

IN THE INCOME TAX APPELLATE TRIBUNAL  
[ DELHI BENCH "H" : DELHI ]

BEFORE SHRI G. S. PANNU, PRESIDENT

A N D

SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No.5171/Del/2019

निर्धारणवर्ष/Assessment Years: 2014-15

Indian Synthetic Rubber Pvt. Ltd., Plot No. 2B, IGL Complex, Sector : 126, Noida, Uttar Pradesh - 201304.	<u>बनाम</u> Vs.	ACIT, Circle : 12 (1) New Delhi.
PAN No. AACCI3980J		
अपीलार्थी / Appellant		प्रत्यर्थी/ Respondent

निर्धारितकीओरसे /Assessee by :	Shri M. P. Rastogi, Adv.; & Ms. Priyanka Goel, C. A.
राजस्वकीओरसे / Department by :	Shri Sanjay Tripathi; Sr. D. R.

सुनवाईकीतारीख/ Date of hearing :	15/02/2023
उद्घोषणाकीतारीख/Pronouncement on :	04/05/2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. This appeal is filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-22 [hereinafter referred to

CIT (Appeals)] New Delhi, dated 19.03.2019 for assessment year 2014-15 in sustaining the disallowance of Rs.1,38,97,606/- on account of freight and exchange variation etc. on import and export of consignment of Rubber Process Oil by treating it as fine and penalty.

2. Briefly stated the facts are that the assessee company was incorporated on 6.12.2010 as a Joint Venture (JV) Company co-owned by Indian Oil Corporation Ltd., Marubeni Corporation of Japan and Trimurti Holding Corporation of Taiwan. During the year under consideration the company has started commercial production of Styrene Butadiene Rubber (SBR) on 4<sup>th</sup> February, 2014. The assessee for the assessment year under consideration filed its return of income on 29.11.2014 declaring loss of Rs.2,24,87,78,408/-. The assessment was completed under section 143(3) of the Income Tax Act, 1961 (the Act) determining the loss at Rs.2,04,71,50,661/-. In the course of assessment proceeding the Assessing Officer noticed that assessee has debited Rs.1,95,77,000/- in the profit and loss account under the head inventory losses/damages. The assessee was required to clarify as to why the said loss of Rs.195.77 lakhs on account of inventory loss/damages is allowable. Assessee furnished its reply stating that the company imported the Rubber Process Oil which is free of import without any restrictions as notified under Trade and Regulation Act, 1992 read with para 4.1 of Foreign Trade Policy for 2013-14. It was submitted that on arrival of the goods the customs authorities have tested it and having found that some of the aromatic's contents were higher than stipulated in the internal

circulars (which were not in public knowledge) till placing of the order under the import of Hazardous Wastage Rule 2008 refused to clear import. Assessee submitted that it has not been given any testing report and in view of prevailing conditions and to avoid further litigation by appeals which would have resulted in large monetary burden by way of demurrages and retention charges etc. the assessee chose to re-export the goods on grounds of commercial expediency and, therefore, the expenses claimed are allowable business expenses.

3. However, not convinced with the explanation of the assessee the Assessing Officer disallowed Rs.195.77 lakhs as not allowable under section 37(1) of the Act on the ground that assessee had imported the product which is prohibited by law, hence such expenses claimed by the assessee are not allowable.

4. On appeal the Id. CIT (Appeals) sustained the disallowance of expenses to the extent of Rs.138.98 lakhs out of Rs.195.77 lakhs after giving a relief of Rs.56.79 lakhs on account of retention charges on other imports on other goods. The disallowance of expenses sustained by the Id. CIT (Appeals) are as under:-

(i)	Loss on price fluctuation	Rs. 58,18,874
(ii)	Freight	Rs. 18,62,370
(iii)	Detention charges	Rs. 47,16,362
(iv)	Customs Compounding fees	Rs. 10,00,000
(v)	Customs penalty	<u>Rs. 5,00,000</u>
	TOTAL :	<u>Rs.1,38,97,606</u>

5. The Id. Counsel for the assessee submits that the assessee is a Joint Venture (JV) Company of Indian Oil Corporation Ltd., a Central PSU, Marubeni Corporation of Japan, and Trimurti Holding Corporation (THC) of BVI (100% subsidiary of TSRC Corporation, Taiwan) for production of Styrene Butadiene Rubber commonly called as synthetic rubber. The year under consideration is the first commercial year of manufacturing activity. Rubber Process Oil (RPO) is an essential ingredient for the manufacturing of synthetic rubber. Since the prices of rubber process oil prevailing in India were more than the international prices and considering the considerable quantity of RPO required by the company, it placed an order on 06 June 2013 on Comfort International Co. Ltd, Taiwan by competitive bidding. Comfort International Co. Ltd, Taiwan dispatched the goods to India on 07 July 2013. Copy of invoice is placed on page 77 of the paper book, which also refers the details of the purchase order.

