

Freedom Rubber Ltd. Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-06-2000

Reported in : (2001)(73)ECC346

Judge : P Chacko, S T S.S.

Appellant : Freedom Rubber Ltd.

Respondent : C.C.E.

Advocate for Pet/Ap. : Shri. G. Shivdars

Judgement :

1. The appellants were engaged in the manufacture of cycle tyres falling under Subheading 4011.10 of the Central Excise Tariff. The said product was exempt from duty. The dispute involved in the present appeal arose when the Department proposed to levy duty on the intermediate product namely "rubberised cotton cord fabric" produced by the appellants and used by them captively in the manufacture of cycle tyres. The appellants had manufactured 7,95,961.300 kgs of rubbersied cotton cord fabric (in short, "RCC fabric") valued at Rs. 2,86,84,028.20 involving Central Excise duty of Rs. 24,68,403.00 and had captively consumed it for manufacture of cycle tyres during the period 01.03.1994 to 16.03.1995, in which period rubberised textile fabrics falling under Heading 59.05 of the Tariff were not exempt from duty. Department, by show-cause notice (SCN) dated 14.01.1999, proposed to recover duty as above with interest under Section 11-AB of the Central Excise Act and to impose mandatory penalty under Section 11-AC of the

Act. The SCN invoked the extended period of limitation under Section 11-A(1) of the Act by alleging 'wilful suppression of facts with intent to defraud the Department of Central Excise duty'. The demand of duty in the SCN was based on the allegation that the RCC fabric was an "independent stable" intermediate excisable product well-known to tyre-manufacturers/traders all over the world, which had a shelf life and was transportable" and that it was chargeable to duty @ 10% ad valorem under Tariff Subheading 5905.10 during the period of dispute. The appellants, in their reply to the SCN, denied all the allegations and submitted, inter alia, that the intermediate product in question was neither marketed nor marketable and here it was not dutiable. They relied on case law as also on CBEC's circular dated 30.06.1999 [published in 1999 (111) E.L.T. 31] which clarified that certain intermediate products captively consumed and not sold commercially were not chargeable to duty on account of their short shelf life. The jurisdictional Commissioner of Central Excise adjudicated the dispute and, by order dated 01.12.1999, held the intermediate product to be marketable on account of its being stable (with shelf life of two days) and known to commercial community and to be chargeable to duty @ 10% during the relevant period under TSH 5905.10. The adjudicating authority confirmed the demand of duty under Rule 9(2) of the Central Excise Rules (CER) read with Section 11-A of the Act and directed the party to pay the same with interest @ 20% under Section 11-AB of the Act. Mandatory penalty of Rs. 25 lacs was also imposed on them under Section 11-AC of the Act. This order of Ld.

Commissioner is under challenge in the present appeal.

3. Shri G. Shivdars, Counsel for the appellants reiterated the grounds of the appeal. He emphasised the following points: (i) No allegation in the SCN that the RCC fabric was actually marketed or was marketable. Therefore, the Commissioner's finding of marketability of the intermediate product is beyond the scope of the SCN. (ii) As per the process of manufacture and the trade practice as explained to the Department and the adjudicating authority, the intermediate product was not marketable.

(iii) No evidence whatsoever was adduced by the Department to support a finding of marketability. No market enquiry was held, no chemical test was conducted, no expert opinion or technical literature on the shelf life and other relevant properties of the product was considered. The Revenue failed to discharge its burden of proof of marketability of the product.

(iv) Neither a shelf life of two days (as found by the adjudicating authority) nor any mention of the product under Tariff entry was enough to hold that the product was marketable. It was the Revenue's burden to prove that the product was marketed or, atleast, capable of being marketed.

(v) Neither in the statement of Shri Gagan Pal Singh, Director of the Company (recorded under Section 14 of the Act) nor in the appellants' reply to the SCN had it been stated that the RCC fabric had a shelf life of two days. The earlier statement to this effect given in the appellants' letter dated 29.07.1998 to the Superintendent of Central Excise was retracted in the reply to the SCN. (vi) The appellants had been manufacturing and clearing cycle tyres at NIL rate of duty since 1991-92 and were not aware of the alleged fact that duty was chargeable on the intermediate product viz. 'RCC fabric' produced and captively consumed in such manufacture. On the other hand, Department was aware of such fact as also the fact that the exemption in respect of rubberised textile fabrics had been withdrawn w.e.f. 01.04.1994 as was evident from the Departmental proceedings against other tyre cord manufacturers in Ludhiana on identical set of facts. Therefore, the extended period of limitation was not invocable against the appellants. The SCN in the instant case was issued 4 to 5 year after the period of dispute and was time-barred.

