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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on	26.07.2024
Order pronounced on	30.08.2024

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THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.Nos.28456, 28462 & 28465 of 2023

&

WMP Nos.27998, 27999 & 28000 of 2023 & 8522 of 2024

In all WPs

M/s.Asahi India Glass Ltd.
Plot No.F 76-81, SIPCOT Industrial Park
Sripeumbudur Taluk, Irungattukottai
Tamil Nadu-602 117
Represented by its Power of Attorney
Mr.Rahul Vashist

... Petitioner

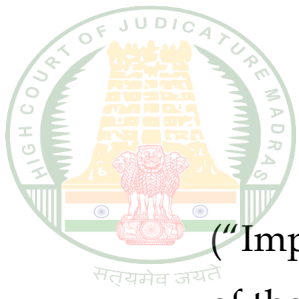
-vs-

1.Commissioner of Customs, Chennai-II
Office of the Commissioner of Customs, Chennai-II (Import)
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.Commissioner of Customs (Audit), Chennai
Custom House, No.60, Rajaji Salai
Chennai - 600 001

... Respondents

PRAYER in W.P.No.28456 of 2023 : Writ Petition filed under Article 226 of the Constitution of India, to issue a writ of Certiorari , calling for the records of the Impugned Show Cause Notice bearing SCN No.74/2023 (DIN:20230873MX0000444BC1) dated 07.08.2023



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("Impugned SCN") issued by the 1st Respondent under Section 28(4) of the Customs Act, 1962, and to quash the same.

PRAYER in W.P.No.28462 of 2023 : Writ Petition filed under Article 226 of the Constitution of India, to issue a writ of Mandamus directing the Respondents to clear the subject goods being 'Light Green Float Glass (Tinted Non Wired Type)' under CTH 70051010 in view of the decisions of various authorities of the Customs Department classify the goods under CTH 70051010.

PRAYER in W.P.No.28465 of 2023 : Writ Petition filed under Article 226 of the Constitution of India, to issue a writ of Declaration declaring that the classification adopted by the Petitioner for the imported goods, i.e. Light Green Float Glass (Tinted Non Wired Type), under CTH 70051010 is correct and proper.

In all WPs

For Petitioner : Mr.Vijay Narayan, Senior Advocate
for M/s.Karthik Sundaram,
Mr.Jitendar Singh &
MrAnshumaan

For Respondents : Mr.Rajendran Raghavan
Senior Standing Counsel

COMMON ORDER

Background



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The petitioner is engaged in the business of manufacturing of processed laminated and tempered glass, *inter alia*, for automotive purposes. The petitioner also imports glass, including light green tinted float glass, for its business operations, and such imports have been made by the petitioner since 2011. While importing light green tinted float glass, the petitioner classified and cleared the same under Customs Tariff Heading (CTH) 70051010. An audit consultative letter dated 01.05.2022 was issued to the petitioner seeking to classify goods imported under 35 bills of entry detailed in the enclosed worksheet under CTH 70052110 instead of CTH 70051010 and calling for payment of Rs.1,14,03,577/-. Such communication was responded to by the petitioner on 11.05.2022 by asserting that the goods are non-wired and have an absorbent layer of tin on one side, which is fluorescent under UV illumination, and also have a microscopically thin non-reflecting layer of zinc sulphate coating on the surface of the glass. Test reports were annexed in support of the assertions. Consequently, it was stated that the classification in CTH 70051010 was in order. A subsequent detailed letter dated 06.03.2023 was also issued by the petitioner.



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2. According to the petitioner, on the erroneous basis that the petitioner had not responded to the audit consultative letter, the first respondent issued a show cause notice dated 07.08.2023, whereby the extended period of limitation was invoked, and the petitioner was called upon to show cause as to why the light green tinted float glass imported under the bills of entry detailed in Annexure-I thereto (the Relevant Goods) should not be classified under CTH 70052110. The amount payable by the petitioner towards short-levy was computed at Rs.11,78,27,642 in this show cause notice. The present writ petitions were filed upon receipt of the aforesaid show cause notice. In W.P.No.28456 of 2023, the petitioner seeks to quash the show cause notice. In W.P.No.28462 of 2023, the petitioner seeks a direction to permit clearance of light green tinted float glass under CTH 70051010 in view of earlier decisions of various authorities of the Customs Department classifying the goods under CTH 70051010. In W.P.No.28465 of 2023, the petitioner seeks a declaration that the classification adopted by the petitioner is correct and proper.

Counsel and their contentions



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3. Oral arguments on behalf of the petitioner were advanced by Mr.Vijay Nayaran, learned senior counsel, assisted by Mr.Karthik Sundaram, learned counsel. Oral arguments on behalf of the respondents were advanced by Mr.Rajendran Raghavan, learned senior standing counsel.

4. Learned senior counsel referred to the impugned show cause notice and pointed out that float glass falls within CTH 7005 and that the Relevant Goods fall within the six digit entry 700510 of the CTH set out in paragraph 7 of such show cause notice, which relates to non-wired glass, having an absorbent, reflecting or non-reflecting layer. At the eight digit level, he submitted that it falls within 70051010, which relates to tinted glass having the characteristics described in CTH 700510. Without considering the petitioner's reply to the audit consultative letter, he contended that the first respondent has called upon the petitioner to show cause as to why the Relevant Goods should not be classified under CTH 700521 (at the six digit level), which pertains to float glass coloured throughout the mass (body tinted), opacified, flashed or merely surface ground. He also pointed out that the respondents seek to re-classify the Relevant



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Goods in CTH 70052110, at the eight digit level, which relates to tinted float glass having the other characteristics specified in 700521.