6. Ld. Counsel submits that the goods arrived on the Nhava Sheva Seaport, at Mumbai India and the Bill of Entry presented to Custom Authorities on 30th July 2013. The Custom drew sample of goods on 30th August 2013 and the samples were forwarded by the Customs to their Lab for the purpose of testing chemical composition on 04th September 2013 and test results were issued by the Lab on 26th September 2013. Kindly see para 1.2 of order dated 7 October 2013 by Addl. Collector-Customs (Imports) at page 70 of the paper book for the dates referred above. In the testing report, the Lab reported that the sample under test does not match with aromatic oil mentioned in IS 15078:2001 and the sample has to be sent to CRCL,

(Central Research Chemical Lab) New Delhi for further testing /examination. The Customs order does not elaborate any further on the matter. However, the company was not provided with a copy of the Lab report. Ld. Counsel submits that when representatives of the Company met the Custom officials for release of goods, they verbally informed that the goods are being detained on account of an internal alert Circular No. 12/2013 (which, was not available in Public Domain) issued by Add Director -CI which states that under Hazardous Waste (Management Handling and Transboundary Movement) Rules 2008, some import of hazardous waste material exceeded the limit should be considered as hazardous and should not be allowed for import. It will be observed from order dated 7th October 2013 passed by the Addl. Commissioner of Customs (Imports), the date of Circular No.12/2013 is 3rd September 2013 (see paragraph number 1.3 of the order of custom official placed at page 70 of paper book). Ld. Counsel submits that though it is a matter which was to be contested before Custom Authorities, it is being mentioned that the company had a good case for the following:

(i) The Circular No. 12/2013 is issued under Hazardous Waste (Management Handling and Trans boundary Movement) Rules 2008. The said Rules deal with import of Hazardous Waste while the Rubber Process oil is a virgin material. Thus the matter becomes a debatable matter.

(ii) The Circular No. 12/2013 does not specify the chemical composition and their limits which are permissible or beyond which they are not permissible.

(iii) Whether an internal circular issued after the dates of placing the order and arrival of goods at Indian port, could be applied retrospectively.

7. Ld. Counsel submits that In case the company had contested the matter before the Custom Authorities (CEGAT) it would have involved considerable time for the decision to be received. This would have resulted in the mounting up of Detention and demurrage charges substantially. Thus, in order to arrest the Detention and demurrage charges from mounting up and mitigate the losses the assessee made the proposal before the custom official to re-export the goods. The Addl. Collector of Customs (Import) accepted the re-export subject to levy of penalty of Rs.5 Lakhs u/s 112(a) of the Customs Act and payment of compounding fees of Rs.10 Lakhs u/s 125 of the Custom Act. By the time the Custom Authorities allowed the re-export of the goods international prices of Rubber Process Oil declined. Consequentially, the company could fetch from re-export, a price for goods much lesser than the price of goods paid by it at the time of import of goods which resulted in a loss from re-export which was further increased due to appreciation of foreign exchange conversion rate of INRS to USD. The company had to bear the Detention & Demurrage charges which it would have to bear even if it was cleared by Customs to be received. Details of the loss incurred & claimed on this account is placed at page 65 of paper book.

8. Ld. Counsel submits that the penalty of Rs.5 lakhs and compounding fees of Rs.10 lakhs, aggregating to Rs.15 lakhs included in the above details, have not been effectively claimed by the assessee by separately adding it back in the Computation of Taxable Income which is placed at page 2 of Paper Book.

9. Ld. Counsel submits that the losses so incurred by the assessee in the transaction are during the course of carrying of lawful business activities. The company continues to use Rubber Process Oil in the manufacture of Synthetic Rubber by procuring it from within India or indigenous sources and there is no illegality pointed out by any authority. That the internal alert circular number 12/2013 issued by the Add Director - CI, a copy whereof was placed during the course of hearing, nowhere states that Rubber Process Oil used for the purpose of manufacturing the synthetic rubber should not be allowed rather it states that it should be verified that it is Rubber Process Oil or not. In the adjudication of Custom Authorities, have nowhere it states that Rubber Process Oil imported by the assessee was not a Rubber Process Oil and was meant for any activity other than manufacturing activity undertaken by the assessee. It is pointed out that Rubber Process Oil imported by the assessee is virgin oil and not a waste material -more so a hazardous waste material as alerted in Circular Number 12/2013 issued by Addl. Director- CI. It is also brought to your kind notice that the very circular of Addl. Director was admittedly issued on 3 September 2013, which is after placing the purchase order in June 2013 and the goods reaching the goods at the port in India on 30 July 2013. In case the imported goods were examined/ tested immediately on arrival there would have been no question of looking and relying on the internal Circular No. 12/2013 issued by the Custom Authorities.

