Collector of C. Ex. Vs. Vijay Flexible Containers Pvt.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-06-1998

Reported in : (1998)LC12Tri(Delhi)

Appellant : Collector of C. Ex.

Respondent : Vijay Flexible Containers Pvt.

Judgement :

1. This appeal and two other appeals have been referred to the Larger Bench by Miscellaneous Order No. 90/95-C, dated 4-5-1995 since the referring Bench did not agree with the decision of the Tribunal in India Tobacco Co. - 1994 (71) E.L.T. 547. There was some difficulty in hearing the other two appeals and they have been delinked. They can be heard by the appropriate two Member Bench after this order is pronounced.

2. The respondent is absent. Notice issued to the respondent has been returned. Shri Lakhinder Singh, JCDR states that the respondents factory seems to be closed. We have therefore heard Shri Lakhinder Singh, JCDR for the appellant-Collector. Shri R. Nambirajan, Advocate has assisted us with the case law.

3. Respondent, engaged in the production of printed cigarette shells and slides as also hinged lid blanks (H.L. Blanks) and clearing the same to manufacturers of cigarettes for packing purpose, filed two classification lists dated 9-3-1982 and 22-3-1982 seeking classification under erstwhile T.I. 68 and claiming exemption under Notification 104/82. Respondent was informed that the goods will attract duty

under erstwhile T.I. 17(4). In the course of his submission before the Assistant Collector, the respondent pleaded alternatively that in case erstwhile T.I. 17(4) was applicable, the benefit of exemption Notification 66/82 would be available. The Assistant Collector passed an order overruling these contentions and classifying the goods under erstwhile T.I. 17(4) and denying the benefit of exemption. In appeal, the Collector (Appeals) held, following the decision of Government of India in the case of Golden Tobacco Co. -1979 (4) E.L.T. (J 561A) that the goods were classifiable not under T.I. 17(4) or 17(3) but were classifiable under T.I. 68 and without deciding whether the benefit of Notification 104/82 would be available. Department, being aggrieved, has filed the present appeal.

4. The parties reiterated their respective contentions before the referring Bench. The respondent raised a new contention that the printed outer shells, slides and H.L. Blanks are not "goods" within the meaning of the Central Excise Act, 1944 (for short, the Act) and relied on the decision of the Tribunal in I.T.C. Ltd. -1994 (71) E.L.T. 547 (T) following the decision of the High Court of Delhi in Zupiter Printery -1991 (34) ECR 7 (Delhi H.C.) and of High Court of Madras in Asia Tobacco Co. -1992 (58) E.L.T. 418 (Madras H.C.). The Bench was of the view that the question of excisability was not an issue before the two High Courts, that the High Courts were not called upon to determine whether the goods fell for classification under any entry other than T.I. 17(4) and the Tribunal did not correctly construe the above decisions. The referring Bench was of the view that printed outer shells and printed paperboards cut to particular size and shape and are parts of cigarette packets and are marketable and sold to cigarette manufacturers and hence they are excisable. Regarding H.L. Blanks, the referring Bench was of the view that the contention of the Department that they are classifiable under T.I. 17(4) as cartons or boxes in flattened/unassembled form has force.

5. If these goods are held to be excisable products there is a dispute as to whether they attract erstwhile T.I. 68 or erstwhile T.I. 17(4) [later 17(3)]. If they attract erstwhile T.I. 68, there is the further dispute whether they also attract exemption Notification 104/82. If the goods fall under T.I. 17(4), the further question would be whether the goods attract exemption Notification 66/82. On this aspect also there

is controversy.

"17. PAPER AND PAPERBOARD, ALL SORTS (including pasteboard, millboard, straw-board, cardboard and corrugated board) in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power - (4) Boxes, cartons, bags and other packing containers (including flattened or folded boxes and flattened or folded cartons), whether or not printed and whether in assembled or unassembled condition." 7. Chapter 48 of the Schedule to CETA, 1985 deals with Paperboard and articles thereof and other goods. The following are the relevant Headings and sub-headings :-48.18 OTHER ARTICLES OF PAPER PULP, PAPER, PAPERBOARD -4818.12 - Printed cartons, boxes, containers and cases, made wholly out of paper or paperboard of heading No. or sub- heading Nos. as the case may be.