By further referring to paragraph 17 of the show cause notice, learned senior counsel submitted that reference is made therein to a recent test report and the results thereof (Ref. No.GC/TCC/TR-3448/22-23 dated 11.04.2023) from the Council of Scientific and Industrial Research(CSIR)-Central Glass and Ceramic Research Institute(CGCRI), Kolkata in relation to bill of entry no. 8261250 dated 13.04.2022. Out of the features listed in the test results at paragraph 17, he submitted that the features mentioned under clauses (c), (d), (j), (k) &(l) are relevant. He also submitted that these features establish that the petitioner's classification is correct.

5. With regard to earlier imports of light green tinted float glass, learned senior counsel submitted that an audit consultative letter dated 27.03.2019 was issued by the Assistant Commissioner, Circle-II, Customs Audit Commissionerate, ICD, Patparganj, Gazipur, Delhi-96. After examining relevant material, he pointed out that the Commissioner, Customs Audit Commissionerate, by communication dated 12.04.2021, informed the Commissioner of



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Customs, ICD Patparganj & Other ICDs, New Delhi, that the office is accepting the view of the Assistant Commissioner (SIIB), ICD-Patparganj, and that the audit proceedings were being closed by accepting the classification of the goods under CTH 700510, as declared by the importer.

6. In spite of the above communication, he submitted that an order dated 04.09.2021 was issued by the Deputy Commissioner of Customs, ICD Rewari, rejecting the petitioner's self-classification under CTH 70052110 in respect of 315 bills of entry and reclassifying such goods under CTH 70052110. As against the order dated 04.09.2021 and subsequent orders dated 23.10.2021 and 16.03.2022, he pointed out that appeals were filed before the Commissioner of Customs (Appeals), New Delhi. By referring to the appellate order, learned senior counsel pointed out that the appellate authority allowed all three appeals and set aside the respective order in original. While allowing the appeals, learned senior counsel submitted that the appellate authority concluded that the classification adopted by the petitioner was valid and that, consequently, the petitioner was entitled to the benefit of Sl.No.934 of



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notification No.46/2011-Customs dated 01.06.2011. Learned senior counsel also referred to the order of the Commissioner of Customs (Appeals) in December 2022 in respect of other bills of entry relating to the Relevant Goods, wherein the same conclusion was reached. After pointing out that these appellate orders attained finality because further appeals were not filed, learned senior counsel submitted that the impugned show cause notice, which relates to the same product and is based on test reports disclosing the same features/characteristics, is liable to be interfered with.

7. He also referred to an order dated 27.03.2024 of the Customs Excise & Service Tax Appellate Tribunal (CESTAT), Chennai, in *Bagrecha Enterprises Ltd. v. Commissioner of Customs*, Customs Appeal No.40203 of 2023. He pointed out that the said case related to the import of clear float glass by classifying the same under CTH 70051090, whereas, the Customs Department took the stand that the goods were classifiable under CTH 70052990. As in the present case, he pointed out that the test reports disclosed the features specified in (c), (d), (j), (k) &(l) of the test results of the present case. In those circumstances, he submitted that the CESTAT recorded a finding



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that the test results disclosed that there was an absorbent tin layer and that the classification by the appellant therein was correct. He also pointed out that the Court concluded that the Customs Department was not justified in invoking the larger period of limitation in the factual context of the Customs Department having finalized the assessment in respect of the same goods for the same party previously by accepting the classification under CTH 70051090. A substantially similar judgment of the CESTAT, Kolkata, in a batch of appeals, including Customs Appeal No.75536 of 2023, was also relied upon for the same proposition.

8. The next contention of learned senior counsel was that the reply dated 20.05.2022 to the consultative letter and subsequent letter dated 06.03.2023 were disregarded while issuing the impugned show cause notice. After pointing out that the consultative letter was in respect of only 35 bills of entry and that the short-levy was confined to Rs.1,14,03,577/-, he submitted that sub-section (4) of Section 28 of the Customs Act, 1962 (the Customs Act), was unlawfully invoked in relation to a classification dispute and that the short levy was computed in a sum of Rs.11,78,27,642 in the impugned show cause



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notice. By pointing out that sub-section (4) may be invoked only in cases where there is fraud, collusion or wilful mis-statement, learned senior counsel submitted that the said provision cannot be invoked in cases wherein there is reasonable basis to classify the goods under a particular tariff heading (such as CTH 70051010 here), especially if the goods were classified and cleared for more than a decade under such classification. In this regard, learned senior counsel submitted that the Customs Department does not allege that the petitioner imported a different commodity after declaring that light green float glass was being imported.

