



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/48-34/Adj/COMMR/15-16
B	Order-in-Original No.	MCH/PR. COMMR./PVR/ 02 /2016-17
C	Passed by	Shri PVR Reddy, Principal Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D	Date of Order	29.06.2016
E	Date of Issue	14.07.2016
F	SCN NO. & Date	SCN No. S/43-02/SIIB/2012-13/Man Industries dated 24.06.2015
G	Noticee / Party / Importer / Exporter	M/s. Man Industries (India) Limited, Village Khedoi, Taluka Anjaar, District Kutch.

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 paise 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/Man Industries dated 24.06.2015 issued to M/s. Man Industries (India) Limited, Village Khedoi, Taluka-Anjar, Dist-Kutch, Gujarat, in the matter of import of “BORSTAR HE3450 HD POLYETHYLENE”.

Brief Facts of the case:

M/s. Man Industries (India) Limited, Village Khedoi, Taluka-Anjar, Dist. Kutchh (hereinafter referred to as "M/s.MIL" for the sake of brevity) are engaged in the manufacturing activity of 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 MIL against the goods imported, it appeared that M/s. MIL 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. MIL 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. MIL, 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 Abhilesh S Ojha, Vice President of M/s. MIL was recorded under Customs Act, 1962. The investigation revealed that the subject imported goods were compounded HDPE only which they have mis-declared the same as "HDPE" in order to avail the benefit of exemption. The goods imported by M/s MIL were not a virgin HDPE and the same were consisting of Carbon Black which reacts very positively with anti-oxidants to produce a highly stable material that is far more resistant to degradation by UV and sunlight.

(3) From the facts and circumstances mentioned hereinabove, it appeared that M/s. MIL 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/Man dated 24.06.2015 was issued to M/s MIL 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) M/s MIL vide letter dated 24.06.2015 requested for extension of time period for filing the reply. However, they have not submitted their defense reply.

PERSONAL HEARING:

(6) A personal hearing of the case was held on 03.02.2016, wherein Shri Vikas Solanki and Shri Ganesh Tiwari appeared on behalf of M/s MIL and submitted the copies of details of evidence and citations relied upon.

DISCUSSIONS AND FINDINGS:

(7) I have carefully gone through the facts of the case mentioned in the show cause notice and submissions made 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%

09. 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 MIL 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 absorbs 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 LLDP of Chapter Heading 390110 and LMDPE of Chapter 39019 all are charged to concessional rate of duty at 5% 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, the 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 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. As relied upon by the notice I have also gone through the decision of Tribunal held in the case of M/s Ratnamani Metal and Tubes Ltd. vide Final Order No. A/10203/WZB/AHD/2013 dated 01.01.2013. The Hon'ble Tribunal has extended the benefit of Sr. No. 477 of the notification No. 21/2002-Cus to the imported goods i.e. HDPE with added carbon black. The relevant extract in the case of M/s Ratnamani Metal and Tubes Ltd 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. The said decision has been relied upon in the case of M/s PSL Ltd 2013(9)TMI 548-CESTAT, Mumbai.

15. Reliance is placed on the following decisions where the definition of primary forms as defined in HSN explanatory Notes were taken into account and it was held that the exemption is available:

- i) CCE vs. Berger Paints India Ltd. 2001 (131) ELT 50
- ii) Polyester Moulding Co. Pvt. Ltd. vs. CCE 2001 (129) ELT 699

16. 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 concessional rate of duty at 5% in terms of Sr. No. 477 of the notification No. 21/2002-Cus to the imported goods i.e. HDPE with added carbon black.

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

18. In view of above, I pass the following order.

ORDER

I drop the proceeding initiated against M/s. Man Industries (India) Limited, Village Khedoi, Taluka-Anjar, Dist. Kutchh in the matter of import of "BORSTAR HE3450 HD POLYETHYLENE" vide show cause notice no. F. No. S/43-02/SIIB/2012-13/Man Industries dated 24.06.2015.



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

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

Mundra, Dated: 29.06.2016

BY SPEED POST

To
M/s. Man Industries (India) Limited,
Village Khedoi, Taluka-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.