



OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE: MUNDRA, KUTCH
MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421
Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62

A	File No.	VIII/48-32/Adj/COMMR/2015-16
B	Order-in-Original No.	MCH/PR. COMMR./PVR/ 03 /2016-17
C	Passed by	Shri PVR Reddy, Principal Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D	Date of Order	30.6.2016
E	Date of Issue	14.7.2016
F	SCN NO. & Date	SCN No. S/43-02/SIIB/2012-13/Jindal Dated 29.06.2015
G	Noticee / Party / Importer / Exporter	M/s. Jindal Saw Limited, Survey no. 92/2, 7/2 & 93-part, Nanakapaya, Taluka- Mundra, Dist-Kutch, Gujarat-370415.

1. This Order-in-Original is granted to the concerned free of charge.
2. Any person aggrieved by this Order-in-Original may file an appeal under Section 129 A(1) (a) Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C.A. -3 to :
" Customs & Excise & Service Tax appellate Tribunal, West Zonal Bench, O-20 Meghaninagar, New Mental Hospital Compound, Ahmedabad 380 016 ".
3. Appeal shall be filed within three months from the date of communication of this order.
4. Appeal should be accompanied by a fee of Rs.1000/- in case where duty, interest, fine or penalty demanded is Rs. 5 Lakh (Rupees Five Lakhs) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 Lakh (Rupees Five Lakh) but less than 50 Lakh (Rupee Fifty Lakh) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 Lakh (Rupees Fifty Lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on the branch of any nationalized bank located at the place where the bench is situated.
5. The appeal should bear court fee stamp of Rs. 5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs. 0.50 (Fifty paisa Only) as prescribed under schedule-I, Item 6 of the Court Fees Act, 1870.
6. An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.
7. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
8. While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

Sub: SCN No. S/43-02/SIIB/2012-13/Jindal dated 29.06.2015 issued to M/s. Jindal Saw Limited, Survey no. 92/2, 97/2 & 93-Part, Nanakapaya, Taluka-Mundra, Dist-Kutch, Gujarat-370415., in the matter of import of "BORSTAR HE3450 HD POLYETHYLENE".

Brief Facts of the case:

M/s. Jindal Saw Limited, Survey No. 92/2,97/2 &93-part, Nanakapaya, Taluka-Mundra, Dist-Kutch, Gujarat-370415 (hereinafter referred to as "M/s.Jindal" for the sake of brevity) are engaged in the manufacturing activity of Carbon Steel & Stainless Steel Pipes, which are to be used in Gas/Oil/Water Pipe Lines. They are also registered with Central Excise Department. They are using imported HDPE for the purpose of coating of the pipes manufactured by them to enhance the life of their product.

2. On examining the copies of Bills of Entry filed by M/s Jindal against the goods imported, it appeared that M/s. Jindal had imported mainly all the consignments of HDPE from a single supplier i.e. M/s. Borouge Pte Limited. In all the import consignments, description of the goods was mentioned as "BORSTAR HE3450 HD POLYETHYLENE". M/s. Jindal had classified their product under CTH 39012000 of Customs Tariff Act, 1975 and, accordingly claimed benefit of concessional rate of duty by way of classifying their product at Sl. No. 477 of Notification No.21/2002-Customs dated 01.03.2002 as amended from time to time. However, as per the Test Certificate/Certificate of Analysis/Mill Test Certificate submitted by M/s. Jindal, the said imported goods (all consignments) were containing the "Carbon Black". Therefore, the investigation of the case has been conducted as per the details of product shown on the webpage of supplier M/s. Borouge Pte Limited as mentioned in the Show Cause Notice and the statement dated 12.07.2012 of Shri Bharat Pratapji Parihar, Executive (Customs & Shipping) of M/s. Jindal Saw Ltd was recorded under Customs Act, 1962. The investigation revealed that the subject goods were containing Carbon Black around 2% and more and, accordingly, the imported goods viz "Borstar HE3450 HDPE" was chemically mixed with another element i.e. "Carbon Black" and, therefore, it had become "Compounded HDPE" in as much as Sl. No. 477 of Notification No. 21/2001-Cus dated 01.03.2002 is so specific that even the polymers mentioned in the column of descriptions of goods such as LDPE and LLDPE at Point No (i) and (ii) in the column of said notification have been differentiated from each other and, similarly HDPE and LLDPE at Point No. (iii) and (iv) of the same have also been differentiated, even though the difference between each other is only the linear arrangement of CH Polymers. The said fact of containing carbon black in the imported goods has also been confirmed by Shri Bharat Pratapji Parihar in his recorded statement dated 12.07.2012. Thus, the Compounded HDPE which is chemically different from HDPE, could not be covered under Sl. No. 477 of the said Notification.