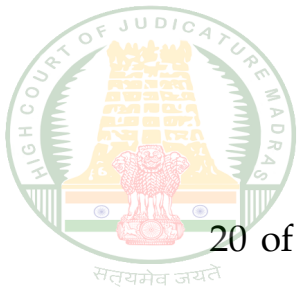
9. Learned senior counsel referred to and relied upon the judgment of the Hon'ble Supreme Court in *Union of India v. Kamalakshi Finance Corporation (Kamalakshi Finance)*, 1991 (55) ELT 433 (SC), particularly paragraph 6 thereof, for the proposition that judicial discipline requires that orders of higher appellate authorities should be followed by subordinate authorities. He also relied upon the judgments of the Hon'ble Supreme Court in *Commissioner Of Central Excise, Nagpur v. Vicco Laboratories ('Vicco*



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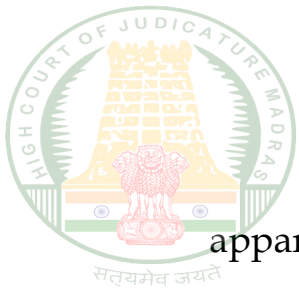
Laboratories'), (2005) 4 SCC 17 , particularly paragraph 4 thereof, and *Siemens Ltd. v. State of Maharashtra*, (2006) 12 SCC 33, regarding circumstances under which a show cause notice may be interfered with by a writ court. He relied on the judgment of the Supreme Court in *Commissioner Of Customs, Central Excise & Service Tax v. Ashwani Homeo Pharmacy (Ashwani Pharmacy)*, 2023 SCC OnLine SC 558, particularly paragraphs 99 and 100 thereof, for the proposition that a long standing classification cannot be changed without change in the tariff structure or in the composition of products. He concluded his submissions by contending that a show cause notice should not be issued with a predetermined mind. In support of this contention, he relied upon the judgment of the Hon'ble Supreme Court in *Oryxs Fisheries Pvt. Ltd. v. Union of India*, 2011 (266) ELP 422, (SC), especially paragraphs 28 and 29 thereof.

10. In response to these submissions, Mr.Rajendran Raghavan, learned senior standing counsel, submitted that float glass should be non-wired and have an absorbent, reflecting or non-reflecting layer to be classified under CTH 700510. By referring to paragraphs 19 &



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20 of the show cause notice, he contended that unless a microscopic thin coating was applied to the glass by using chemical vapour deposition, it cannot be classified under CTH 700510. He also pointed out that it is recorded in paragraph 20 of the show cause notice that the layer of zinc sulphate is a protective layer, which does not work as an absorbent, reflecting or non-reflecting layer; and that the goods cannot be classified under CTH 700510 in the absence of an absorbent, reflecting or non-reflecting layer. His next contention was that each consignment of goods is required to be examined to ascertain whether the characteristics necessary for classification under CTH 70051010 are present. Consequently, he contended that the self-classification by the petitioner cannot be accepted merely because such classification was accepted in respect of goods imported under earlier bills of entry. Put differently, his contention is that the examination should be on goods-specific basis. He relied on the judgment of the Calcutta High Court in *Stores Supply (India) Agency v. Assistant Collector of Customs, 1985 0 Supreme (Cal) 55*, for the proposition that jurisdiction to decide on the validity of classification is vested in the competent customs authorities and, consequently, the court would not interfere unless there is an



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apparent mistake. He also contended that the judgment of the Hon'ble Supreme Court in *Vicco Laboratories* is distinguishable because the issue of classification had been conclusively decided earlier therein.

11. Since the challenge is to a show cause notice, learned senior standing counsel also submitted that interference is not warranted unless the show cause notice was issued without jurisdiction or further proceedings would not be justified even assuming without admitting that all the statements in the show cause notice are correct. According to him, the present case does not fall within either category. As regards jurisdiction, he submitted in conclusion that sub-section (4) of Section 28 confers the right on the Customs Department to invoke the larger period of limitation even in cases of misclassification if such misclassification is a result of suppression of facts or wilful misstatement.

Discussion, analysis and conclusion



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12. The challenge in W.P.No.28456 of 2023 is to a show cause notice. The settled legal position is that a writ court would not, as a rule, interfere therewith. This rule is not without exceptions as held by the Hon'ble Supreme Court in *Vicco Laboratories*. Since paragraphs 31 to 34 of the *Vicco Laboratories* are relevant in the context of this dispute, the said paragraphs are set out below:

“31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinance from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the concerned authorities is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of



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issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out.

32. Case of the respondent that the classification of the said products having attained finality pursuant to the decision of this Court, the appellants have no jurisdiction to issue impugned show-cause notice on the ground on which it has been issued and it virtually amounts to reopening of the issue which stands concluded by the decision of this Court, and that therefore it is an abuse of process of law. The High Court after referring to the history of litigation rightly concluded that the matter stood concluded by judgments of this Court and the High Court in respondent's case.

33. In the earlier judgment this Court had given liberty to the Department in the following terms: (Vicco Laboratories case, pp.20-21, paras 9-11)



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"9. Although the adjudicating authority had found in the course of the hearing that the market survey indicated that the product in question was known as a cosmetic, we do not go into the question as this was not the ground on which the show-cause notice was issued.

10. The show-cause notices having proceeded on a misapprehension of the tests laid down in Shree Baidyanath's case, the same cannot be sustained.

11. The appeals are accordingly dismissed without any order as to costs. It will be open to the Department to take such test if otherwise so entitled in respect of the products for the purpose of classifying the products under the appropriate tariff heading as they may be advised."