10. Therefore, the ld. Counsel submits that the expenses incurred by the assessee on import of rubber process oil is allowable under

section 37(1) of the Act and these expenses cannot be treated as expenses incurred for infraction of law. The ld. Counsel further submits that in the computation of income filed had already disallowed compounding fee and fine and penalty paid for customs amounting to Rs.15,00,000/- [Rs.10,00,000/- plus Rs.5,00,000/-) and, therefore, the same cannot be subjected to disallowance once again.

11. On the other hand, the ld. DR strongly supported the orders of the authorities below.

12. It is not in dispute that the assessee placed purchase order for 360.420 MTS of rubber process oil vide purchase order No. IRM/13-14/RC-015 dated 6<sup>th</sup> June, 2013 as is evident from the invoice raised by Comfort International Company Limited on the assessee vide invoice No. 130707A dated 7.07.2013. The purchase order and the copy of invoice are placed at page Nos. 77 - 79 of the paper book. It is not in dispute that there was no circular or notification by any competent authority like customs/DGFT etc. stating that the said cargo with rubber process oil grade 2535 (dark oil) purchased by the assessee is prohibited or banned to import in India as per Foreign Trade Policy, 2013-14 either on the date of placing purchase order by the assessee or on the date of arrival of cargo at Nhava Sheva Sea-port at Mumbai on 30<sup>th</sup> July, 2013. We observe that the internal circular issued by Addl. Director, Customs & Excise in alert circular No. 12/2013 was issued only on 3.09.2013 in respect of hazardous nature of goods declared as rubber process oil and petroleum based greece. We observe that on arrival of the

cargo with rubber process oil the samples were forwarded by the Customs officials for the purpose of testing chemical composition only on 04<sup>th</sup> September, 2013 and the best results were issued on 26<sup>th</sup> September, 2013. Therefore, we observe that the rubber process oil imported by the assessee was freely importable as on the date of placing the order and also as on the date of the cargo reaching the sea-port in India. We also observe that since the customs authorities were not releasing the rubber process oil imported by the assessee and was further required for testing the samples by Central Research Chemical Laboratory as the samples under test does not match with aromatic oil mentioned in IS 15078:2001 and to avoid contesting the matter further the assessee chose to re-export the rubber process oil without incurring further demurrage charges and to avoid any further litigation the consignment was re-exported and also incurred huge loss on such re-export. All these goes to show that the expenses incurred by the assessee, namely, for import of rubber process oil, loss on price fluctuation, freight and retention charges cannot be said that these expenses were incurred for infraction of law. These expenses were incurred in the course of carrying on business of the assessee and they are allowable as deduction under section 37(1) of the Act. Thus, we direct the Assessing Officer to delete the following expenses incurred by the assessee:-

(i)	Loss on price fluctuation	Rs. 58,18,874
(ii)	Freight	Rs. 18,62,370
(iii)	Detention charges	<u>Rs. 47,16,362</u>
	TOTAL :	<u>Rs.1,23,97,606</u>

13. Coming to expenses incurred towards customs joining fee of Rs.10,00,000/- and customs penalty of Rs.5,00,000/-, it is evident from the computation of income for the assessment year 2014-15 furnished by the assessee which is placed at page 2 of the paper book that the assessee itself has disallowed while computing the loss from business and, therefore, the said expenses cannot be disallowed once again. Thus we direct the Assessing Officer to delete the disallowance of Rs.1,38,97,606/- made under section 37(1) of the Act while computing the income of the assessee. Ground raised by the assessee is allowed.

14. In the result appeal of the assessee is allowed.

Order pronounced in the open court on : 04/05/2023.

Sd/-  
( G. S. PANNU )  
PRESIDENT

Sd/-  
( C. N. PRASAD )  
JUDICIAL MEMBER

Dated : 04/05/2023.

*\*MEHTA\**

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक / Assessee
2. राजस्व / Revenue
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, DELHI/

DR, ITAT, DELHI

6. गार्ड फाइल / Guard file.

By order

ASSISTANT REGISTRAR  
ITAT, New Delhi.

Date of dictation	02.05.2023
Date on which the typed draft is placed before the dictating Member	03.05.2023
Date on which the typed draft is placed before the Other Member	04.05.2023
Date on which the approved draft comes to the Sr. PS/PS	04.05.2023
Date on which the fair order is placed before the Dictating Member for pronouncement	04.05.2023
Date on which the fair order comes back to the Sr. PS/PS	04.05.2023
Date on which the final order is uploaded on the website of ITAT	04.05.2023
Date on which the file goes to the Bench Clerk	04.05.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order.	