(3) From the facts and circumstances mentioned hereinabove, it appeared that M/s. Jindal had knowingly suppressed the material facts from the department, that the goods in question were not "HDPE" but a "Compounded HDPE", in order to avail the exemption wrongly, which is otherwise not admissible to them. Accordingly,

they had mis-declared the goods as "HDPE" in their import documents with an intention to evade payment of appropriate Customs Duty by way of suppression of facts and thereby contravened the provision of Customs Act, 1962 and the rules made there under. Therefore, the duty short paid by them is recoverable under the provisions of erstwhile sub-Section (1) and now under sub-Section (4) of Section 28 of the Customs Act, 1962 by invoking the extended period of five years. All these acts of contravention on their part rendered the goods imported by them during the period from 01.07.2010 to 26.04.2013 liable for the confiscation under Section 111(m) of the Customs Act, 1962. They are also liable to pay interest at appropriate rate for delayed payments as per provisions of Section 28AA of the Customs Act, 1962 and also liable for imposition of penalty under the provisions of Section 112(a) of the Customs Act, 1962, in as much as they appeared to have suppressed the facts with an intent to evade a payment of duty and hence rendered themselves liable for penalty under provisions of Section 114A of the Customs Act, 1962.

(4) Therefore, a Show Cause Notice bearing F.No.S/43-02/SIIB/2012-13/Jindal dated 29.06.2015 was issued to M/s Jindal Saw Limited, proposing a demand of differential duty of custom amounting to Rs.3,38,29,784/- along with interest, penalty and confiscation of goods under Customs Act,1962.

DEFENCE:

(5) In the defense reply dated 10.08.2015 M/s. Jindal Saw Ltd contended that notice issued to them was illegal, without jurisdiction and besides barred by limitation and unsustainable on facts and in law; that Shri Bharat Prajapati Parihar, whose statement was relied upon in the SCN, was neither technically nor commercially competent or qualified in regard to chemical composition or carbon contents of the imported goods as he had no knowledge of the subject; that they had correctly paid appropriate duty of custom on the imported goods; that final assessments of all the bills of entry have already been made by the assessing officer; that the department has not drawn any samples of the imported goods nor any chemical examination by the authorized chemical examiner has been made; that the notice is barred by the limitation; that they are an 100% EOU and imported goods HDPE for coating of pipes in their EOU which is entitled to exemption from duty of Customs under Notification No. 53/2003-Cus dated 22.07.2003; that in respect of imports which are exempted from duty in the hands of the importer, there could be no allegation of willful intent to evade duty and, therefore, the notice has been wrongly issued; that in case of M/s Ratnamani Metals on the identical issue Tribunal vide final order A/10203/WZB/ AHD/2013 dated 01.01.2013 has given decision in their favour; that the orders of the Tribunal are binding on the Revenue; that the foreign supplier of the imported goods has

given complete details of the goods supplied including chemical contents; that since they are not liable to pay differential duty no question of levy of penalty arise.

PERSONAL HEARING:

(6) A personal hearing of the case was held on 28.03.2016, wherein Shri Thangarajan, DGM of M/s. Jindal Saw Ltd., had attended the same. He had reiterated the submissions made in their reply to the SCN. He also cited the case laws which are in their favour on identical issue and requested to drop the proceedings as there is no duty since the clearances were meant for 100% EOU.

DISCUSSIONS AND FINDINGS:

(7) I have carefully gone through the facts of the case mentioned in the show cause notice, defense reply and submissions made by M/s Jindal during the course of personal hearing. The mute point is to decide in the present case is whether the imported HDPE Grade HE 3450 is treated as high density ethylene polymer and satisfies the description as mentioned in Sl. No. 477 of Notification No.21/2002-Cus for the exemption.

(8) I may refer Notification No. 21/2002-Cus dated 01.03.2002, the relevant portion of which is reproduced hereunder.

Sl. No.	CTH	Description of goods	Rate of Duty
477	3901	The following polymers of ethylene namely:-	5%
		(i) Low density polyethylene (LDPE)	5%
		(ii) Linear Low density polyethylene (LLDPE)	5%
		(iii) High density polyethylene (HDPE)	5%
		(iv) Linear Medium density polyethylene (LMDPE)	5%
		(v) Linear High density polyethylene (LHDPE)	5%
559	3901 to 3915 (except) 3908	All goods	7.5%

9. As per the above notification the goods falling under Chapter Tariff Heading 3901 at Sl. No. 477 extends exemption to polyethylene of high density attracts duty @ 5%. However, the goods that fall under CTA 3901 to 3915 (except) 3908 at Sr.No.559 attract duty @ 7.5%.

10. In the present case the allegation in the SCN that M/s Jindal Saw Ltd has imported the goods, which are not explicitly denied to be HDPE but the blend of HDPE with 2% added carbon black and hence the new product emerged is an "compounded HDPE" and, therefore, denied the exemption under Sr. No. 477 of the exemption Notification 21/2002-Customs dated 01.03.2002.