However, as rightly observed by the High Court the impugned show cause notice was nothing but a repetition of the earlier show-cause notices with slight variations which in no way was relatable to any different test.

34. When the factual scenario is considered in the background of the legal principles set out above, the inevitable conclusion is that the appeal is sans



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merit, deserves dismissal, which we direct. Costs made easy."

13. One of the principles formulated by the Hon'ble Supreme Court in *Vicco Laboratories* is that interference may be justified at the show cause stage if the authorities concerned seek to resurrect an issue that was previously concluded by a decision of the Court. Such conclusions were recorded in the context of a classification issue. Whether interference with the impugned show cause notice is called for, either on the basis of the ratio laid down in *Vicco Laboratories* or otherwise, is considered next by examining the material facts.

14. It is common ground that the subject of the show cause notice is goods imported by the petitioner (the Relevant Goods), under the bills of entry detailed in Annexure-I to the show cause notice, by labelling the goods as light green float glass (tinted non-wired type), and by classifying such goods under CTH 70051010 and availing concessional rate of basic customs duty vide Sl.No.934 of the ASEAN Free Trade Agreement Notification No.46 / 2011 dated 01.06.2011. Such show cause notice was issued on the basis of test



report bearing Reference No.GC/TCC/TR-3283/21-22, dated

30.04.2021 of the CSIR-CGCRI, Kolkata. The said test report pertains

to bill of entry No. 54 dated 30.03.2020. The test results are set out below:

“a. From complete analysis it can stated that, the composition of the glass is soda-lime silica based glass containing other minor components as given in the complete chemical analysis report.

b. The measured average thickness of glass plates is observed to be 2.45 mm.

c. The Tin side is detected under UV illumination using tin detector.

d. The glass is float glass.

e. As received glass is light green as per transmission spectral profile with average visible transmission to 85.96% and with Fe₂O₂ content of 0.86%.

f. The glass is light green glass without opacified or surface ground.

g. The glass is light green coloured throughout the mass (body tinted)

h. It is non-wired glass.

i. No absorbent layer is observed other than tin layer on one side of the glass which is



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fluorescent under UV illumination.

j. No reflecting or non-reflecting layer."

(emphasis added)

15. By relying on the above test results, the first respondent recorded the *prima facie* conclusion that the Relevant Goods do not have an absorbent layer, other than the tin layer observed in the above extracted test results. This tin layer was, however, construed in the show cause as inherent to the production of float glass and, consequently, not a valid basis for the classification. As regards the zinc sulphate layer, it was *prima facie* recorded that it is a protective layer and, therefore, not an absorbent, reflecting or non-reflecting layer. As a corollary to the above interpretation of the test results, the *prima facie* finding that the Relevant Goods were wrongly classified under CTH 70051010 was recorded. On the basis of the *prima facie* conclusion that the Relevant Goods are non-wired glasses not having an absorbent, reflecting or non-reflecting layer and coloured throughout the body, it was recorded that the Relevant Goods are *prima facie* classifiable under CTH 70052110. A more recent report bearing reference No.GC/TCC/TR-3448/2022-23 dated 11.04.2023



from CSIR-CGCRI, Kolkata, in respect of bill of entry No.8261250

dated 13.04.2022 was also referred to in the impugned show cause

notice. The test results thereof are as under:

“The test results are given below:

- a. From complete analysis it can be stated that, the composition of the glass is soda-lime silica based glass containing other minor components as given in the complete chemical analysis report.*
- b. The measured average thickness of glass plates is observed to be 2.86 mm.*
- c. The Tin side is detected under UV illumination using tin detector.*
- d. The glass is float glass.*
- e. As received glass is light green float glass as per transmission spectral profile with average visible transmission of 85.19% and with Fe₂O₃ content of 0.62%.*
- f. The glass is non-wired glass.*
- g. The glass is light green coloured throughout the mass (body tinted), glass is not opacified or not merely surface ground.*
- h. No reflecting or non-reflecting layer exist.*
- i. The glass is annealed glass for decorative/industrial/automotive purposes.*



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j. An absorbent layer is observed on tin side of the glass which is fluorescent under UV illumination.

k. Glass is Tinted

l. The glass is found to be coated with ZnSO₄ film on the side oppose to tin side as protective layer."

(emphasis added)

16. Several test reports of samples taken from other bills of entry relating to the import of light green tinted float glass have been enclosed by the petitioner in the paper book. By way of illustration, the results from the sample tested in respect of bill of entry No.2052662 from test report dated 22.05.2019 and bearing reference No.GC/3127/TCC/3427-3428/2019-20 are set out below:-

"Based on the test results and analysis, following points can be drawn:

a) From complete chemical analysis it can be stated that, the composition of the glass is soda-lime silica based glass containing other minor components as given in the complete chemical analysis report.