8. In the case which led to the decision in 7. T.C. Ltd. -1994 (71) E.L.T. 547 (T) the assessee who produced printed outer shells, printed outer shells with slides and printed H.L. cutouts and inner frames filed classification list under T.I. 17(4) and claimed the benefit of Notification No. 66/82. The lower authorities agreed with the classification but denied benefit of the notification on the ground that the articles are printed boxes and hence taken out of the scope of the Notification by the proviso to the Notification. The departmental representative conceded the non-dutiability of outer shell before the Tribunal on the basis of the decision of the High Court of Delhi in Zupiter Printery -1991 (34) ECR 7 (Delhi H.C.), but contended that outer shells and inner slides were manufactured together and hence dutiable. H.L. cutouts and inner frames manufactured in the factory would be dutiable. Relying on the decision in Zupiter Printery - 1991 (34) ECR 7 (Delhi H.C.) and Asia Tobacco Co. -1992 (58) E.L.T. 418 (Madras H.C.) the Tribunal held against dutiability of all the articles. The Tribunal did not consider if the articles were "goods" and if so, whether they fell under T.I. 68.

9. In I.T.C. Ltd. - 1994 (71) E.L.T. 478 (T) the assessee who produced inner slides for captive consumption in cigarette packets filed classification list under sub-heading 4818.19. The lower authorities upheld classification under sub-heading 4818.90. The Revenue pleaded for classification under subheading 4818.13.

4818.13 referred to cigarette paper, 4818.19 referred to cartons, boxes, containers and cases (including flattened or folded boxes and flattened or folded cartons), whether in assembled or unassembled condition -"Other".

4819.90 referred to general "other". The assessee moved the Tribunal asserting classification under sub-heading 4818.19 as component parts of cigarette packets and also contending, on the strength of the decision of the High Courts of Madras and Delhi, that slides should be regarded as non-excisable on account of being not marketable. The Tribunal followed the decision in Zupiter Printery to the effect that outer shell is not a Box or Container, indicated that Slide cannot by itself be a Box or Container or Carton and held that Slide produced by cutting paper or paperboard to size and shape and constituting a part of a cigarette packet has to be regarded as "article of paper/paperboard" covered by Heading 48.18 by sub-heading 4818.90. The Tribunal took the view that the question of dutiability of slides or cigarette packets under sub-heading 4819.90 was not an issue for decision in the judgments of the two High Courts and hence the judgments are distinguishable and held that slides cannot be regarded as non-marketable. Slides have a specific name and are parts of cigarette packets which find extensive use in Cigarette Industry and the assessee has been filing classification lists for Slides manufactured in their factory. Zupiter Printery showed that it was common practice for cigarette manufacturers to acquire packets and parts thereof from parties engaged in the manufacture of such packets and parts. Accordingly the Tribunal held that Slides are marketable and liable to duty under sub-heading 4818.90.

10. In Avadhoot Printers - 1994 (71) E.L.T. 829 (T), the appellant filed classification list for the product "Slides for cigarette packets" under subheading 4818.19 read with Notification No. 63/82. The lower authorities held sub-heading applicable to be 4818.90. Following the decision of the same Bench in I.T.C. Ltd. - 1994 (71) E.L.T. 478 (Tribunal) the appeal filed by the assessee was dismissed.

11. The referring three-Member Bench was of the view that the question of excisability of outer shells and H.L. Blanks, was not an issue for decision in the cases of Zupiter Printery - 1991 (34) ECR 7 (Delhi H.C.) and Asia Tobacco Company -1992 (58) E.L.T. 418 (Madras H.C.). The Bench observed :- "The High

Courts were not called upon to determine whether the two items fall for classification under any other entry in the Schedule to the erstwhile Central Excise Tariff while in this case we are called upon to decide the classification of the two items under T.I. 17(4) or under T.I. 68." The Bench indicated that containers are parts of cigarette packets and are marketable and are sold to cigarette manufacturers and hence they are excisable. As regards H.L. Blanks, the Bench saw force in the contention that they are classifiable under T.I. 17(4) as cartons or boxes in flattened or unassembled form. Accordingly the Bench took the view that the decision in the I.T.C. Ltd. -1994 (71) E.L.T. 547 (T) which purported to follow the said decision did not lay down the correct law.

12. The assessee in Zupiter Printery case, producing cigarette "outer shell" out of printed paperboard supplied by a manufacturer of cigarettes on receipt of job charges and clearing the same under T.I.68 was, in view of the Finance Act, 1982 which introduced new entry 17, was directed by the Superintendent of Central Excise to classify printed "outer shell" under erstwhile T.I. 17(4) and to obtain Central Excise licence and apply for re-classification. The assessee after protracted correspondence applied for provisional clearance under Rule 9B of the Central Excise Rules, 1944 and applied for licence and filed classification list under T.I. 17(4), as directed. Subsequently, following a direction of the Board, the Superintendent passed an order classifying outer shell as "box" under T.I. 17(4), thereby depriving the assessee of the benefit of Notification No. 66/82 which would have been available if it is not treated as "box". The Board had directed that "outer shells" are in the nature of printed boxes and classifiable under T.I. 17(4) and would not be eligible for exemption under Notification No. 66/82. This order was challenged in a Writ Petition filed before the High Court of Delhi. The High Court held that the direction of the Board to quasi-judicial authority was not valid.

