sample was tested but does not give any details of the samples which were tested. It is not clear if the same person had tested the samples. At any rate, this declaration was given in 2023-five years after the test report was given. It is humanly impossible for anyone to remember which sample was tested five years ago unless there is a record and there is no such record.

g) The reliance placed on the emails by the learned counsel for the appellant cannot be accepted as it is not the correspondence between the importer (Nanz) and the overseas supplier but is some email between two other parties.

h) For their role in the deliberate mis-declaration of the grade and quantity of the imported goods and also the relationship with an intent to evade payment of duty, penalties were correctly imposed on Puri and Malhotra which need to be upheld.

i) The impugned order may be upheld and the appeal may be rejected.

7. We have considered the submissions on both sides. Of the three allegations—that the quantity of the goods was mis-declared, that it was wrongly declared that importer and the overseas suppliers were not related parties and that the guar gum was of food grade, the appellant is not disputing the first two.

8. We, therefore, examine if, based on the evidence available on record, if the guar gum which is imported is of food grade or of other than food grade. Revenue's contention that it is of food grade is based on the test reports of AES to whom the samples were sent by CRCL. The appellant did not dispute the samples being sent to this laboratory and in fact, had paid the fee for the testing also. Learned authorised representative for the Revenue has produced before the covering letter under which the samples were sent to the CRCL for testing which were further forwarded to AES. All samples which are drawn are entered in a register by the Customs and the entry number in the register gives the correlation with the sample and these numbers were further correlated with the test reports. For these reasons, we find the test reports of AES credible and they state that the imported guar gum was of food grade.

9. We have carefully examined the test report of Balaji and the declaration of the Director of Balaji submitted during the hearing. Neither the test report nor the declaration state any marks and numbers of the samples which were tested. Therefore, we are not satisfied that the test report of Balaji pertains to the imported goods and the samples which were tested were those samples which were drawn in the presence of both sides. Needless to say that any test report is as good as the sample which was tested. Unless the report can be correlated

with the sample, the test report cannot be relied upon.

10. Notwithstanding the above, we also find that the test report of Balaji mentions at the top " See note 150 E(f) Under the Drugs and Cosmetics Act, 1940 and the Rules made thereunder" and indicates against different parameters "I.P." which apparently refers to the standards of Indian Pharmacopeia. The test conducted by Balaji is to check the imported guar gum against pharmacopeial standards and in so testing, it found that the total microbial content was higher than what was permissible as per IP. All other parameters were within the pharmacopeial standards. This report nowhere states that it tested the samples to check if the guar gum is of food grade or that it is not of food grade and it does not advance the case of the appellant that the imported guar gum is not of food grade.

11. The appellants' contention that valuation should be based on the transaction value is not correct for four reasons. Firstly, the quantity of the goods is much larger than what was declared. Secondly, the buyer and seller are related parties. Thirdly, the grade of the guar gum has been mis-declared by the appellant as "not of food grade" but on testing, it is found to be of food grade. Fourthly, the declared value is Rs 19.264 per kg as opposed to the contemporaneous import prices of Rs. 424.95 per kg. For all the reasons, the impugned order is correct in rejecting the transaction value and determining the value based on the contemporaneous values available in the NIDB.

12. We, therefore, find that the impugned order is correct in rejecting the transaction value and re-determining the value based on the contemporaneous values of imports available in NIDB.

13. Undisputedly, Shri Puri and Shri Malhotra were involved in the mis-declarations and therefore, we find the impugned order is correct in imposing penalties on them.

14. For all the above reasons all three appeals are rejected and the impugned order is upheld.