11. On going through the description of goods disclosed by M/s Borough Pte Ltd on their webpage it observes that the product Borcoat HE3450 is a black, high density polyethylene having physical properties i.e. typical value of 942 kg/m³ in terms of Base resin and 952 kg/m³ in terms of its compound. It contains carbon black added to polyethylene. I have also noted the object of said product to absorb ultraviolet radiation which otherwise causes the material to degrade.

12. As per CTA, the polyethylene having a specific gravity of 0.94 or more does fall under SH 390120 00. The goods, other than that of said one having less gravity of 0.94 viz LDPE and LLDPE of Chapter Heading 390110 and LMDPE of Chapter 39019 all are exempted and charged to 5% BCD in terms of Sr. No. 477 of the said notification. However, the remaining products other than that of polyethylene of the said Chapter Heading are covered under Sr. No. 559 of the same. In the present case as per the description of goods mentioned, predominance of polyethylene cannot be denied, in as much as the investigation has not brought any cogent evidence on record to prove the product other than that of said Chapter Heading of 3901. Also I do not find any scope of classifying the said product described as compounded HDPE as proposed in the SCN other than that of the goods classified above due to predominance of polyethylene. Thus, on the basis of above observations I find the subject Show Cause Notice deserves to be vacated.

13. M/s Jindal in their defense reply has referred and relied upon the decision of Hon'ble Tribunal, Ahmedabad vide Order No. A/10203/WZB/ AHD/2013 dated 01.01.2013 in the case of M/s Ratnimani Metal and Tubes, wherein the benefit of Notification No. 21/2002-Cus as Sr. No. 477 has been extended to the imported goods i.e. HDPE with added carbon black. The relevant extracts of the said order is reproduced below:

8. After hearing both the parties in great details, we find that the Ld. Commissioner has taken a view that adding a carbon black results in chemically modifying the HDPE. It is not the case of the appellant that, addition of carbon black does not result in any chemical modification. The carbon black is added for the purpose of colour and strength. The appellant also submits that only chemically modified polymers are different and otherwise, they are to be treated as HDPE. Further, they also submitted that the test certificate given by the supplier clearly indicate that the goods are not chemically modified HDPE. In our opinion, the lower authorities have not been fair. On the one hand, they relied upon the test certificate of the supplier to hold that addition of carbon black results in chemical modification, ignoring the specific statement of the supplier that there is no chemical modification. Having relied upon the test certificate for coming to one conclusion, the whole test certificate should have been taken into consideration. Moreover, no technical literature or opinion has been produced either by the appellant or by the revenue in support of their case. The Revenue has not got even the test certificate from the Government laboratory which was essential in this case. Whether the product is a chemically modified HDPE or not and whether it is known as HDPE in the market, has not been considered at all. In the absence of test conducted by the Government controlled laboratory, if the test report of the supplier is

relied upon, it has to be fully considered. The Revenue has not applied even the trade parlance test.

9. *At this stage, it may be worthwhile to note that in the case of M/s Plastic Colour Corporation, the assessee was engaged in making shipping compounds by adding 2.5% carbon black HDPE granules. This activity was finally held to be not amounting to manufacture and the matter has reached finding like Hon'ble Supreme Court which held it so.*

10. *In the absence of any support for the conclusion that the product imported by the appellant has been chemically modified or it is not known as HDPE in the market, the benefit of exemption under Sr. No.477 has to be extended to the appellant.*

11. *In the result, the appeal is allowed with consequential relief, if any, to the appellant."*

14. Moreover, no appeal has been filed by the department against the said order of Tribunal, and thus the same has attained finality.

15. Thus, considering the decisions at para supra being an identical to the present facts of the case I do not find any reason to deny the benefit of Sr. No. 477 of the notification No. 21/2002-Cus to the imported goods i.e. HDPE with added carbon black.

16. In view of the above discussions and findings I pass the following order:

ORDER

I drop the proceeding initiated against M/s. Jindal Saw Limited, Taluka Mundra, Kutch, in the matter of import of "BORSTAR HE3450 HD POLYETHYLENE" vide show cause notice no. F. No. S/43-02/SIIB/2012-13/Jindal dated 29.06.2015.



(P.V.R. Reddy)
PR. COMMISSIONER
CUSTOM HOUSE, MUNDRA

F. No. VIII/48-32/Adj/COMMR/2015-16

Mundra, Dated 30.06.2016

BY SPEED POST

To
M/s. Jindal Saw Limited,
Jindal City, Tal.Anjar,
Dist.Kutchh.

Copy to:

1. The Chief Commissioner of Customs, Customs Zone, Ahmedabad.
2. The Deputy Commissioner (Review), CCO, Ahmedabad.
3. The AC (Recovery) | AC (Gr-II), Custom House, Mundra.
- ✓ 4. The Dy.Commissioner(EDI)for uploading this order on Commissionerates Website.
5. Guard file.