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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% DECIDED ON: 23.01.2017

\+ W.P. (C) 577/2013

WISHALL INTERNATIONAL ..... Petitioner
Through: Mr. P.V. Saravana Raju with Mr. A. Garg, Advocates.

Versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Harpreet Singh, Advocate for Resp-2&3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S.RAVINDRA BHAT, J.

1. The petitioner, a Chennai based unit filed a shipping bill on 15.5.2003 to export the consignment declared as *"ladies leather sandals*" claiming drawback applicable to Sl.No.64.06 of the relevant customs duty Drawback schedule. At the instance of Special Investigation Bureau of the Customs in New Delhi, the goods were considered *"chappals"* and not *"sandals"* as declared. To clarify and ensure proper description of the goods, the petitioner forwarded samples to the Council of Leather Exports, New Delhi by letter dated 19.5.2003. The Regional Director of the Council for Leather

Exports after examining the goods issued a certificate which is quoted below:

"CLE/NR/CUSTOMS/2002-03/136 May 19, 2003

<u>TO WHOM IT MAY CONCERN</u>

M/s. Wishall International No.13 (Old No.7) Balaji Nagar, First Main Road, Ekkatuthangal, Guindy, Chennai- 600 097, are one of our member-exporters of Leather Footwear. They have secured export order for the Ladies Leather Sandals without back-strap but with heel thickness of more than 10 mm, as per attested samples of the product sent herewith which falls under ***Chapter 64 serial No.64.06 "Leather Sandals, namely, for Gents/Ladies/Children" of the Drawback Schedule for 2003-04 (effective from 1st April, 2003),*** *as per the Ministry of Finance, Department of Revenue (DBK Commissionerate)* ***letter No.609/25/2002-DBK dt. 30th January, 2002 (copy enclosed for ready reference).***

It is requested that their export consignment may kindly be cleared accordingly.

S/d
(R.K. Pandey)
REGIONAL DIRECTOR"

2. The Superintendent SIIB Customs addressed the Council for Leather Exports on 16.7.03 seeking opinion for the categorization of the product. The Council for leather exports, forwarded the sample to Footwear Design and Development Institute. The institute by its letter dated 13th October 2003 stated that the export goods fell under the category of *"chappal"*

covered under Sl.No.64.10 of the drawback schedule. The letter of the Institute reads as follows:

"ALOK SINHA (I.A.S.)
Managing Director

To,
The Regional Director
Council for Leather Exports, 6F&G, Gopala Towers,
Rajendra Palace, New Delhi 110008.

October 13, 2003

Subject: Classification of leather chappals & sandals for drawback purpose.
Ref.: Letter dated Sep.23,2003 from CLE regarding above-mentioned subject

Dear Mr. Pandey,
Pls refer to your lleter no.CLE/NR/CUSTOMS/2003-04/ dated Sep.23, 2003 regarding classification of the articles (02 nos) as 'Chappal' or 'Sandal'.
We had gone through the articles provided by you as per circular number 8/2002-cus dated 30th Jan.2002.
We therefore, conclude that provided articles Fall under the category of 'Chappal' covered under Sl.No.64.10.
Regards,
Alok Sinha"

3. Based on this opinion of Footwear Design and Development Institute, a Show Cause Notice was issued to the petitioner on 20.5.2005 asking it why an amount of ₹1,30,800/- claimed, erroneously sanctioned and paid as differential duty drawback should not be recovered along with interest @15% p.m. and why the amount of ₹2,935/- in draw back account no.187925 maintained at Punjab national Bank MCH should not be

appropriated towards the drawback amount paid and recoverable from the petitioner. The notice also proposed penalty under Section 114 of the Customs Act.

4. The petitioner replied to the show cause notice and was afforded personal hearing. Thereafter, the Additional Commissioner passed the Order-in-Original on 16.12.2009 confirming recovery of drawback of ₹1.3 lakh and appropriated an amount of ₹2,935/- lying in balance in the drawback account at the Punjab National Bank, New Delhi. He also imposed a penalty of ₹1.25 lakh under Section 114 of the Customs Act.

5. The petitioner was aggrieved by the Order-in-Original and preferred an appeal to the Collector of Customs (Appeal). That appeal was rejected on 31.08.2010. It, therefore, preferred a revision application to the Central Government under Section 129DD of the Customs Act. This was rejected by the impugned order dated 12.03.2012. The reasoning of the Central Government is contained in the following extracts of its order: -

> *"7. Government observes that the applicant sought to export the goods by declaring the same as ladies leather sandals under DBK Sr.No.64.06 attracting 10% of Drawback. The goods were examined 100% and representation samples were sent to FDDI, Noida for their opinion. FDDI, Noida vide its letter dated 13.10.2003 stated that goods fell in the category of chappals under heading 64.10 and hence, attracts Drawback @5%. Meanwhile, the applicant also submitted a certificate issued by Council of Leather Export (CLE) who opined vide their letter dated 19.05.2003 that the goods fell under category of leather sandles. Due to difference of opinion, the Regional Director, CLE, New Delhi was summoned to give his voluntary statement under section 108 of the Custom Act, 1962, who opined that FDDI were better equipped to deal with the technical matters and their opinion prevails over any other opinion. Accordingly, original authority after following due*

process of law vide impugned Order-in-Original ordered for recovery of erroneously sanctioned Drawback along with applicable interest and also imposed penalty upon applicant. Commissioner (Appeal) upheld impugned Order-in-Original. Now, applicant has filed this Revision Application on the ground mentioned in para (4) above.