Relying on the decision of the Supreme Court in G. Claridge & Co. Ltd. - 1991 (52) E.L.T. 341 (S.C.), it was held that "outer shell" is not a receptacle or a container or enclosure. Dealing with the contention of the Revenue that "outer shell" is Box, the High Court held :- "In the cigarette trade the shell is not known as a "box" which is a relevant consideration to be taken...By "box" we understand the encasement which ordinarily is used for the convenient transportation of its' contents...Box is in fact more like a shelter wherein other articles in itself...

...This is neither an encasement nor a receptacle which can hold the thing in itself. Even if we do not give much importance to the dictionary meaning of the word "box" still the correct guide in such a case is the context and the trade meaning....In commercial and in cigarette trade, the container in which cigarettes are packed is known as a packet of cigarettes and not as a box or carton.

Therefore, even for the sake of argument, if it is presumed that the "outer shell" is a packet, still it can not be called a box. That packet consists of both the components, the shell and the slide. But in the absence of the slide, by no stretch of imagination it can be called a box." The High Court further held that "outer shell" not being box as contemplated in T.I. 17(4), the entry was not applicable. The necessary inference would be that even if entry T.I. 17(4) applied, Notification No. 66/82 would apply. The High Court also held :- "The definition of "goods" makes it clear that to become "goods" an article must be something which can ordinarily come to the market to be sold and bought. But at the shell-stage, it can neither be bought nor sold in the market. Box has a definite meaning as understood in the common parlance. Therefore this mere outer shell by itself cannot be put in that category. To be called a "box" it must answer to the description of "box". An article cannot be called a 'box' if it assumes the shape after some other things are put in it, i.e. the slide in this case. The outer shell to be described as a box must have a separate and independent existence from the slide, but that is not the case.

For the reasons stated above we hold that the 'shells' of cigarette packets manufactured by the petitioner are not excisable under Entry 17(4)...." 13. The judgment in Zupiter Printery - 1991 (34) ECR 7 (Delhi H.C.) shows that till Entry 17 was substituted by the Finance Act, 1982, the assessee accepted classification under T.I. 68 for outer shells made out of printed paper-board and thereafter the department called for classification under T.I. 17(4). The only contention raised by the assessee before the High Court was that printed outer shell cannot be regarded as a Box or Container since it has no lid and is open at both ends and cannot hold anything and there is neither encasement nor receptacle which can hold anything in itself and since in the trade the container in which cigarettes are packed is known as a packet of cigarettes and not as a box or carton. The assessee had no contention that the outer shell was not "goods" which can ordinarily come to the market to be sold and bought. This aspect was not presented before nor decided by the Court. The observation to that effect is seen immediately followed by the observation that outer shell is not Box, as it has no separate and independent existence from the slide. This observation is seen followed by the finding that outer shell manufactured by the assessee was not excisable under Entry 17(4). It is thus clear that the Court did not decide and did not purport to decide the aspect whether outer shells are "goods " or "excisable goods" and whether they are dutiable under the residuary Entry T.I. 68. That was why the Court merely held against "excisability under Entry 17(4)". The ratio of the decision is that - (1) outer shell of cigarette packet by itself and without slide is not a Box or container or the like, and (2) it is not excisable under Entry 17(4) as it is not a box or container or the like.

(The High Court cannot also be regarded as having decided that outer shell and slide together constitute a box) The dismissal by the Supreme Court of Appeal No. 5436A/92 filed by the Department only means that the Court did not find any error in the above ratio.

14. In Asia Tobacco Company Ltd. -1992 (58) E.L.T. 418 (Madras H.C.), the writ petitioner engaged in the manufacture of cigarettes was also preparing outer shell and inner slide and using the same in packing cigarettes. The Department informed the petitioner that the articles fell under T.I. 17(4) and Notification No. 66/82 was not applicable as the outer shells are printed boxes. It appears, before the introduction of Item 17(4) in the Tariff in 1982, the outer shells and inner slides were regarded as classifiable under T.I. 68 and entitled to exemption under Notification No. 118/75 relating to goods intended to be used in the factory. The High Court held :- "...it is seen that the packet is completed only after cigarettes have been put in it. Cigarettes are put first in the bundling paper and then placed in the slide. The slide along with the cigarettes is then inserted into the outer shell. The packet of cigarettes is thus completed at a stage when cigarettes are already in it. It is not in dispute that at this stage of assembly, it is not only the packet which is assembled but a packet of cigarettes containing cigarettes therein. Thus if

this assembly is to be treated as manufacture, the manufacture is not of packet but of cigarette packet containing cigarettes. Thus a cigarette cannot be subjected to duty twice over.

