

Associated Packaging Industries Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-26-1998

Reported in : (1999)(63)ECC182

Judge : S Bhatnagar, Vice-, J Balasundaram

Appellant : Associated Packaging Industries

Respondent : Collector of Central Excise

Judgement :

1. In all these four appeals, the common issue which arises for determination is the correct classification of the item 'HDPE fabrics laminated with LDPE on both sides' manufactured by the assessee herein--the department seeks classification under subheading 3920.32 (prior to 1.3.1988 and under sub-heading 3920.28 subsequent to 1.3.1988). Heading 39.20 reads as under: Other plates, sheets, films, foil and strips of plastics, non-cellular, whether lacquered or metallised or laminated, supported or similarly combined with other materials or not".

Heading 3920.32 covers "Flexible plates, sheets, films, foil and strips". From 1.3.1988 the corresponding heading 3920.38 covered "flexible, laminated sheets ". The manufacturers claim classification of the item as other articles of plastic falling under sub-heading 3926.90.

2. We have heard Shri V Lakshmi Kumaran. learned Counsel for M/s.

Associated Packaging Industries and M/s. Moneeto Plasti-Fab (P) Ltd., Shri K.K. Anand. learned Counsel for M/s. Shree Rama Packaging and Shri J.M. Sharma. learned DR for the Revenue in all the cases. None represented M/s. Duck Lamiplast inspite of notice of hearing on 26.2.97 having been issued on 30.1.97. Hence, we proceed to dispose of the appeal in the case of M/s. Duck Lamiplast also particularly since the issue involved in all the four cases is a common one.

3. The process of manufacture is that strips are manufactured out of HDPE granules and the same, by intertwining a running length, are converted into fabrics which are coated with LDPE granules on both the sides. We find that the test report dated 29.8.89 of the sample drawn from M/s. Shree Rama Packaging describes that the sample is "in the form of translucent cut piece of sheet having thickness 0.25 mm and smooth surface". It is woven fabric made of high density polyethylene narrow strip having a thick coating of low density polyethylene". The other manufacturers namely M/s. Associated Packaging Industries, M/s.

Moneeto Plasti-Fab and M/s. Duck Lamiplast do not dispute that the above description also covers their product. From the test report, it is clear that the product is a flexible sheet.

4. Shri V. Lakshmi Kumaran, learned Counsel whose arguments are adopted by Shri K.K. Anand, Advocate has sought to argue that the product is not a sheet as defined in the Glossary of Plastic Terms IS 7019-1982 wherein Clause 2.139 defines a sheet as 'a non-fibrous non-metallic material normally greater than 0.25 mm thickness' on the ground that their product is made from fibre and is. therefore, fibrous and not non-fibrous. However, this argument is not substantiated and therefore, does not deserve to be accepted. The alternative argument of the learned Counsel is that heading 3920 excludes sheets which are coated with plastic materials and only covers sheets or film or foil which are lacquered or metallised or laminated, supported or similarly combined with material other than plastic. This argument is not acceptable, because as rightly pointed out by the learned DR| heading 3920 covers sheets, etc. whether plain or subjected to the other processes described in sub-heading and since the product in dispute is nothing but plastic sheet, it would remain for classification under sub-heading

3920, in the absence of exclusion of coated sheets from this sub-heading.

5. Since the product consists entirely of plastic and is nothing but coated with LDPE, the correct classification of the same is under sub-heading 3920.32 (pre 1.3.88) and heading 3920.38 (post 1.3.88) which is a specific entry for the product and cannot be classified as articles of plastic under heading 3926.90 which is a residuary entry.

The item is not an article of plastic at the stage of clearance by the assesses. although it can become an article of plastic after further cutting or stitching into bags, car covers etc.

6. In the light of the above discussion, we hold that the product in dispute in all these cases is a plastic sheet falling for classification under heading 3920.32 (prior to 1.3.88) and heading 3920.28 (post 1.3.88). The classification under heading 3926.90 is rejected. In the result, we uphold the impugned orders in the case of M/s. Associated Packaging Industries and M/s. Moneeto Plasti-Fab and reject Appeal Nos. 4093/90 and 414/90-C. In the Appeal Nos. 422/91 and 487/ 91-C. the impugned order is set aside and the appeals of the Revenue are allowed.

