

# **SUPREME COURT OF INDIA**

Metlex (India) Private Limited

Vs.

Commissioner of Central Excise, New Delhi

C.A.Nos.3224-3225 of 1998

(S. N. Variava and H. K. Sema JJ.)

12.02.2004

## **JUDGMENT**

### **S. N. VARIAVA, J:-**

1. These Appeals are against the Orders of Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) dated 19th December 1997 and 4th June 1998. They are being disposed of by this common Judgment, as except for the period under consideration the law points are the same.

2. Briefly stated the facts are as follows: -

In Civil Appeal Nos. 3224-3225 of 1998 the period under consideration is 1-3-1988 to 30-9-1989 and 1-10-1989 to January 1990. In Civil Appeal No. 5176 of 1998 the period under consideration is 1987-88 and 1988-89. In Civil Appeal No. 5176 of 1998, the Appellant is also urging that during that period they were doing job work for one M/s. Flex Laminators and are thus not liable to pay excise. In the view we're taking it is unnecessary to deal with this aspect.

3. The Appellants filed a Classification List showing the item as falling under Tariff item 3920.36 and 3920.38. The Appellants claimed benefit of Notification No. 53/88-C.E., dated 1st March 1988. The Appellants were issued Show Cause Notices on the basis that their goods did not fall under Item 35 of the Notification but that they fell under Item 32.3 of the Notification.

4. In reply to the Show Cause Notice, amongst other contentions, the Appellants contended that merely by metallising/lacquering/laminating films no process of manufacture is undertaken so as to attract duty. Reliance was placed on Board Circular to this effect. Of course the circular relied upon

was for an earlier period.

5. The Assistant Collector held against the Appellants. It was held that their good fell under Item 32.3. The Assistant Collector brushed aside the argument that there was no manufacture by concluding that the circular relied upon was in respect of an earlier Tariff item. The Assistant Collector therefore avoided going into the question whether or not there was manufacture. The Appeal filed by the Appellants was allowed by the Collector (Appeals) who held that the Appellants' product fell under Item 35 of the said circular.

6. The Tribunal has disposed of the Appeal of the Respondents by concluding that Appellants' product cannot fall under Item 35 of the Circular and that it would fall under Item 32.3. The Tribunal has held that there was manufacture. The Tribunal has concluded that the Appellants had not led any evidence to prove that there was no manufacture and that in the tariff they are recognised as distinct items classif table under different sub-headings. Whether the product manufactured by the Appellants falls under Item 35 or Item 32.3 one would have to look at the Circular. The Circular reads as follows: -

"Notification No. 53/88-C.E., dated 1-3-1988.

Effective rates of duty on the specified plastics and articles thereof

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India, in the Ministry of Finance (Dept. of Revenue) No. 132/86-Central Excises, dated the 1st March, 1986, the Central Government hereby exempts goods of the description specified in column (3) of the table hereto annexed and falling under heading numbers or subheading numbers of the schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as are specified in the corresponding entry in column (2) of the said table, from so much of the duty of excise leviabale thereon which is specified in the said schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said table, subject to the conditions, if any, laid down in the corresponding entry in column (5) of the said table.

TABLE

S.No.

Heading No./SubHeading No.

Description of goods

Rate

Conditions

32

39.2

(iii) All goods (other than of polymers of vinyl chloride and regenerated cellulose)

35% ad vol.

If the strips are not intended for use in the weaving of fabrics or for manufacture of sacks.

35.

39.20

Films (other than of regenerated cellulose)

25% ad val.

If produced out of goods falling under heading Nos. 39.01 to 39.15. on which the duty of excise leviable thereon under the CESA, 1944 or the additional duty under Section 3 of the Customs Tariff Act, 1975, as the case may be, has already been paid."