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- b) *The measured average thickness of glass plates is observed to be 2.91 mm.*
- c) *The Tin side is detected under UV illumination using tin detector.*
- d) *The glass is float glass.*
- e) *As received glass is transparent glass as per transmission spectral profile with average visible transmission of 85.23% and with Fe₂O₃ content of 0.61%.*
- f) *The glass is transparent glass without opacified or surface ground.*
- g) *The glass is coloured throughout the mass (body tinted)*
- h) *It is non-wired glass.*
- i) *An absorbent layer (Tin) is observed on one side of the glass which is fluorescent under UV illumination.*
- j) *The glass is found to be coated with ZnSO₄ film on opposite to tin side as protective layer.”* (emphasis added)

17. On comparison of these test results, especially the three extracted in this order, the characteristics of the imported light green float glass, as reported therein, are substantially identical, except for



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one observation. The test report dated 30.04.2021 pertaining to bill of entry No.7094656 contains an observation that no absorbent layer is observed other than tin layer on one side of the glass. Even as regards this observation, it is noticeable that an absorbent tin layer was noticed. It bears reiteration that this absorbent tin layer was, however, construed in the impugned show cause notice as *prima facie* inherent to the production of float glass. Since such interpretation appears to be the primary basis of the show cause notice, it is instructive to examine whether and, if so, how such test results were previously interpreted.

18. From the paper book of the petitioner, it follows that a final assessment was made by the Assistant Commissioner, Noida Customs Commissionerate, and the classification under CTH 70051010 was accepted by communication dated 25.03.2021, on the basis of the test report in respect of bill of entry No.8990366. Shortly thereafter, by communication dated 12.04.2021, audit proceedings were closed by the Commissioner, Customs Audit Commissionerate, Delhi. Later, the Deputy Commissioner of Customs, ICD Rewari, by order dated 04.09.2021, rejected the self-assessment of the petitioner



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in respect of 315 bills of entry and concluded that the goods are liable to be reclassified under CTH 70052110. This order and two other similar orders were appealed against before the Commissioner of Customs (Appeals). The order in appeal dated July 2022 has been placed on record. The relevant discussion and findings of the appellate authority are set out below:

“5.2 The issue involved is correct classification of goods viz. “Light Green Float Glass/Coloured Float Glass”. Before going into merits of correct classification, I note from the impugned orders itself that the dispute originated on the basis of post clearances audit. Though there is mention of consultative letters issued to the appellant for differential duty but the same have not culminated in issuance of SCN to the appellant. I concur with the appellant that the Adjudicating Authority has not bothered to find or mention about the culmination of consultative letters issued by the Audit Commissionerate. Whereas, it is a fact on record that the Audit Commissionerate had concluded the proceedings vide their letter dated 12.04.2021 issued by the



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Commissioner (Audit) and accepted their classification under CTH 700510.

A plain reading of the above letter reveals that the Audit Commissionerate had accepted the classification made by the Appellant under CTH 700510. In fact, as per the said letter, the executive Commissionerate viz. Office of the Commissioner, ICD Patparganj & Other ICDs was also in agreement with the said classification. Further, it is seen from record of hearing that the appellant specifically prayed for issuance of Show Cause Notice. Still, no reasons have been brought on record as to why no SCN was issued. Further, there is no mention in the entire order about providing of said SIIB report or Test reports to the Appellant.

5.3 It is not clear as to on what basis, the said letter was ignored by the Adjudicating Authority in the impugned order dated 04.09.2021 issued subsequent to above letter and in other two orders. None of the impugned orders mention or counter the said letter at all. The Adjudicating Authority, despite being subordinate to the Commissioner proceeded to overrule the findings



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of Audit, without countering or mentioning the same. I find this action to be of gross insubordination. If the Adjudicating Authority had any disagreement with the Audit Commissioner, the same should have been clearly brought out. I also note that Adjudicating Authority even did not elaborate as to what was recommendation or findings of the SIIB in their letter dated 17.06.2021.

5. Now coming to merits of issue, the contesting entries viz. 70051010 (as declared by the appellant) and 70052110 (as per the Assessing Authority) from the Customs Tariff are reproduced below:-

Upto 31.12.2019

7005	<i>Float glass and surface ground or polished glass, in sheets, whether or not having an absorbent, reflecting or non-reflecting layer, but not otherwise worked</i>
700510	<i>-Non-wired glass, having an absorbent, reflecting or non-reflecting layer:</i>
70051010	<i>---Tinted</i>
70051090	<i>---Other</i>
	<i>- Other non-wired glass:</i>
700521	<i>-- Coloured throughout the mass (body tinted) opacified, flashed or merely surface ground:</i>
70052110	<i>--- Tinted</i>



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It is pertinent to mention that w.e.f. 01.01.2020 (as amended vide Finance Act, 2019 and made applicable as per Notf.89/2019-Cus.(N.T.), dated 10.12.2019), the sub-heading 700521 was amended to read as under:- "--Coloured throughout the mass (body tinted), opacified, flashed or merely surface ground:"

Thus, specifically a comma was inserted in the said sub-heading. The said amendment was not given retrospective effect.

5.4.1 Chapter Note 2 of chapter 70 is reproduced below-

"2. For the purposes of headings 7003, 7004 and 7005:

(a)

(b)

(c) the expression "absorbent, reflecting or non-reflecting layer' means a microscopically thin coating of metal or of a chemical compound (for example, metal oxide) which absorbs, for example, infra-red light or improves the reflecting qualities of the glass while still allowing it to retain a degree of transparency or translucency; or which



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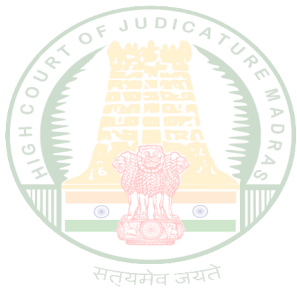


prevents light from being reflected on the surface of the glass.”