Even otherwise it is submitted that the outer shells and inner slides cannot be subjected to any separate assessment. What-ever it may be there is absolutely nothing to show that the outer shells are to be called thus as packets and liable to excise duty." The finding was that T.1.17(4) was not applicable to outer shell and slide. It is true that applicability of T.I. 68 was not considered, as Revenue did not raise any such contention. The only findings are that no packet without cigarettes comes into existence and outer shells as such are not packets and not liable to excise duty as packets. It is true that the basic question whether outer shell and slide can be regarded as excisable otherwise than as a packet or box or under any other tariff entry was not considered in this case. This decision has been followed in another writ petition filed by the same assessee as reported in 1993 (66) E.L.T. 55 (Madras H.C.).

15. I.T.C. Ltd. - 1994 (71) E.L.T. 547 (T) dealt with outer shells, outer shells along with slides and H.L. cutouts and inner frames. The only controversy was whether these articles fell under erstwhile T.I.17(4) and dutiability as such and the conclusion was in the negative relying on the decision in Zupiter Printery -1991 (34) ECR 7 (Delhi H.C.) and Asia Tobacco Co. -1992 (58) E.L.T. 418 (Madras H.C.). These decisions did not deal with H.L. Blanks. One decision dealt with outer shell and the other dealt with outer shell and slide and H.L. cutouts and inner frame. The Court held against applicability of erstwhile T.I.17(4). I.T.C. Ltd. - 1994 (71) E.L.T. 547 (T) or the two decisions of the High Courts are not authorities for the position that outer shells along with Slides or H.L. Blanks are not "goods" or non-excisable or do not fall under T.I. 68. The ratio of the decisions of the two High Courts are binding on the Tribunal. These decisions are seen supported by the decisions of the Supreme Court in G. Claridge & Company - 1991 (52) E.L.T. 341 (S.C.) and Punjab Anand Lamps Industries -1989 (43) E.L.T. 816 (S.C.).

16. In G. Claridge & Company Ltd. - 1991 (52) E.L.T. 341 (S.C.), the Supreme Court examined the scope of the word "Container" occurring in T.I. 17(4),

considered the dictionary meaning of the word and observed :- "In Item 17 of the old Tariff, the word "Containers" is preceded by the words "boxes, cartons, bags and other packing" and in Heading 48.18 of the new Tariff, the word "Containers" is preceded by the words 'cartons, boxes' and is followed by the words "and cases". It is a well-accepted canon of statutory construction that when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. It is based on the principle that words take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general.... Considering the context in which it is used in the relevant tariff item, we are of the opinion that the said expression has to be construed to mean 'packing containers' which are analogous to boxes and cartons, that is, an enclosed receptacle which can be used for storage and transportation of articles. Egg trays being receptacles which are not covered or enclosed cannot be used for transportation of articles and, therefore, they cannot be regarded as 'containers' under the above-mentioned entries in the Excise Tariff".

The assessee, manufacturing egg flats and cartons, tube light packing tray and apple trays filed classification list effective from 1-4-1981 under erstwhile T.I. 68 and was paying duty accordingly. After the revision of T.I. 17 from 1-3-1982, classification list was filed under T.I. 17 and claiming exemption under Notification No. 66/82 and this was approved by the Assistant Collector. Subsequently, after issuing show cause notice, it was held that the duty was payable under T.I. 68 as articles of pulp. The Collector (Appeals) reversed this decision and upheld classification under Item 17(4) as products of paper and paperboard. This order was challenged by the Department before the Tribunal. After the introduction of the new Tariff in 1986, the assessee sought classification under sub-heading 4818.19 which carried nil rate of duty. The Assistant Collector held the goods classifiable under sub-heading 4818.90 as not being containers. The Collector (Appeals) held that the products are "packing container" classifiable under sub-heading 4818.19. The Department challenged this order also.

The Tribunal disposed of all the appeals together and held that the products not being containers were not classifiable under erstwhile T.I. 17(4) or 17(3) or new sub-heading 4818.90 and were classifiable under erstwhile T.I. 68 and new sub-heading 4818.90. The Tribunal sustained the demand for a period of six months. The Supreme Court, agreeing with the conclusions of the Tribunal dismissed the appeal. The question of excisability was not raised before and not decided by the Court.