8. Government notes that the department had drawn the representative sample from export assignment and referred the matter to the office of the FDDI, Noida, for their opinion as to whether the goods covered vide impugned Shipping Bill were Sandles or not. FDDI, Noida vide their letter dated 13.10.2003 stated that the impugned goods were not covered under the category of sandals. Meanwhile, the applicant also submitted a report from C.L.E., New Delhi. Stating that the goods covered vide impugned Shipping Bill were Sandles. However, Government notes that such opinion was given on the goods presented by applicant and not on the basis of samples, which were drawn from the impugned export consignment by department. As such, veracity of this report with respect to goods in question cannot be accepted. Further, the Regional Director, CLE opined that the FDDI being specialized body, their opinion prevails over others. Government notes that there is categorical opinion which clearly states that the goods were not Sandals. Such reports are based on the basis of examination of representative samples of impugned goods and hence, veracity of the same cannot be questioned. The subsequent opinion given by FDDI on the basis of samples forwarded by CLE cannot be made applicable to this case as sample sent by CLE to FDDI were not drawn from the export consignment in question. This is not case, wherein, there are two contradictory report of same representative samples. Under such circumstances, opinion of FDDI, Noida, which is based on observation of representative samples, is rightly accepted. In view the said position there remains no contradiction in opinion of CLE & FDDI, and therefore the cross examination of Shri Alok Sinha, IAS would have served no purpose. As such, Commissioner (Appeals) has rightly

> *denied his cross-examination. In view of above circumstances Government observes that goods were rightly classified and drawback schedule Sr.No.64.10 as chappals."*

The Central Government granted limited relief, however, in respect of the penalty imposed; it reduced it to ₹10,000/-.

6. The petitioner argues that the classification adopted in all previous years was consistent with trade understanding with respect to the goods, i.e., leather sandals. The circumstance that they did not contain strap in any way did not detract from the fact that they were known to the man of commercials and the users as "sandals". It is argued importantly that the opinion of the Leather Export Council was not based upon documentary appraisal but in fact after examination of the tests samples. The Council of Leather Exports itself is an expert body and routinely deals with articles including clothing and footwear and in a best position to appraise the goods in question. In rejecting this summarily, the FDDI's opinion could not have been preferred. Furthermore not according an opportunity to the petitioner to cross-examine and/or question the expert apropos the FDDI's opinion would cast a doubt on the validity of the opinion itself.

7. Counsel for the Revenue urges that this Court should not exercise its discretionary jurisdiction to upset findings of fact. As to whether the articles were "sandals" or "chappals" should be left best to the judgment of the experts; in the circumstances of the case the goods were subject to scrutiny by experts and FDDI's opinion was final in this regard. It was submitted, based on the counter affidavit, that the goods did not contain a strap at the back and were therefore, *Chappals.* There was neither any glaring infirmity

in appreciation of facts nor arbitrariness that called for exercise of discretion under Article 226 of the Constitution of India.

8. The facts discussed above would show that the petitioner is a manufacturer of footwear; the subject articles are concededly women's footwear. The opinion given in favour of the petitioner, by the Council, was of an expert body; it was however doubted. As is apparent from the pleadings and the submissions that the trigger of suspicion that the petitioner had wrongly described the article, was because the article did not possess a strap at the back. Whatever be the reason, once the Council made its determination: based on inspection of the sample, and given that the opinion was based on objective material, there ought to have been something more for the FDDI to conclude that *"We therefore, conclude that provided articles Fall under the category of 'Chappal' covered under Sl.No.64.10"*. The Council's opinion was based on the Central Government's letter:

> *"They have secured export order for the Ladies Leather Sandals without back-strap but with heel thickness of more than 10 mm, as per attested samples of the product sent herewith which falls under* ***Chapter 64 serial No.64.06 "Leather Sandals, namely, for Gents/Ladies/Children" of the Drawback Schedule for 2003-04 (effective from 1st April, 2003),*** *as per the Ministry of Finance, Department of Revenue (DBK Commissionerate)* ***letter No.609/25/2002-DBK dt. 30th January, 2002 (copy enclosed for ready reference)."***

9. The respondents, in our opinion, acted upon prejudice and a preconceived notion that ladies sandals cannot be without a back strap. To hold so, there ought to have been some evidence of commercial purpose; the fact that the Council - a Central government body, which routinely deals with these issues in the context of export, had, *based on evidence and*

instructions of the Government furnished an opinion that the goods were sandals and not *chappals* was deemed insufficient. Apart from these, the court wonders whether any of the experts in this case was a woman, the ultimate customers. In such cases, the commercial parlance test would predominate. This was explained by the Supreme Court in *United Offset Process Pvt. Ltd v Assistant Collector of Customs* 1989 Supp (1) SCC 131 as follows:

> *"If there is no meaning attributed to the expressions used in the particular enacted statute then the items in the customs entries should be judged and analysed on the basis of how these expressions are used in the trade or industry or in the market or, in other words, how these are dealt with by the people who deal in them, provided that there is a market for these types of goods. This principle is well known as classification on the basis of trade parlance. This is an accepted form of construction. It is a well known principle that if the definition of a particular expression is not given, it must be understood in its popular or common sense viz. in the sense how that expression is used everyday by those who use or deal with those goods"*

10. Having regard to the above and the totality of circumstances, this court is of the opinion that the impugned orders, upholding duty draw back withdrawal and imposing penalty cannot be sustained. They are hereby quashed. The writ petition is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JANUARY 23, 2017