5.4.3 A Plain reading of CTH 7005 would reveal that 70010 covers non-wired glass having absorbent, reflecting or non-reflecting layer. A clear conclusion is that single clash entry after 70051090 i.e “-- other non-wired glass” would cover non-wired glasses without absorbent, reflecting or non-reflecting layer.

5.4.4 The Adjudicating Authority has held that CTH 700521 covers glass which may or may not have absorbent or reflecting or non-reflecting layer. The Adjudicating Authority has contended that the impugned goods are coloured throughout body (i.e. body tinted) and thus covered by CTH 700521 and articles of CTH 700521 may or may not have absorbent/reflecting layers. This interpretation itself is erroneous in light of scheme of CTH under 7005 and explanation given in 5.4.3 above.

5.4.5 It is settled position of law that burden of proof of classification is on the Department. The



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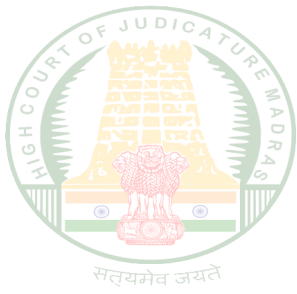
classification has been changed on the basis of Test Reports. I have carefully going through the copies of Test Reports from CGCRI, Kolkata. I find that said Test Reports are not conclusive enough to reject the declared classification by the Appellant. Rather, the said Reports do mention the presence of Layer. The exact findings of some of the Test Reports in this regard are as under:-

“c) The Tin Side is detected under UV illumination using tin detector.

i) An absorbent layer (Tin) is observed ion one side of the glass which is fluorescent under UV illumination.

j) The glass is found to be coated with ZnSO₄ film on opposite to tin side as protective layer.”

The Test Reports have clearly established that impugned goods were having absorbent layer (Tin) on one side. This fact is not disputed. Accordingly, I find absolutely no reason to exclude these goods from 700510 & classify them under 700521. Rather, the said goods viz. “Light Green Float Glass/Coloured Float Glass” with absorbent Layer of Tin on one side would



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merit classification under Sub-heading 7005 and more precisely under CTH 7001010.

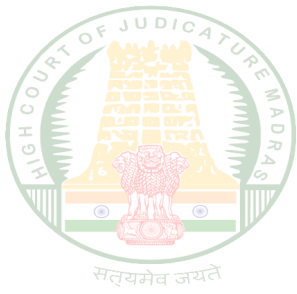
(emphasis added)

....

5.6 The classification issue in the favour of the appellant is further supported by the stand of other Assessing Authorities for the similar goods imported by the Appellant. For instance, they have submitted a copy of letter C.No.VIII(30)Cus/ICD DD/Gr-3/Asahi/106/2020 dated 25.03.2021 issued by the Assistant Commissioner (Gr.-3), Noida Customs, wherein it has been decided that the goods in question are liable to be classified under CTH 700510. A scanned copy of said letter is pasted below:-

5.7 As the declared classification of the appellant has been upheld, hence the benefit of S.No.934 of the Notification No.46/2011-Cus. Dated 01.06.2011 is held to be applicable. Consequentially the demand of differential duty does not survive. Accordingly, the interest liability under section 18(3) also does not survive. Thus, all the three impugned orders are liable to be set aside.

ORDER

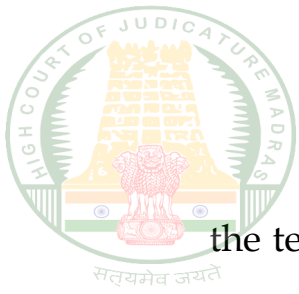


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6.0 In view of the above discussion and findings, the instant three (03) appeals filed against the respective OIO are allowed and the said Orders are set aside. The impugned bills of entry should be finalized and re-assessed with classification of impugned goods under CTH 70051010 with application of S.No.934 of Notification No.46/2011-Cus. Dated 01.06.2011, as amended, along with consequential relief, as per law.

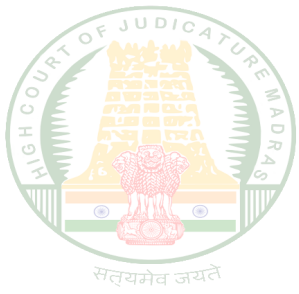
19. As is evident from the above extracts, the factual position in those appeals was that the Commissioner of Customs, Customs Audit Commissionerate, had accepted the petitioner's classification. Although a consultative letter was issued to the appellant imposing differential duty, it did not result in the issuance of a show cause notice. Therefore, the appellate authority noticed that the letter of the Commissioner of Customs, Customs Audit Commissionerate, was ignored by the adjudicating authority while issuing the order impugned therein on 04.09.2021. On the merits, the appellate authority recognised that the burden of the proof of classification is on the Customs Department. The appellate authority further examined the test reports from CGCRI, Kolkata and concluded that



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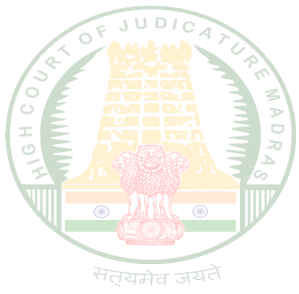
the test reports do not warrant rejection of the declared classification by the appellant. The appellate authority extracted the features / characteristics disclosed in the test report. Those features/characteristics are identical to the features/characteristics disclosed in test report dated 11.04.2023 as (c), (j) and (l). The appellate order was issued on 20.07.2022. The respondents have not placed any material on record to indicate that such appellate order was appealed against.