17. In Punjab Anand Lamps Industries - 1989 (43) E.L.T. 816 (S.C.), the dispute arose regarding Bulb sleeves and Tube light sleeves manufactured by the assessee and used for packing bulbs and tubes in the context of Exemption Notification No. 66/82 which exempted articles of paper or paperboard under Item 17(3), but kept printed boxes and printed cartons outside the operation of the notification. The Tribunal had referred to the dictionary meaning of 'box' as a receptacle usually having a lid and held that "sleeves" produced by the assessee could not be called "box" or "carton" and will be covered by the Exemption Notification, even assuming that the product is a container. Sleeves do not have any lid and contain by themselves nothing because they are opened from both sides. They had no independent market as such and were utilised for captive consumption. The Supreme Court sustained the conclusion of the Tribunal in the absence of any positive and reliable evidence that there was either a market for these sleeves and these bulb sleeves were known and marketable as corrugated boxes and cartons.

It may be noted that according to the Revenue, sleeve rolls consisting of 17.5 cm wide corrugated paper on one side and plain paper on the other side mounted on a packing machine and cut to necessary length to circumscribe lamps and the joint was automatically covered by gum tapes. The sleeves are conveyed automatically to a conveyor on which the lamps manually inserted and the ends are folded to prevent the lamp from falling out. For the Tubes, sleeves already cut to proper length are supplied by others. Tube lamp is manually put in and the sleeve edges are manually folded and gum tape is applied. Tube lamp is inserted in the tube and put in outer cardboard packing. There was no occasion to decide on excisability of sleeves or non-applicability of T.I. 68 since such aspects were not raised before the Court.

18. We are dealing with two different kinds of products in this case.

The first consists of printed outer shell and slide and the second consists of H.L. Blanks. Generally ten cigarettes are packed with the aid of outer shells and slides and 20 cigarettes are packed using H.L.

Blanks. Outer shell is a product of printed paperboard, open at both ends. Ten cigarettes wrapped in silver paper are placed on the slide, which is thereafter placed inside the outer shell. The two ends of slide are tucked inside the outer shell so as to prevent cigarettes from falling out. When the slide with cigarettes is placed inside the outer shell and both ends are tucked in, it has the appearance of a small box. H.L. Blank is a rectangular piece of printed paperboard cut at appropriate places. Cigarettes wrapped in silver paper are placed on the central part of H.L. Blank and the other parts of H.L. Blank are folded and adjusted and glued in such a manner that it assumes the appearance of a packet with cigarettes wrapped in silver paper inside.

When H.L. Blank is so used, it has the appearance of a small box. These aspects are admitted by both sides before us.

19. Respondent manufactures outer shells and slides from printed paperboard. Outer shell is open ended at both sides and cannot be regarded as a box or receptacle or container. Where the outer shell and slide are used to make a packet, it is not a packet simpliciter, but a cigarette packet. No packet as such comes into existence. Even accepting that a packet can be regarded as a box, since it does not come into existence as such, but comes into existence only as a packet of cigarettes, it cannot fall under erstwhile T.I. 17(4). Similarly H.L. Blank is only a piece of printed paperboard and is not a receptacle. It assumes the form of a packet only when the cigarettes are inside it and cannot be regarded as a box attracting T.I. 17(4).

Shri Lakhinder Singh, JCDR contended that outer shell with slide and H.L. Blank can be regarded as box in an unassembled condition. A carton may come into existence in a flattened or unassembled condition, as it is convenient for purpose of transport. It can thereafter be assembled or made to assume its proper shape.

This is not factually true of outer shell and slide or H.L. Blank since as already pointed, when made to assume the form of a packet, it is not a mere packet, but a packet of cigarettes on which proper duty is paid. We are supported in this view by the decisions of the Supreme Court and High Courts of Delhi and Madras. It is therefore clear that T.I. 17(4) is not attracted to outer shell slide or H.L. Blank. If it is to be assumed that T.I. 17(4) is attracted treating the articles as "box" benefit of Notification No.66/82 is not available since only printed boxes and printed cartons (flattened or not) (whether in assembled or unassembled condition) are taken out of the purview of the Notification.

20. Respondent was classifying the outer shell sleeves and H.L. Blank under T.I. 68 till the present dispute arose in 1982. According to the appellant if T.I. 17(4) is held inapplicable, the articles fall under T.I. 68 and benefit of Notification No. 104/82 is not available.

Besides resisting these contentions, Respondent contended before the referring Bench that these articles are only pieces of printed paperboard, in the form of printed paperboard, they are already duty paid under the appropriate Tariff entry, the conversion of paper-board into outer shell, Slide or H.L. Blank does not amount to "manufacture" under Section 2(f) of the Act and they are not different and distinct from paperboard as known to the trade and not marketable and hence are not "goods" and not excisable at all. These contentions are rebutted on behalf of the appellant. These articles are produced adopting the following processes: (a) standard sheet of printed paperboard is cut to required size, and (b) cuts are made in each piece to enable appropriate parts to be folded after cigarettes are packed in it.

