Collector of Central Excise Vs. Rohit Pulp and Paper Mills Ltd.

Collector of Central Excise Vs. Rohit Pulp and Paper Mills Ltd.

SooperKanoon Citation : sooperkanoon.com/2007

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-06-1985

Reported in : (1985)(0)LC790Tri(Delhi)

Judge : G Sankaran, H Syiem, S Jain

Appellant : Collector of Central Excise

Respondent : Rohit Pulp and Paper Mills Ltd.

Judgement :

1. The captioned appeal was initially filed as a revision application before the Central Government which, under the provisions of Section 35-P of the Central Excises & Salt Act, 1944, has come as transferred proceedings to this Tribunal for disposal as if it were an appeal filed before it.

2. The facts of the case, briefly stated, are that M/s. Rohit Pulp and Paper Mills Ltd., Udvada, District Bulsar (Gujarat) (hereinafter referred to as the Respondents) are manufacturers of paper. Paper is excisable under item No. 17 of the First Schedule to the Central Excises & Salt Act, 1944 (hereinafter referred to as CET). The dispute in the present matter relates to a variety of paper known as maplitho paper of grammage ranping from 140 grammes per sq. metre (GSM) to 179 GSM. Prior to 16 3.1976, the Respondents were clearing such paper as pulp-board falling under sub-item (3) of item No. 17 CET. On 16.3.1976, item No, 17 of the CET underwent certain legislative changes. From 16.3.1976 onwards the Respondents were clearing maplitho paper of the above grammage under sub-

item (I) of item No. 17 CET as printing and writing paper. It appears that the Central Excise authorities made certain trade enquiries which revealed that the said paper was being used as card, title cover and outer cover of text books, etc. The authorities, therefore, considered that the correct classification of the subject paper was under sub-item (2) of item No. 17 and not sub-item (1). On this basis, the Supdt. of Central Excise, Bulsar issued on 12.4.1977 a notice to the Respondents asking them to show cause why a sum of Rs. 76,371.11 representing the short levied duty should not be recovered from them in respect of the maplitho paper cleared by them during the period from 13.4.1976 to 31.1.1977 in terms of the provisions of Rule 10 read with Rule 173-J of the Central Excise Rules, 1944. In due course, the Assistant Collector of Central Excise, Surat passed an order dated 30.9.1977 holding that the maplitho paper in question was classifiable under item No. 17(2) CET and consequently, confirming the demand in the show cause notice. Aggrieved with this order, the Respondents preferred an appeal before the Appellate Collector of Central Excise, Bombay who, in his order in Appeal No.282/79 dated 9 4.1979, held that the end-use of the paper taken into consideration by the Assistant Collector was not material and that the subject paper was classifiable under item No. 17(1) and not 17(2) and thus set aside the Assistant Collector's Order-in-Original. In exercise of the powers vested in them, under Section 36(2) of the Central Excises & Salt Act, 1944, the Central Government called for examination of the records of the aforesaid Order-in-Appeal for the purpose of examining the propriety, legality and correctness of the said order. Il appeared to the Central Government that in allowing the appeal, the Appellate Collector lost sight of the fact that item No. 17(2) CET covered not only paper board but also other papers not falling under item No. 17(1) and the fact that trade inquiries had revealed that the subject paper was actually used as card, outer cover of text books, etc. and not as printing and writing paper. The Central Government also relied upon a report of the Tariff Commission of the Government of India in the course of which the Commission had observed that this type of paper of grammage below 85 GSM was normally Used for the purpose of priming while that above 85 GSM was used for the purpose of drawing.

Il, therefore, appeared to the Central Government that the subject paper would fall outside the scope of item No. 17(1) and that it would be appropriately covered under item No. 17(2). Based on these premises, the Central Government formed the tentative view that the Order-in-Appeal passed by the Appellate Collector was not proper, legal and correct. By notice E. No. 198/4/2/80-CX-V dated 20.3.1980, the Central Government called upon the Respondents to show cause why the said Order-in-Appeal should not be set aside and the Assistant Collector's order restored or why such order as deemed fit, after considering the submissions of the Respondents should not be passed.

3. It appears that, on 18.7.1980, the Respondents wrote to the Central Government Mating that the nature and extent of the alleged trade enquiries referred to in the show cause notice had not been set out nor had the material gathered from the trade enquiries been revealed in the show cause notice. It was submitted that it would be in the interest of natural justice that full details pertaining to the said trade enquiries ought to be revealed to the Respondents so that they could have reasonable opportunity of dealing with them. The Central Government was called upon to disclose the full details and particulars of trade enquiries and any other relevant material on which the Department might be relying. It appears from the record that no reply was sent to the aforesaid letter. On 8.8.1980, the lawyers to the Respondents sent a detailed reply to the notice denying the allegations contained in it and reiterating that in view of the non-disclosure of the details of the trade enquiries referred to in the review notice, they were in no position to meet or deal with the same and, therefore, there was breach of the principles of natural justice. Thereafter, it appears that a hearing took place on 12.1.1981 before the Additional Secretary to the Government of India and this was followed by a statement of written submissions However, the proceedings were not concluded and, on the setting up of this Tribunal, they were transferred to it in terms of Section 35-P(2) of the Central Excises & Salt Act, 1944 to be disposed of as if it were an appeal filed before the Tribunal.