(vii) Neither any interest under Section 11-AB nor any penalty under Section 11-AC of the Act was chargeable/imposable since these provisions of law were not in force at the relevant time.

(viii) The case law relied on by the adjudicating authority would not support the Revenue's case.

Ld. Advocate also cited the following decisions in support of the above points: C.C.E. v. United Phosphorus Ltd. (v) Metro Tyres Ltd. v C.C.E. Final Order No. 993-1005/999-C dated 17.09.1999 in Appeal Nos. E/788 etc./98-C. Counsel prayed for setting aside the impugned order and allowing the appeal.

4. Ld. SDR, Shri Prabhat Kumar reiterated the findings of the adjudicating authority and relied on the case law referred to in the impugned order. He laid stress on the fact that the appellants had themselves stated before the Department in their letter dated 29.07.1998 that RCC fabrics produced and captively consumed by them in the manufacture of cycle tyres and a shelf life of two days. Such statement was never retracted by them before the adjudicating authority. Therefore, that authority was justified in finding that the shelf life of the product was two days. Ld. SDR further argued that the affidavits filed before the Tribunal by the party contradicting their earlier plea of shelf life were not to be accepted in law. A shelf life of two days coupled with the strength and stability of the product (as conceded by Shri Gajan Pal Singh in his statement given to the Department on 30.07.1998 under Section 14 of the Act) together with the factum of the product having been classified under specific Tariff Sub-heading was enough for the adjudicating authority to hold that the item was marketable and excisable. Ld. DR also defended the invocation of extended period in the case by submitting that no material was brought on record by the party to rebut the allegation of suppression of facts with intent to evade payment of duty. He, therefore, pleaded for rejecting the appeal.

5. We have carefully considered the rival submissions. We note that Ld.

Commissioner, relying on Supreme Court's rulings on the point, rightly understood the settled law that the dutiability of any product depended on its marketability. He then went into the question whether RCC fabric was marketable or not. He took the correct view that, for holding a product to be excisable, it was not necessary that the item must be actually sold or marketed and what required to be shown was only that the item was capable of being sold in the market as 'goods'. Ld.

Commissioner then held the RCC fabrics to be marketable and hence excisable. This decision, we note, was based on findings on three aspects viz. (a) the

appellants themselves had, in their letter dated 29.07.1998 to the Superintendent of Central Excise Preventive), submitted that the fabric had a shelf life of two days and was stable; (b) the product was well-known to the commercial community and the persons who dealt with and consumed it; (c) the product was separately classified under TSH. 5905.10.

6. As correctly understood by Ld. Commissioner, the essential test for deciding the dutiability of any product is the test of marketability.

Unless the product is 'goods' capable of being sold in market, it will not be exigible to duty under Section 3 of the Central Excise Act. The burden to prove that any product alleged to be chargeable to duty is marketable is on the Department as per settled law, which position has not been disputed before us. Since the burden to prove that the RCC fabrics produced and consumed captively in the manufacture of cycle tyres in the appellants' factory were marketable was on the Department for the purpose of demanding duty on the intermediate product, Department ought to have specifically alleged in the SCN that, or atleast to the effect that, the fabrics were marketable. As rightly pointed out by Ld. Advocate, no such allegation was raised in the SCN by the Department. The Commissioner's finding of marketability of the RCC fabrics is questionable on this very ground.

7.1 Even otherwise, could it be held that the Commissioner's finding of marketability of the RCC fabrics is sustainable on the basis of the evidence on record? The Supreme Court in the case of Moti Laminates (supra) examined the dutiability of goods captively consumed, and, after referring to its earlier decisions in the cases of Bhor Industries (supra) and Ambalal Sarabhai Enterprises (supra), held as under: But when the Rules (9 and 49 of the CER) were amended (in the year 1979) a fiction was created that any article produced or manufactured if captively consumed was statutorily presumed to satisfy the test of marketability. But this presumption can be rebutted if it is established that the article produced and captively consumed was neither goods nor marketable nor capable of being marketed. The duty is attracted not by captive consumption of any article but it must be a goods within the meaning of the Act, which, apart, from having a distinctive name and known as such, must be marketable or capable of being

marketed.