By being subjected to these processes, the pieces of printed paperboard become distinct and different with distinct identity and have distinct names, such as, "outer shell, Slide, H.L. Blank". These articles with such names are known to the trade and market. The appellant in the decision reported in 1991 (34) ECR 7 (Delhi H.C.) was producing outer shells as job worker and clearing tine same to a cigarette manufacturer. The appellant in the decision reported in 1994 (71) E.L.T. 829 (T) was producing "Slide" and selling the same to cigarette manufacturer. In

Punjab Anand Lamps Industries case, 1989 (43) E.L.T.816 (S.C.), the assessee was procuring Sleeves (used for packing Tube Lights) from others. The assessee in the present case has been supplying outer shells, Sleeves and H.L. Blanks to cigarette manufacturers. It is therefore clear that these articles are known to the market and marketable as such. They are distinct and different from printed paperboard from which they are made. We therefore hold that the articles in question are "goods" manufactured from printed paper-board and in the absence of a specific Tariff Entry, fall within the purview of erstwhile T.I. 68.

21. Under Notification No. 104/82, the Central Government exempted from duty goods falling under T.I. 68 and specified in the annexure to the Notification. Apparently, according to the Respondent, Outer shells, Slides and H.L. Blanks are covered by serial number 24 in the annexure, which reads thus:- "24. All products of the printing industry including newspapers and printed periodicals".

There was an identical item covered by Notification No. 55/75. In Rollatainers Ltd. - 1994 (72) E.L.T. 793 (S.C.), the Supreme Court held that printed carton manufactured by the appellant cannot be regarded as product of the printing industry, but is a product of the packaging industry. A carton remained a carton, in the trade and common parlance, whether it is plain carton or printed carton. This decision has been followed in the appellants' own case reported in 1997 (96) E.L.T. 9 (S.C.). In this view, we hold that the articles manufactured by the Respondent, though they attract T.I. 68, are not goods specified in the annexure to the Notification and the Respondent is not entitled to the benefit of the Notification for these articles.

(a) Outer shells, Sleeves and H.L. Blanks made by the Respondent from printed paperboard fall under erstwhile T.I. 68, and not erstwhile T.I. 17(4) [or 17(3)].

(b) These articles do not have the benefit of Notification No. 104/82.

(c) If the articles fall under T.I. 17(4), they will attract the benefit of Notification No. 66/82.

(d) The two classification lists filed by the Respondent shall be treated as approved subject to the findings in clause (a) and (b).

The appeal filed by the Department is accordingly dismissed in accordance with the above findings.

23. With due respect to Hon'ble President, my view in the matter is as follows : The issue in the appeal is as to whether "Printed Shells" & "Printed H.L. Blanks" can be classified under T.I. 17(4) and as to whether the benefit of Notification No. 66/82, dated 28-2-1982 is available to these products.

24. Ld. Collector (Appeals) in the impugned order has taken a view following the ratio of the judgment rendered by Govt. of India in the case of Golden Tobacco Co. reported in 1979 (4) E.L.T. (J 581A), held that the Shells & Slides are not classifiable under T.I. 17(4) or T.I.17(3) but are correctly classifiable under T.I. 68, and on that reasoning set aside the order of Asstt. Collector. He has not given any finding on the applicability of the notification, although the same had been raised before him, and he has duly noted it, in his order.

25. In the grounds of appeal, the Revenue is contending that the judgment of Govt. of India (supra) related to Pre-1982 Tariff description of Item 17 when there was no entry regarding boxes, cartons and packing containers. The assessee's products are products of packaging industry and such products are classifiable under T.I. No.17(4) [now T.I. 17(3)] as 1982 Budget, enlarged the description of T.I.17 as to cover the products in question. It is contended that these "Printed Shells" and "Printed H.L. Blanks" are in the nature of printed boxes (slide type of boxes) and are classifiable under T.I. 17(4). Thus they are not eligible for exemption under the said notification.

26. The matter pertaining to the classification of Outer shells of cigarette packets came up for consideration before Hon'ble High Court of Delhi in the case of Zupiter Printery and Anr. v. Union of India etc. A specific plea was taken that the Outer shells are not "goods" and they are not excisable under Item 17(4). However, it was the revenue's contention that the item is to be treated as boxes, cartons and packing containers and that of packing industry was also in issue.

