

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

Customs Appeal No. C/64 of 2010

**Arising out of Order-in-Appeal No. 596(GR.IV)2009(JNCH)/IMP-219,
Dated: 28.10.2009**

Passed by the Commissioner of Customs (Appeals) Nhavasheva

Date of Hearing: 24.01.2019

Date of Decision: 24.05.2019

**ADVANCE LAMINATES PVT LTD
SURVEY NO 282, PLOT NO 1
SHAPPAR VILLAGE ROAD
TAL. KOTDA, RAJKOT, GUJARAT**

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
NHAVASHEVA JAWAHARLAL NEHRU CUSTOM HOSE
POST URAN, DIST. RAIGAD, NHAVA SHEVA**

**Appellant Rep by: Shri J C Patel, Adv.
Respondent Rep by: Shri S R Nair, EO, AR**

**CORAM: C J Mathew, Member (T)
Suvendu Kumar Pati, Member (J)**

Cus - The issue which has come up to the Tribunal stage in second round of litigation is refusal of Commissioner (A) to grant benefits of Notfn 71/2009-Cus. to the assessee exempting Safe Guard duty on import of aluminium foil - Admittedly notfn 71/2009 exempted colour laminated aluminium foil from Safe Guard duty w.e.f. 23-03-2009 and "assessee's" import was made and goods were cleared in between the two dates but none of the documents produced before Customs Authorities for customs clearance reveal the description of item was colour coated aluminium foil - There is no such occasion at the time of clearance to draw representative sample, as there was no dispute concerning application of Safe Guard duty on imported goods which occurred due to subsequent notification with retrospective effect - Assessee also produced a sample foil before this Tribunal and as found from the order of Commissioner (A), sample piece was also produced before him during hearing of appeal but that by itself cannot establish links between imported goods and sample produced by assessee, besides the fact that production of additional evidence/Exhibits before Tribunal is subjected to Rule 23 of CESTAT procedure rule that has not been followed by assessee - Assessee also has not sought permission from this Tribunal, as described in Rule 23 of CESTAT procedure Rules, to produce such document at the appeal stage nor was asked by Tribunal to produce the same, for which it could not be taken as a piece of evidence - Further the certificate does not bear any date of issue to substantiate that it was

obtained by assessee before or during hearing of appeal by Commissioner (A) - More importantly, the said certificate does not reveal that "colour coated aluminium foil" were shipped to the assessee since shipment category mentioned in certificate is "roll aluminium foil/coil colour and polyester (PE) coated" - The use of "slash" between two categories of goods brings confusion as to which of those two categories was imported vide invoice under reference - More importantly, the annexed document to such certificate containing description of goods indicated that it was of "silver colour" which is usually the colour of normal aluminium foil - Assessee failed to substantiate with cogent evidence that it had imported "colour coated laminated aluminium foils" to make it eligible for exemption from Safe Guard duty - The impugned order is upheld: CESTAT

Appeal dismissed

FINAL ORDER NO. A/85969/2019

Per: Suvendu Kumar Pati:

1. The narrow compass in which the issue has come up to the Tribunal stage in this second round of litigation is the refusal of Commissioner of Customs (appeals), Mumbai, Zone-II, JNCH, Nhava Sheva to grant benefits of Notification No. 71/2009-Cus. to the Appellant exempting Safe Guard duty on import of aluminium foil.
2. Factual backdrop of the case is that Appellant, a manufacturer of laminated sheets including laminated sheet of metal finish, imported aluminium foils from China vide Bill of Entry no. 844515 dated 06-04- 2009 which was duly assessed. Subsequently vide order dated 15-04- 2009, Safe Guard Duty @35% vide notification no. 26/2009 Cus dated 23-03-2009 was imposed on Appellant which was also duly discharged by it. Subsequent notification 71/2009 dated 19-06-2009 was issued by the Government of India, Ministry of Finance exempting Safe Guard duty on colour coated aluminium foil w.e.f. the date of notification no. 26/2009 i.e. dated 23-03-2009. Appellant filed appeal before the Commissioner Customs (Appeals) to grant benefit of exemption notification to the appellant but the same was refused to the Appellant. Rejection order passed by the Commissioner Customs (Appeals) is assailed before this Tribunal.
3. On perusal of the order of Commissioner Customs (Appeals), it is noticed that he had rejected the appeal primarily on three grounds: First; Invoice, packing list and Bill Of Landing did not disclosed that imported goods were colour aluminium foils as it was mentioned as "aluminium foil" only in those documents; Second; Appellant failed to establish that imported goods were colour coated aluminium foils; Third; sample shown by the appellant was not representing piece of sample as not collected from the imported goods itself at the time of clearance.
4. In the memorandum of appeal and during hearing of appeal, Learned Counsel for appellant submitted that all variety of aluminium foil falls