20. In effect, without filing an appeal, by initiating proceedings pursuant to the impugned show cause notice, the respondents are endeavouring to reopen an issue that was determined by the appellate authority in relation to the same goods on the basis of test results disclosing substantially similar characteristics of the goods. This course of action is in violation of the requirement that a subordinate authority should act in accordance with the conclusions of an appellate authority unless the order of such appellate authority is successfully challenged by approaching the Tribunal or High Court. This is the ratio of the decision in *Kamalakshi Finance*.



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21. As held in *Vicco Laboratories*, a show cause notice is not ordinarily interfered with in exercise of discretionary jurisdiction under Article 226. Nonetheless, such general rule is not without exception. One of the exceptions recognized in *Vicco Laboratories* is when a settled issue is sought to be resurrected. Moreover, in *Ashwani Pharmacy*, the Supreme Court held that a change in classification is not justified where the characteristics and composition of the product remain unchanged. In the case at hand, there has been no change in the characteristics or composition of the Relevant Goods or in the customs tariff headings. The classification of light green tinted float glass under CTH 70051010 was accepted by the appellate authority in the appeals referred to above. Without challenging such appellate orders in accordance with law, the same issue is sought to be resurrected in respect of the same party by issuing the impugned show cause notice on the basis of test reports that disclose substantially similar findings as the test reports that were relied upon in earlier proceedings. Therefore, this justifies interference. The issues relating to pre-notice consultation and the invoking of the enlarged period of limitation remain to be considered.



WEB COPY 22. The issuance of a notice prior to the show cause notice is regulated by the Pre-Notice Consultation Regulations, 2018 (the Pre-Notice Regulations). Significantly, the definition of “notice” in Regulation 2(c) thereof is restricted to a show cause notice under sub-section (1) of section 28. The petitioner received an audit consultative letter dated 01.05.2022 in respect of 35 bills of entry. While the said letter does not make express reference to the Pre-Notice Regulations, it makes express reference in paragraph 4 to waiver of show cause notice and penalty if payment is made pursuant to the audit consultative letter. This is a clear indication that the audit consultative letter was issued under sub-section (1) of section 28 because such waiver is provided in sub-section (2) of section 28 only in respect of proceedings under sub-section (1). The short-levy was computed at Rs.1,14,03,577/- in this document. Although the petitioner replied thereto on 11.05.2022 and asserted that the classification was valid for reasons set out therein, such reply and the subsequent letter dated 06.03.2023 were not taken into account while issuing the impugned show cause notice under sub-section (4) of



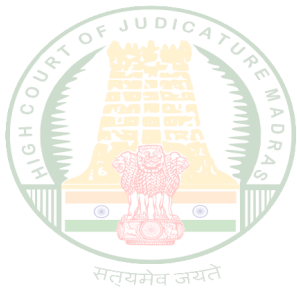
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section 28. This aspect assumes significance while examining the validity of the impugned show cause notice.

23. Section 28 of the Customs Act enables recovery *inter alia* of duty not levied or not paid or short-levied or short-paid. As per sub-section (1), recovery proceedings may be initiated by issuing a show cause notice within two years from the relevant date. Sub-section (4) empowers the proper officer to initiate recovery proceedings within five years from the relevant date where *inter alia* non-levy, non-payment, short-levy or short payment is on account of collusion, any wilful mis-statement or suppression of facts. Sub-section (4) and Explanation 1, in relevant part, are as under:

“(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -

- (a) collusion; or*
- (b) any wilful mis-statement; or*
- (c) suppression of facts*



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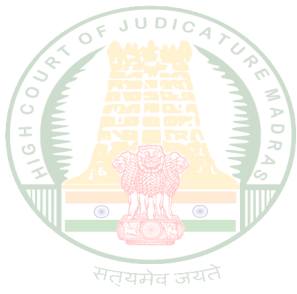
by the importer or the exported or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid pr which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

Explanation 1: For the purposes of this section, "relevant date" means,-

(a) in a case where duty is not levied or not paid or short-levied or short-paid or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;"

24. The show cause contains the following reasons for invoking section 28(4) of the Customs Act:

"26....The Customs department can scrutinize the documents after the clearance of goods for any short levy/non-levy as per section 28 of Customs Act, 1962 and take appropriate action to safeguard the revenue. It appears that the

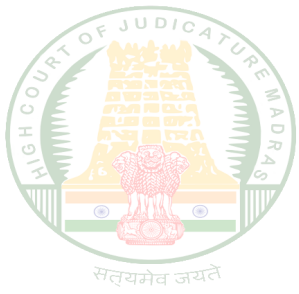


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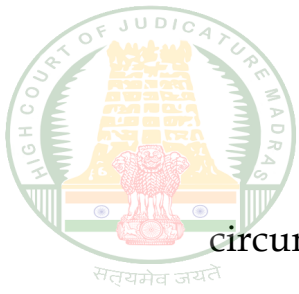
importer in this case had wilfully mis-classified the imported goods with a malafide intention to evade applicable customs duty by wrongfully claiming benefit under ASIAN-INDIA FTA vide notification no.46/2011-Customs.