On a very exhaustive consideration, the Bench upheld the contention that the item in question is not "goods" and applying the ratio of Hon'ble Supreme Court judgment rendered in the case of G. Claridge & Company Ltd. v. Collector of Central Excise, Pune as reported in 1991 (33) ECR 433; they held that the item in question cannot be considered as "boxes, cartons and packing containers". Thereby, overruling the revenue's contention that they are products of packaging industry.

While coming to the conclusion that they are not goods, the Hon'ble High Court specifically referred to the judgments of Hon'ble Supreme Court rendered in the case of Indian Aluminium Cables Ltd. v. Union of India and Ors.Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co. -1988 (37) E.L.T. 480 (S.C.). This was to overrule the contention that the shell is described as 'box' under the Indian Standard Guide for principle uses and styles of fibreboard containers. This contention of revenue was held to have no force because ISI guide is relevant for standardization and quality control and has nothing to do with the classification of the goods in terms of the tariff schedule. In this regard, the above noted Hon'ble Supreme Court judgments were relied. It was also held that in the cigarette trade the shell is not known as a 'box' which is a relevant consideration to be taken as observed by the Hon'ble Supreme Court in the above mentioned judgment. The Hon'ble High Court said in para 16 that - "By "box" we understand an encasement which ordinarily is used for the convenient transportation of its contents. Chambers English Dictionary defines "box" as "receptacle for holding anything usually four sided". Box is in fact more like a shelter which keeps other articles in itself. Therefore, in the Oxford English Dictionary, Vol. I, "box" has been defined as "a case or receptacle usually having a lid, originally applied to a small receptacle of any material for drug, ointments or valuable".

17. The question for consideration is whether the "outer-shell" manufactured by the petitioner, which has no lid and is open from both sides can hold and keep cigarettes. The answer would be in the negative. This is neither an encasement nor receptacle which can hold the thing in itself. Even if we do not give much importance to the dictionary meaning of the word "box" still the correct guide in such a case is the context and the trade meaning. The trade meaning is one which

is prevalent in that particular trade. Fiscal Entry must be understood in that context of that particular trade. In the cigarette trade, Mr. Ravinder Narain pointed out that when 20 packets of cigarettes are put in a bigger box or a container. Such an outer container is known in commercial and common parlance as a carton. These cartons are then put in bigger cardboard boxes and such bigger containers are known as boxes. In commercial and in cigarette trade, the container in which cigarettes are packed is known as a packet of cigarettes and not as a box or carton.

Therefore, even for the sake of argument, if it is presumed that the "outer shell" is a packet, still it cannot be called a box. That packet consists of both the components, the shell and the slide. But in the absence of the slide by no stretch of imagination it can be called a box.

18. The definition of "goods" make it clear that to become "goods" an article must be something which can ordinarily come to the market to be sold and bought. But at the shell stage, it can neither be bought nor sold in the market. Box has a definite meaning as understood in the common parlance. Therefore, this mere outer shell by itself cannot be put in that category. To be called a "box" it must answer to the description of a "box". An article cannot be called a "box", if it assumes the shape after some other things are put into it i.e. the slide in this case. The outer shell to be described as a box must have a separate and independent existence from the slide, but that is not the case.

19. For the reasons stated above, we hold that the "shells" of cigarette packets manufactured by the petitioner are not excisable under Entry 17(4) of the First Schedule as introduced by Finance Act, 1982. Impugned orders dated 7th April, 1982 and 30th April, 1982 are quashed and set aside".

Thus, as can been seen from the reading of the ratio of the Hon'ble High Court, they have completely ruled out the item being a "box or a carton" as known in commercial and common parlance. They have also clearly held that the item is not "goods" and they have quoted the definition of "goods"; i.e. an article must be something which can ordinarily come to the market to be sold and bought. They have held that at the shell stage, it can neither be bought nor sold in the market.