8. For the product to fall under Item No. 35, the product must be a "film" which has been produced out of the goods falling under Heading 39.01 to 39.15. The Appellants purchase "film" on which duty has been paid and thereafter laminate or metallise that film. Thus, presuming that a process of manufacture is undertaken, the product which the Appellants produce is not produced out of any goods falling under Item No. 39.01 to 39.15. Therefore, in our view, the Assistant Collector and the Tribunal were right in concluding that the Appellants' product could not fall under Item No. 35.

9. However, the more important aspect is whether there can be said to be any manufacture. Undoubtedly, the Appellants had filed the Classification List. But merely because a party mistakenly files a Classification List does not mean that he has to pay duty, if in law, he is not bound to pay duty. If there is no manufacture then the mere fact that a Classification List has been filed would not make them liable to pay duty.

10. In reply to the Show Cause Notice it was clearly contended that there was no manufacture. Once this contention was taken, it had to be dealt with by the Assistant Collector. It is settled law that if the Revenue claims that there is manufacture, then the burden of proving the fact is entirely on the Revenue. In this case even though the point was specifically taken, the Assistant Collector skirts the issue and does not decide the same. Thus, there is no evidence on record that manufacture has taken place.

11. The Tribunal whilst dealing with this aspect has held as follows: -

"Insofar as the alternative prayer for considering whether any process of manufacture is involved in converting the plain plastic films into flexible metallised plastic films or laminated plastic films on the ground that all of them fall under heading 39.20 is concerned, while it is true that 39.20 covers plain plastic films as well as lacquered or metallised or laminated films it is noteworthy that they fall under separate sub-headings. Further more it is a well settled point of law by now that two items falling under the same heading may also attract excise duty if in the process of or as a result of production on conversion of one form into another a new product known to the market emerges. Hence the mere fact that both input and output are classifiable under the same heading does not make any difference in this respect. Further more, the respondents have not filed any evidence in

support of their contention that no manufacture is involved or no new product emerges. Whereas in the tariff they are recognized as distinct items classifiable under different sub-headings."

In our view, this finding is clearly unsustainable.

12. It has been held by the Bombay High Court in the case of Garware Plastics & Polyester Ltd. v. Union of India reported in 1990 Indlaw MUM 15 (Born.) that the process of lacquering/metallising of polyester film does not amount to manufacture, there being no new distinct commercial commodity having a different identity or name. Thereafter, the Tribunal has in the case of Rexor India Ltd. v. Collector of C. Ex. reported in 1990 Indlaw CEGAT 568 (Tribunal) held the same. It must be mentioned that a Special Leave Petition filed against this Judgment, by the Department, was dismissed on 17th August 1995. The Tribunal again in the case of Chemicoat Ltd. v. Collector of C. Ex. reported in 1991 Indlaw CEGAT 321 (Tribunal) relied on the Bombay High Court Judgment and held that there was no manufacture. Special Leave Petition filed against this Judgment was also dismissed by this Court reported in 1997 (94) E.L.T. A151.

13. This Court has in the case of Collector of Central Excise v. Technoweld Industries, reported in 9 (S.C.)/ held that there is no manufacture when wire of a thinner guage is drawn out of duty paid wire rods. It was held that the initial product was a wire rod and the ultimate product was also a wire. In this case it was also held that merely because there are two separate tariff entries does not mean that the product is excisable. It was held that the product becomes excisable only if there is manufacture.

14. Thereafter in an unreported Judgment dated 10th February, 2004 in Civil Appeal No. 2113 of 1998 (M/s. Tega India Ltd. v. Commissioner, Central Excise, Calcutta-11) this Court has held, on a consideration of a number of other decisions, that merely fixing rubber lining on paper, tanks and other such articles does not amount to manufacture.

15. In this case the Appellants purchase duty paid film. They merely laminate or metallise it. The product is a film to start with and remains a film after process of lamination or metallisation. Thus there is no new distinct product, which has come into existence and it would have to be concluded that there is no manufacture.