under CTH7607 but colour coated aluminium foil are not manufactured in India, for which Safe Guard duty was not supposed to be levied and realising the facts that import of colour coated aluminium foil could not threaten or cause domestic market disruption, subsequent notification no. 71/2009 was issued exempting safe guard duty on colour coated aluminium foils.

5. He also submitted that as at the time of assessment of goods, all types of aluminium foil were subjected to Safe Guard duty in terms of notification no. 26/2009, appellant's consignment though was undisputedly colour coated aluminium foil, there was no reason available for drawing sample at the stage of clearance for which representative samples of the imported goods were not available but overseas supplier M/s. Zhejiang GKO Decoration Material Co. Ltd. of China had issued a certificate stating that imported goods under dispute was "colour coated aluminium foil" and going by the website of the supplier's company, particular type of aluminium foil imported by the appellant can be ascertained as item description no. JK-006 which was colour aluminium foil, for which the order passed by Commissioner Customs (Appeals) rejecting appellant's prayer is required to be set aside. Learned Authorised Representative for the respondent department supported the reasoning and rationality of the order passed by the Commissioner Customs (Appeals) and sought no interference by the Tribunal.

6. We have heard the issue at length and perused the case record. Admittedly notification no. 71/2009 dated 19-06-2009 exempted colour laminated aluminium foil from Safe Guard duty w.e.f. 23-03-2009 and "Appellant's" import was made and goods were cleared in between the two dates but none of the documents produced before the Customs Authorities for customs clearance reveal the description of item was colour coated aluminium foil. Admittedly there no such occasion at the time of clearance to draw representative sample, as there was no dispute concerning application of Safe Guard duty on the imported goods which occurred due to subsequent notification with retrospective effect. Appellant also produced a sample foil before this Tribunal and as found from the order of Commissioner of Customs (Appeals), sample piece was also produced before him during hearing of the appeal but that by itself cannot establish links between imported goods and sample produced by the Appellant, besides the fact that production of additional evidence/Exhibits before the Tribunal is subjected to the Rule 23 of CESTAT procedure rule that has not been followed by the Appellant.

7. Appellant claims that overseas supplier had issued certificate to the effect that colour aluminium foils were imported by it vide invoice dated 03-06-2009 but no reference is found in the order of Commissioner Customs (Appeals) that such certificate was produced before him during hearing of the appeal by him. Appellant also has not sought permission from this Tribunal, as described in Rule 23 of CESTAT procedure Rules, to produce

such document at the appeal stage nor was asked by the Tribunal to produce the same, for which it could not be taken as a piece of evidence. Further the certificate does not bear any date of issue to substantiate that it was obtained by the appellant before or during hearing of the appeal by the Commissioner Customs (Appeals). More importantly, the said certificate does not reveal that "colour coated aluminium foil" were shipped to the appellant since shipment category mentioned in the certificate is "roll aluminium foil/coil colour and polyester (PE) coated". The use of "slash" between two categories of goods brings confusion as to which of those two categories was imported vide invoice under reference. More importantly, the annexed document to such certificate containing description of goods indicated that it was of "silver colour" which is usually the colour of normal aluminium foil. We, therefore, considered one of the view that the appellant failed to substantiate with cogent evidence that it had imported "colour coated laminated aluminium foils" to make it eligible for exemption from Safe Guard duty. Hence the order.

8. The appeal is dismissed and order no. 596(GR.IV)2009(JNCH)/ IMP-219 dated 28-10-2009 passed by the commissioner is hereby confirmed.

(Order pronounced in the court on 24.05.2019)