1. With due respects to Hon'ble Member (Judicial), my opinion in the matter is as follows.

2. I observe that the issue involved here relates to determination of nature and type of items in question & their characteristics (in the first instance) and consequently, their classification. In this respect, a difficulty arises from the fact that the products have been described differently at different places in various documents (as we will see as we proceed) and therefore, inter alia, the following questions arise: (iii) whether they are coated materials (with granules, solutions or film) & The difficulty is compounded by the fact that in the documents before us and during the submissions made before us. the relevant aspects have not been highlighted and the issues appear to have been mixed up.

3. In the case of the appellants M/s. Associated Packaging Industries, in the appeal memorandum, the product has been described as 'HDPE Woven Fabrics

Coated/covered with plastics on both sides' and it has been mentioned inter alia, that they are also known in the market in commercial parlance as 'both sides coated HDPE woven fabrics or plastic coated fabrics'. In the Order-in-Original dated 7.9.88 also, it is mentioned that is declared as an article of plastic namely 'both sides coated HDPE fabrics'. The classification list was approved with this declaration classifying the product under 3926.90 and allowing assessment at nil rate under notification 132/ 86 as amended. The Collector (Appeals), however, set aside this order holding inter alia that the product is completely made of plastic only and is nothing other than sheet coated or laminated on both the sides by coating of LDPE granules vide order dated 16/28-4/6-90. There is no reference to any chemical test report or market enquiry in any of the orders.

4. The description in the appeal memorandum and Order-in-Original and Order-in-Appeal aside in a letter dated 19/20.2.90 addressed to the Collector, Bombay the product is being referred to as 'HDPE fabric coated/covered with plastic on both the sides'.

5. In the case of M/s. Moneeto Plasti-Fab. Pvt. Ltd., in the appeal memorandum, the product has been described as 'HDPE Woven Fabrics Coated/covered with Plastics on both sides' and in the statement of facts, it is also mentioned that in the open market and commercial parlance, it is known as 'articles of plastics both side coated HDPE fabrics' and there is a reference to a proposal for chemical test and report from the experts and that such a proposal has not been accepted.

In the Order-in-Original, the A.C. had approved the classification under 3926.90 with the benefit of notification 132/86 treating the material as 'an article of plastic namely both sides coated HDPE fabrics'. The Collector (Appeals) has, however, set aside the order making the same observations as in the case of M/s. Associated Packaging Industries and its impugned order dated 28.3.90/9.4.90.

6. In the case of appellants CCE, Mehsana and respondents M/s. Shree Ram Packaging, in the appeal memorandum, the department has described the product, as 'laminated HDPE fabrics' and claimed classification under 3920.32 as flexible plain sheet of plastic. But, interestingly, while in the brief facts (para 1). the product has been described as 'laminated fabrics', subsequently in para 5(3), it

has been described as 'HDPE fabric coated with LDPE on both sides'. The Order-in-Original describes the product as 'laminated HDPE fabrics' in the brief facts of the case and the product is treated as plain flexible sheet of plastic as the HDPE fabric is coated on both the sides by HDPE solution'. It also refers to a test report in which the product is said to be described inter alia as 'the translucent cut piece of sheet having thickness 0.25 mm and smooth surface' and the A.C. has classified it under 3920.32 without reference to any notification.

7. In the case of respondents M/s. Duck Lamiplast, the department has described in the appeal memorandum the product as 'HDPE fabrics coated/covered or laminated with plastic on both the sides whereas the respondents in the cross objection has described the product as 'HDPE fabrics coated both sides with LDPE'. It refers to a test report in which it is said to be described as 'Woven fabric made of narrow continuous strip having specific gravity more than 0.94 laminated/coated on both side with a thin film of low density'. The Order-in-Original, however, describes the product as 'lamination work of HDPE fabrics falling under chapter 54 with LDPE on both the sides' mentioning that the respondents sought classification of HDPE fabric coated/covered or laminated with plastic on both the sides. The A.C. has referred to a test report dated 8.8.89 describing the product as 'woven fabric made of narrow continuous strip having specific gravity more than 0.94 laminated/coated on both the sides with a thin film of LDPE'. The A.C. also talks of subsequent approval of classification list due to misleading description and classified the product under 3920.30 and does not refer to any notification.