16. It was however submitted that the case has proceeded on the admitted footing that there was a manufacture. It was submitted that the matter must be remitted back to decide whether there is manufacture. It was submitted that this aspect will have to be decided in terms of Note 12 to Chapter 39 and after looking at the process adopted by the Appellants. It was submitted that under the present Tariff there are separate sub-heading and thus after examining the process of the Appellants it may be possible to contend that a new and distinct product has come into existence.

17. We are unable to accept this submission. The question is whether an individual and distinct product has come into existence. It is settled law that the burden is on the department to prove that a new and distinct product has come into existence. The Appellants, in reply to the Show Cause Notice, took up the contention that there was no manufacture. If the Department still wanted to contend that manufacture had been undertaken, the Department had to prove it by cogent evidence. The Tribunal was clearly in error in seeking to cast the burden on the Appellants to show that there was no process of manufacture.

18. Note 12 to Chapter 30 reads as follows :-

"12. In heading Nos. 39.20 and 39.21, the expression "flexible" means an article which has a modulus of elasticity either in flexure or in tension of not over 700 kilograms per square centimetre at 23 degree C and 50 per cent relative humidity when tested in accordance with the method of test for stiffness of plastics (ASTM Designation D-747-63), for flexural properties of plastics (ASTM Designation D-790-63), for tensile properties of plastics (ASTM Designation D-638-64T), or for tensile properties of thin plastic sheeting (ASTM Designation D-882-64T) and 'rigid' means all articles other than 'flexible' as defined above."

Tariff Item 39.20 reads as follows :-

" Heading

Sub-Heading

Description of Goods

Rate of duty

39.20.

Other plates, sheets, film, foil and strip, of plastics, non-cellular, whether lacquered or metallised or laminated, supported or similarly combined with other materials or not chloride :

- Of polymers of vinyl

3920.11

-- Rigid, plain

60%

3920.12

-- Flexible, plain

60%

3920.13

-- Rigid, lacquered

60%

3920.14

-- Flexible, lacquered

60%

3920.15

-- Rigid, metallised

60%

3920.16

-- Flexible, metallised

60%

3920.17

-- Rigid, laminated

60%

3920.18

-- Flexible, laminated

60%

3920.19

- Other

60%

- Of regenerated cellulose :

3920.21

-- Film, plain

60%

3920.22

-- Film, lacquered

60%

3920.23

-- Film, metallised

60%

3920.24

-- Film, laminated

60%

3920.25

-- Sheet, plain

60%

3920.26

-- Sheet, lacquered

60%

3920.27

-- Sheet, metallised

60%

3920.28

-- Sheet, laminated

60%

3920.29

- Other

60%

- Of other plastics :

3920, 31

-- Rigid, plain

60%

3920.32

-- Flexible, plain

60%

3920.33

-- Rigid, lacquered

60%

3920.34

-- Flexible, lacquered

60%

3920.35

-- Rigid, metallised

60%

3920.36

-- Flexible, metallised

60%

3920.37

-- Rigid, laminated

60%

3920.38

-- Flexible, laminated

60%

3920.39

- Other

60%"

Thus this entry makes no distinction between ordinary film and film which is lacquered or metallised or laminated of course the sub-headings 3920.31 to 3920.38 classify as "Rigid plain. Flexible plain. Rigid lacquered. Flexible lacquered etc." Note 12 only sets out what is "Flexible". But we are not concerned with any dispute as to whether the Appellants' product is Rigid or Flexible. It is an accepted position that the Appellants' products are "Flexible lacquered film" and/or "Flexible metallised film". As stated above, the product remains a "film".

19. In the above view, we set aside the order of the Tribunal and hold that no process of manufacture has taken place and therefore the Appellants are not liable to pay any duty on the product.

20. Accordingly, the Appeals are allowed. There will be no order as to costs.

21. We, however, clarify that in view of the fact that the Appellants had initially proceeded on the footing (of course mistakenly) that there was manufacture, they will not be entitled to claim any refund on the basis of this Judgment.