The court further held that, even in respect of goods specified in the Tariff schedule, it could be established that it was not marketable and therefore no duty was leviable on it. In other words, the test of marketability is applicable even to those goods which are mentioned in the Tariff.

7.2 In *United Phosphorus (Supra)*, the ratio of the aforesaid decisions was followed by the Apex Court while upholding the view taken by the Tribunal to the effect that the mere mentioning of an item in Drawback Rules with reference to a different context was not enough to satisfy the test of marketability unless it was shown that the intermediate products were capable of being taken to market and of being bought and sold. 7.3 In the instant case, the RCC fabrics appeared to fall under TSH 5905.10. But this fact by itself would not render the product chargeable to duty. It was incumbent on the Revenue to prove that the product was marketable.

8.1 We note that the only material on the basis of which the Commissioner found the product to be marketable is the appellants' letter dated 29.07.1998 to the Superintendent of Central Excise. In that letter, the party had stated that the RCC fabric had a shelf life of 2 days. In the same letter, they had also given an account of the process of manufacture of cycle tyre involving captive use of the RCC fabric. In their statement given to the Department under Section 14 of the Act on 30.07.1998, they submitted, inter alia, that the material was strong and stable. They consumed the material captively and did not sell it. Department has also caused a study of the manufacturing process to be conducted by its officers by visiting the factory.

8.2 It was on the basis of the above information/materials that the SCN was issued to the appellants. In their reply to the SCN, they, inter alia, submitted that ordinarily the RCC fabrics had a shelf life of a few hours only. This submission, we note, amounted to retraction of their earlier statement (in letter dated 29.07.1998) that the shelf life was two days and was, in our view, a substantial shift on the part of the assessee in the pleading of a material fact germane to the issue of marketability of the product. But, it appears, no evidence whatsoever was adduced

by the party before the adjudicating authority to substantiate the 'shortened' shelf life. This situation, however, offered no justification to the said authority for ignoring the definite plea contained in the reply to SCN and adopting the assessee's earlier plea of two days' shelf life without any support of evidence. When such earlier plea had come to be incorporated as a pleading of fact against the assessee in the SCN, it had turned out to be a departmental allegation against them and, therefore, it called for positive steps from the part of the Revenue to prove the fact so alleged. No steps whatsoever were taken by the Department to prove that the shelf life of the product was two days. There was no examination of Shri Gajan Lal Singh, no consultation of technical literature, no chemical or other test of samples and no steps for taking opinion of technical experts. Therefore, Ld. Commissioner's finding that the RCC fabric had a shelf life of two days requires to be rejected for want of evidence.

9.1. Even if it be assumed that the correct shelf life was two days, would it be sufficient to hold the product to be capable of being marketed? In the case of Metro Tyres (Supra), the product in question was RCC fabric itself. The appellants in those appeals were also manufacturers of cycle tyres etc. Their process of manufacture was similar to that of the present appellants. The RCC fabric which emerged as an intermediate product was captively consumed by them in the manufacture of cycle tyres. One of the questions which arose for consideration by the Tribunal was whether the intermediate product had got sufficient shelf life and was capable of being bought and sold in the market. The manufacturers' affidavits showed the shelf life in the range of 3-4 hours while expert's opinion was in favour of 24 hours.

After considering all such evidence on record, the Tribunal recorded its finding as under: We find that a fact comes out clearly that the shelf life of the product is a few hours ranging from 3-4 hours to 24 hours. 24 hours cannot be termed as a long shelf life so as to bring the product into the market for the purpose of buying and selling. The expert's opinion and the affidavits clearly showed that curing takes place even at room temperature and once the surface gets cured, it loses its binding character. Thus from these affidavits and the expert opinion, we can say that the shelf life of the product is short so as to store the product and bring it to the

market for the purpose of sale and purchase.

The Tribunal, having found the product to be non-marketable, held the same to be non-excisable as 'goods' under Section 3 of the Act by following the Apex Court's ruling in *Moti Laminates* (supra).

9.2. Though the intermediate product in question and the process of manufacture of tyres in the instant case appear to be identical, respectively, with those in the above case of *Metro Tyres*, it may not be safe to adopt the above finding of the Tribunal for deciding, in the instant case, the question whether a shelf life of two days is sufficient for marketability of the product. This is because it is not known as to whether the same set of Rubber Chemicals as used by *Metro Tyres* was used by the present appellants and, if so, whether the same formula (proportion of mixing) was used in the mixing stage of the process of manufacture. Whether during (vulcanisation of rubber) will take place at room temperature and, if so, how much time will be taken for the surface-curing will all depend on the nature of the rubber and the rubber chemicals (vulcaniser, accelerator, activator, retarder etc.) used in the mixing stage and also on the proportion of mixing.