8. The Collector (Appeals) has passed a common order in respect of M/s.

Shree Rama Packaging and M/s. Duck Lamiplast. In the brief facts of the case, the product has been first described as 'HDPE fabrics coated/covered or laminated with plastic on both the sides' and in the subsequent lines in the same paragraph, the words used are 'coated or laminated fabrics'. In his findings, the Collector treats the item as 'woven fabrics of HDPE with thin coating of LDPE on both the sides' even after noting the assessee's M/s. Shree Rama Packaging's submission that the goods in question were known as 'HDPE laminated fabrics' in the trade

and the manufacturing process described by the assessee M/s.

Duck Lamiplast that the items are coated with LDPE on both the sides.

In the Chemical Test report in the case of M/s. Shree Rama Packaging, the chemical examiner's report is as under: Sample is in the form of translucent cut piece of sheet having thickness 0.25 mm and smooth surface. It is a woven fabric made of high density polyethylene narrow strip having a thin coating of low density polyethylene.

In the case of M/s. Duck Lamiplast, the chemical examiner's report is as follows: Sample is in the form of black coloured cut piece of sheet of thickness 0.3 mm. It is a woven fabric made of narrow continuous strip having specific gravity more than 0.94 laminated/coated on both side with a thin film of low density polyethylene having specific gravity less than 0.94. The thickness and width of narrow continuous strip are less than 1 mm and 4 mm respectively.

9. All this shows that both the sides, the department as well as the assessee, the A.C. as well as the Collector (and even chemical examiners) have not taken serious note of the method of manufacture and the characteristics of the final product and all the sides have proceeded as if coating and lamination were synonymous (as evident from the use of the words 'coating' at one place and 'lamination' at another or writing coated/laminated). It is, therefore, clear that the distinction between coating and lamination has been somehow lost sight of. In my opinion, they are two entirely different processes and coated products or items are distinct and distinguishable from laminated items or products.

10. The 'Rosato's Plastics Encyclopaedia and Dictionary' defines 'lamination' as follows: Lamination: The laying on of layers of materials and bonding them.

The Fig. above is an example of a two layer lamination bonding of a plastic film with aluminium foil. Different materials, including reinforced plastics, in two or more plies are laminated to produce different products.

'Coating' is defined as "the film formed by the material" as given in McGraw Hill Dictionary of Scientific & Technical Terms-- Fifth Edition.

As we know, it is produced by various techniques on a given surface and therefore, 'any material that will form a continuous film over a surface' is also called as coating material (vide the same dictionary).

It is also seen that in two of these cases (M/s. Associated Packaging Industries and M/s. Moneeto Plasti-Fab Pvt. Ltd.), the product sample was not tested and the other two namely, M/s. Shree Rama Packaging and M/s. Duck Lamiplast where it was tested, in one case (M/s. Shree Rama Packaging), the chemical examiner refers to the sample as having a low density whereas in the case of M/s. Duck Lamiplast, the words used are 'laminated/coated on both the sides with a thin film of LDPE'.

11. Learned Counsels have argued, *infer alia*, that their product is made from fibre and is, therefore, fibrous whereas as per Glossary of Plastic Terms that a 'sheet' is a non-fibrous non-metallic material normally greater than 0.25 mm thickness but. it appears that the distinction between articles made from fibre and those which are by themselves fibrous appears to have been lost sight of.

12. The test report in the case of M/s. Shree Rama Packaging of the sample merely describes the materials as a translucent cut piece of sheet having thickness 0.25 mm and smooth surface as mentioned in para 3 above. Neither this report nor the process of manufacture broadly described before us or any other material indicates that the material in question was made from fibre or was fibrous.

13. Even if it was made from fibre, it would not help the cause of the appellants even in terms of the Glossary definition because the product made from fibre need not necessarily be fibrous and by application of appropriate processing techniques a non-fibrous material could be produced. Again, there is nothing to indicate that the item in question was fibrous in character. Therefore. I agree with my learned Colleague that this plea has remained unsubstantiated.