As can be seen from the above quoted paragraph 18, they have held that box had a definite meaning as understood in the common parlance. Therefore, it has been held that mere outer shell by itself cannot be put in that category. They have held that to be called a "box" it must answer to the description of a 'box'. An article cannot be called a 'box', if it assumes the shape after some other things are put into it i.e. the slide in this case. Therefore, they have clearly overruled its classification as goods and besides they being considered it as a packets of cigarette. In the other sense, the claim of the revenue to consider them as articles of packaging industry has been clearly overruled. Thus, the issue raised by the revenue in this case that these articles are packets, containers and that they are of packaging industry stands overruled in terms of this judgment. Further point as to be noted is that the Hon'ble High Court has categorically stated that the item is not "goods". The word "goods" has been understood as defined under Section 2(d) which defined excisable goods which means "goods" specified in the Schedule to the Central Excise Act, 1985. (These words substituted by Notification No. 10/86-C.E., dated 5-12-1986) has been subjected to a duty of excise. Therefore, the Hon'ble High Court says that they are not goods. It means they are not goods under the definition of "excisable goods" under Section 2(d) of the Central Excise Act, 1944. Once they are declared as not 'goods' for the purpose of the Act, therefore, it follows that they are not goods either for one tariff or for another tariff. There cannot be a proposition that the Hon'ble High Court meant to declare the item as not 'goods' only for the purpose of Tariff Item 17 and not for Tariff Item 68. The goods have been understood to mean an article which can ordinarily come to the market to be sold or bought. When Hon'ble High Court has categorically held that at the shell stage, it can neither be bought nor sold in the market; it follows that they have been declared as not "goods" for the purpose of Central Excise Act and not for only Tariff Entry 17(4) of the First Schedule. Such a proposition cannot be held as argued by ld. DR in this matter and held so by the majority.

27. This finding given by the Hon'ble High Court in respect of printed shells would apply in all force to item "Printed HL Blanks". Printed HL Blanks are independently are not 'goods', which are ordinarily sold in the market, but they are made as per specification. They are made from paperboard and as Hon'ble High Court has held that they are not articles of packaging industry, therefore, they have to be held as

such in regard to this item also and the same ratio which pertains to "Printed Shells" clearly applies to "Printed HL Blanks", as they are not in the nature of 'packets, cartons, containers and articles of packaging industry'. Once, we hold that both the items are not articles of packaging industry, therefore, the judgment of Hon'ble Supreme Court rendered in the case of Rollatainers Ltd. v. Union of India as reported in 1994 (72) E.L.T. 793 would not apply and become distinguishable.

Hon'ble Supreme Court had held that the Notification No. 55/75-C.E., dated 1-3-1975 did not apply the articles of packaging industry. The articles before us namely "Printed Shells" and "Printed HL Blanks" not being of packaging industry and being only Printed HL Blanks from Paperboard and being a product and article of printed industry, is eligible to the benefit of Notification. The view taken by Hon'ble Madras High Court in the case of Asia Tobacco Co. Ltd. v. Union of India as reported in 1992 (58) E.L.T. 418 is on the same lines as that of Hon'ble High Court in the case of Zupiter Printery and Anr.. In order to strength of the finding that the articles are not "goods", a categorical finding has been given by the Hon'ble Madras High Court in paras 5 & 6. They have after examining several judgments of the Hon'ble High Court, Hon'ble Supreme Court and Tribunal held that even while considering the process of packing of cigarettes, it is seen that the packet is completed only after cigarettes have been put in it.

Cigarettes are put first in the bundling paper and then placed in the slide. The slide along with the cigarettes is then inserted into the outer shell. The packet of cigarettes is thus completed at a stage when cigarettes are already in it. They have held that thus if this assembly is to be treated as manufacture, the manufacture is not of a packet but of a cigarette packet containing cigarettes. Thus, a cigarette packet cannot be subjected to duty twice over. Even, otherwise, it is submitted that the outer shells and inner slides cannot be subjected to any separate assessment. It is held that, whatever it may be, there is absolutely nothing to show that the outer shells are to be called thus as packets and liable to Excise Duty. Therefore, they answer the first point that they are not cigarette packets to be covered under Item 17 of the First Schedule and they are not liable for duty in this case.

28. Thus, the ratio of both the judgments of Delhi and Madras High Court will squarely apply to both the items in question. Even in the case of Printed HL Blanks, packet of cigarette comes into existence.

Simultaneously along with the cigarette, when the same is placed on the Printed HL Blanks and on the same being folded or pasted. Thus, the ratio of both the judgments will squarely apply to this item also. I am not in a position to disagree or distinguish these judgments on one count or the other. Therefore, the three members Bench of the Tribunal in the case of ITC Ltd. v. Collector of Central Excise as reported in 1994 (71) E.L.T. 547 have rightly followed both these judgments. The Tribunal again considered these judgments in the case of ITC Ltd. v.CCE as reported in 1994 (71) E.L.T. 478 and held that the "shell" of a cigarette packet is neither a 'carton' nor a 'box' and it cannot also be deemed as a 'container' of any sort. On the same considerations, it was held that "slide" which when inserted into a "shell" forms a cigarette packet, cannot by itself be a box or container and it can also not be a carton.

29. In the result following the ratio of the judgments of Delhi High Court and Madras High Court, the contentions of the revenue are required to be negatived and appeal to be dismissed by upholding the order of the Collector and also by holding that the item is entitled to the benefit by the Notification No. 66/82, dated 28-2-1982.