The faster the curing at room temperature, the shorter the shelf life of the rubberised fabric. Shelf life, therefore, depends on the facts of each case. We are, therefore, unable to apply the finding of shelf life in *Metro Tyres* (supra) to the present appellants's case, nor are we inclined to rely on the affidavits (Annexures 4 and 5 to the appeal memo) filed by the appellants. These affidavits were not available to the adjudicating authority. There is no request before us for admitting any fresh evidence either.

10. We note that, apart from shelf life, there is another aspect which the Commissioner ought to have considered, but did not consider, in the appellants' case. This can be brought out by examining the various stages of the manufacturing process as understood by the Department (vide para 2.1 of the Commissioner's order), which are extracted below: At this stage Rubber, Carbon Black, Zinc Oxide, Rubber Chemicals, filter etc. are mixed together. The actual proportion in which various chemicals are mixed is trade secret for each manufacturer and also depends upon the quality of the final product to be made.

The Rubber mixed preparation obtained by mixing as detailed in the process (i) above are made to pass through the cord calendering machine and simultaneously cotton yarns in parallel length are also made to pass through therein. The product which is obtained from the cord calendering machine is commonly known as "Rubberised Cotton Cord Fabrics". This Rubberised Cotton cord fabrics is used as ply in the manufacture of cycle/rickshaw tyres.

To make green Tyre two bead wire, rings, ply and tread Rubber are used.

Thereafter the green tyre is put in the press and it is cured with the help of Air bag by providing steam to it.

The first stage of the process as understood by the Department shows that Rubber is mixed with Carbon Black, Zinc Oxide and other Rubber Chemicals in a proportion which is trade secret for each manufacturer and depends upon the quality of the final product to be made. It is the rubber-mixed preparation so obtained that is made to pass, simultaneously with cotton yarns in parallel length, through cord calendering machine in the second stage of the manufacturing process, where from "rubberised cotton cord fabric" emerges, which is then used as ply in the manufacture of tyres. When the proportion of mixing in the first stage is dependent on the desired quality of the final product (tyre) and is also a trade secret, how can the RCC fabric (resulting from such mixing followed by calendering) attract buyers in the open market? No prudent man will think that a manufacturer who wants to manufacture cycle tyres of a particular quality of his choice will buy from the market RCC fabrics of another manufacturer who keeps trade secret of the formula for manufacture of such rubberised fabrics.

This aspect, which was disclosed to the Department by their own study of the manufacturing process, was also explained to the Commissioner by the appellants in their reply to SCN. They said: "... product cannot be considered to be marketable as each manufacturer mixes the ingredients according to his own formula and Tyre Cord Fabrics prepared by one is of no use to other and it is primarily for these reasons that it is not marketed". Ld. Commissioner did not at all consider the above element of marketability of the particular product in question.

11. Department had not adduced any evidence to substantiate the SCN allegation that the RCC fabric was well-known to the tyre-manufactures/traders. Yet Ld. Commissioner recorded a finding that the product was "well known in commercial parlance to commercial community and the persons who deal and consume it". Such a finding, unsupported by evidence, cannot be sustained in law.

12. We would follow the view taken by the Tribunal in Metro Tyres (supra) that marketability to RCC fabric is dependent on its shelf life. But the Commissioner's finding of 'two days shelf life' has already been rejected by us. The Revenue has failed to discharge its burden of establishing that the product has sufficient shelf life so as to be capable of being bought and sold in the market. It has, therefore, to be held that the product is not marketable and hence not excisable as 'goods' under Section 3 of the Central Excise Act. The demand of duty on the RCC fabrics produced and removed for captive consumption by the appellants during 01.03.1994-16.03.1995 is not sustainable and the same is vacated. In view of this decision on merits, we need not consider the appellants' plea of limitation.

13. Since the demand of duty stands vacated, there is no question of any interest or penalty. Even otherwise, as rightly submitted by Ld.

Counsel, neither any interest under Section 11-AB nor any penalty under Section 11-AC of the Act can be charged/imposed on the party for the period of dispute, since these provisions of law were not there on the statute during such period.

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