27. The importer is in the business dealing in Glass for a long period and very well conversant with the manufacturing process of Float Glass. As the importer was aware of the fact that Tin layer would be invariably present while manufacturing of Float Glass and also there are other special methods of Coating a Float Glass like "Chemical Vapour Deposition", he would have known that the goods would not fall under CTH 7005.10. Hence, it appears that importer have wilfully/intentionally misclassified the goods CTH 70051010 and suppressed the relevant facts from department about the process involved in the manufacture of Float glass with an intent to evade the applicable customs duties. For their wilful suppression of facts and misstatement, the provisions under section 28(4) of the Customs Act 1962 appear to be rightly invocable in this case for demanding duty for the extended period...."



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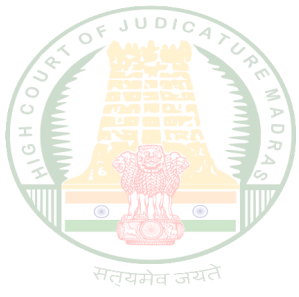
25. The admitted position is that the petitioner has imported light green float glass by classifying the same under CTH 70051010 since about 2011. The respondents did not question such classification by undertaking verification, and consequential reclassification under section 17 of the Customs Act. Earlier final assessments accepting the self-classification were not challenged. As discussed earlier, even appellate orders dated 20.07.2022 and 29.12.2022 accepting the petitioner's classification have not been challenged. While the impugned show cause notice refers to the audit consultative letter, it does not refer to the two replies thereto and wrongly records that no reply was received. No reasons were recorded for issuing the audit consultative letter under sub-section (1) of section 28 and, thereafter, issuing a show cause notice under sub-section (4) thereof. Out of the two test reports referred to in such show cause notice, even the report dated 30.03.2020, on which strong reliance is placed by the respondents to justify the show cause notice, records the observation that there is no absorbent layer other than the tin layer. The other more recent report dated 11.04.2023 refers to an “absorbent layer ... on the tin side of the glass”. When these facts and



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circumstances are considered cumulatively, invoking the enlarged period of limitation is erroneous and qualifies as an additional reason to interfere with the show cause notice.

26. In W.P.No.28462 of 2023, a direction is prayed for to clear light green float glass (tinted non-wired type) under CTH 70051010. Subject to the customs authorities being satisfied that the products sought to be imported are light green float glass (tinted non-wired type), clearance thereof should be permitted under CTH 70051010 unless the earlier classification by the customs appellate authority is reversed in further appeal. In W.P.No.28465 of 2023, the petitioner seeks a declaration that the classification adopted by it is correct. Such declaration would not ordinarily be granted in proceedings under Article 226 because it would entail detailed examination of the characteristics of the goods, including by subjecting such goods to testing, and other factual issues. Since the review undertaken in this jurisdiction is confined to the decision making process, this request cannot be countenanced merely on the basis of decisions made in other fora on the classification of light green float glass.



WEB COPY 27. In the result:

(i) W.P.No.28456 of 2023 is allowed by quashing the show cause notice bearing SCN No.74 / 2023 dated 07.08.2023.

(ii) W.P.No.28462 of 2023 is disposed of by directing the respondents to clear goods labelled as Light Green Float Glass (tinted non-wired type) under CTH 70051010 subject to being satisfied that the consignments actually contain light green float glass (tinted non-wired type). Such direction is, however, subject to the appellate orders accepting the classification under CTH 70051010 in respect of the above goods not being reversed in further appeal.

(iii) W.P.No.28465 of 2023 is dismissed for reasons set out in this order. No costs.

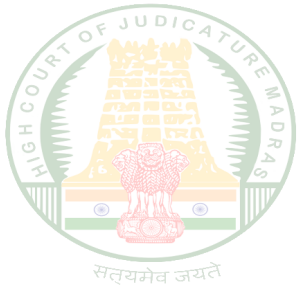
30.08.2024

Index : Yes/No

Internet : Yes/No

Neutral Citation : Yes/No

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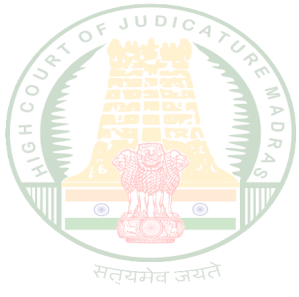


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To

1. Deputy Commissioner of Income Tax,
TDS Circle 2(1),
BSNL Building No.120,
Greens Road, Chennai,
Tamil Nadu - 600 006.

2. The Commissioner of Income Tax, TDS,
BSNL Building No.120,
Greens Road, Chennai,
Tamil Nadu-600 006.

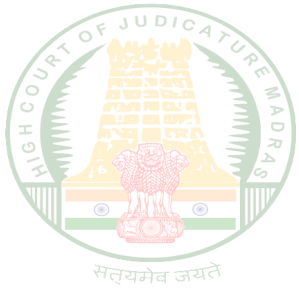


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SENTHILKUMAR RAMAMOORTHY J.
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Pre-delivery order made in
W.P.Nos.28456, 28462 & 28465 of 2023
&
WMP Nos.27998, 27999 & 28000 of 2023 & 8522 of 2024



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30.08.2024