14. However, the alternative argument that heading 39.20 excludes coating with plastic material requires a closer look and we must examine this aspect carefully as the language of the heading includes *inter alia*, sheets of plastic whether lacquered or not. supported or similarly combined with other material or not but,

prima facie, there is no reference to sheets coated with other material.

15. The interesting part of the matter is that in the present case, the material of which the fabric is made namely, HDPE is also a plastic material and the LDPE is also a plastic material. Therefore, a question also arises whether the item is a plastic sheet simpliciter or a sheet coated with LDPE or one laminated with LDPE or whether the item could be treated as a sheet at all. If it was a coated product, whether coating was that of granules/solution and if it was a laminated product, how was the lamination done because after describing the process of manufacture and testing both the sides or rather all the sides have used coating and lamination loosely and at times, interchangeably as if it made no difference but. as we have seen above, coating and lamination are different processes and coated products have to be distinguished from laminated products.

16. Therefore, first and foremost, it is required to be determined whether the products in question in case of all the parties were merely HDPE fabrics coated or covered with LDPE granules fibrous or they were laminated with LDPE. It is important because heading 39.20 covers laminated sheets but not coated sheets irrespective of whether coating was of plastic or some other material.

17. Furthermore, it has not been examined as to how these products are being treated in the market. If the product was coated fabrics, it will automatically go out of 39.20. But, even if in any particular case, they were laminated, a question would arise whether they would still attract 39.20 depending upon as to how they are treated in the market in the absence of any specific definition of sheet in the tariff. The chapter note 10 of Chapter 39 does not help us in this regard because it does not define but describes sheets and distinguishes between sheets etc. of various types and whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked. What is, however, required to be seen for our purpose is whether the Collector was correct in taking into account such other features and aspects as the assessee had pleaded before him stating that they were not being sold in sheets of any specific length or breadth or other specified dimensions but as coated plastic fabrics in rolls.

18. It is, however, obvious that all the relevant aspects have not been duly taken into account and the various sides have misdirected themselves in losing sight of the distinction between coating and lamination. I, therefore, set aside all the orders and remand the matters to the Assistant Commissioner for de novo consideration in accordance with law after giving an opportunity to the appellants/ respondents to be heard in the matter and produce such other relevant material as may be necessary. He should, inter alia, record a specific finding regarding the characteristics and features of the product and thereafter, classify them and also determine whether notification, if any, was relevant and applicable during the period in question and to assess the goods accordingly, in accordance with law.

In view of the difference of opinion between Hon'ble Member (Judicial) and the Vice-President, the matter is submitted to Hon'ble President for reference to a Third Member on the following point: Whether in view of observations and findings of Hon'ble Member (Judicial), the impugned orders are required to be set aside and the appeals of the Revenue allowed or in view of the observations and findings of the Vice-President, the matters are required to be remanded for de novo consideration in accordance with law as proposed by the Vice-President.

1. The difference of opinion matter was argued before me by Shri V.Lakshmi Kumaran learned Counsel for appellant, M/s. Associated Packaging Industries and Shri Lakhinder Singh learned Joint Chief Departmental Representative who appeared on behalf of Revenue. I have taken into account their respective submissions and perused the two orders of the bench which had heard the appeals originally and the impugned orders. I find that the first sentence of the reference order about the order of the Judicial Member mentions only about the setting aside of the impugned orders and allowing of the appeals of the Revenue. That will be only in respect of appeals E/422/91-C and E/487/91-C since the other two appeals E/4093/90-C and E/414/90-C are not by Revenue but by the concerned assesseees. These appeals have been proposed to be dismissed upholding the orders impugned therein. This does not find a mention in the referring order. The order proposed by Vice-President proposes remand of the matter to the Assistant Commissioners concerned in all the cases. I share his reasoning and accordingly agree with his order for setting aside of all the orders

and remanding the matter to the Assistant Commissioners for de novo consideration in accordance with law after giving opportunity to the appellants/ respondents for hearing and producing other relevant matter as may be necessary and recording a finding regarding the products for classifying them and determining the applicability of the relevant Notification. The papers may be returned to the Original Bench for disposal of these appeals in accordance with the majority view.

In view of the majority opinion, the matters are remanded for reconsideration in accordance with law in the light of observations and findings of the Vice-President.

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