4. The matter was taken up for hearing on 10.4.1984 when Shri M.P.Bharucha, the learned Counsel for the Respondents, raised a preliminary objection that the show cause notice issued by the Central Government was hit by limitation provided in Section 11-A of the Central Excises & Salt Act, 1944. We heard detailed arguments on this from both sides and, by our order No. 247/84-C dated

10.4.1984, we over-ruled the objection raised by the Respondents and held that the show cause notice was not barred by limitation.

5. The appeal was taken up for hearing on 10.1.1985 on the merits of the dispute We have heard Shri A.K. Jain, SDR, for the appellant and Shri A.M. Hidayatullah, Advocate, with Shri M.P. Bharucha, Advocate, for the Respondents.

6. The salient submissions of Shri A.K. Jain, the learned Departmental Representative, may be summarised as follows: (a) The initial dispute was whether the subject maplitho paper of grammage 140 to 179 GSM was a printing and writing paper falling under item No. 17(1) CFT as claimed by the Respondents or it was a pulp-board falling under item No. 17(2) & not usable as printing and writing paper as contended by the Department. The present dispute, however, was not whether it was pulpboard. The show cause notice proceeded on the premise that the subject paper was not a printing or writing paper but a kind of paper not falling under item No. 17(1) but under item No. 17(2) This Tribunal had given a decision on the classification of maplitho paper of 85 GSM and above in Sirpur Paper Mills v. Collector of Central Excise, Madras : 1984 ECR 957. The Tribunal held that the grammage of the paper was not a determinant and that the paper fell under item No. 17(3) CET, as printing and writing paper. Though this decision might appear to be in favour of the Respondents, it was not really so in view of the fact that the dispute in the Sirpur Paper Mills case pertained to 1972, i.e. prior to the amendment of item No. 17 in 1976. The decision, therefore, had no relevance to the present dispute.

(b) The present dispute pertained to the period 13.4.1976 to 31.1.1977 which was wholly covered by the amended item No. 17.

(c) From the record of the personal hearing before the Assistant Collector (Page 7-A of the Respondents' paper book 1) it would be clear that the practice followed by them prior to the 1976 Budget was to classify maplitho paper as pulp board and that they had all along consistently called maplitho as maplitho paper depending on the trade practice and not on the end-use practice. This would also be clear from the summary of arguments submitted before the Appellate Collector (Pages A18 and A19 of Paper Book 1). This description of the product coupled with its end-use as card, title cover, outer cover of text books, etc was clear evidence of its not being a printing and writing paper.

(d) The very words "printing and writing paper" signified that the paper should be predominantly for use in printing or writing. The aforesaid uses of the subject paper would show that it was not printing and writing paper. I he Respondents had not produced any evidence in support of their contention that the subject paper was printing and writing paper. No doubt, certain affidavits were produced before the Appellate Collector (but not before the Assistant Collector) in support of this contention. These did not deserve credence since they were from dealers and were of a stereotyped nature.

(e) Though grammage was not specified in the tariff to demarcate printing and writing paper from other papers and it might not be very relevant, the fact that the Respondents themselves had accepted the paper as pulp-board which was not generally used for printing and writing went against them.

(f) Referring to the documents submitted by the Respondents in their paper book, it was submitted that the notice at page A25 was one issued by the Patna Collectorate and not the Baroda Collectorate in whose jurisdiction the Respondents were located nor did it have any relevance since it was issued in the context of an export ban. The trade notice dated 21.2.1977 at page A26 did not spell out the grammage of maplitho paper which fell in the list of papers classified as writing and printing paper. Thus, it was also not of any help. The DGTD's communication to the All India Small Paper Mills Association at page A27 and page A28 was also of no consequence since the purpose of that circular was entirely different -not interpretting the excise tariff.

(g) The Indian Standard Specifications relied upon by the Respondents were also of no help because these Standards were for quality control purposes. In this context, two decisions of the Tribunal were cited-Greaves Cotton Ltd. Bombay v. Collector of Central Excise, Bombay Corporation, Digboi v. Collector of Central Excise, Calcutta .

(h) At worst, this case could be said to be a marginal one in which two views were equally plausible. In such an event, there was no bar in the Revenue taking a view favourable to it and that view could not be upset merely because the other view appeared to be a better one. In this connection, the Delhi High Court judgment in Hyderabad Asbestos Cement Products Ltd. and Anr. v. Union of India and Ors.

1980 ELT 735 was cited.

7. The submissions of the learned Counsel for the Respondents may be summarised thus: (a) The particulars of the trade enquiries said to have been made by the Department were not disclosed to the Respondents at any stage.

(At this stage, the Deptl. Representative produced copies of certain letters said to be written by certain wholesale paper merchants in Ahmedabad in support of the contention that the subject maplitho paper was used in title covers, cards, etc.). Shri Hidayatullah objected to the production of these documents at this stage since they had not been disclosed to the Respondents at the earlier stapes of the proceedings. How ever, dealing with the said documents, Shri Hidayatullah stated that the letter dated 22.3.19/7 from M/s. Vinod Rai & Co. to the Inspector of Central Excise, Surat stated that such paper was commonly used in the market as binding and also writing and printing paper. Similarly, the letter dated 22.3.1977 from Rati Lal & Sons showed that the paper was used in title covers, cards and book printing. These documents also, therefore, went to support the Respondents' contention.

(b) On the other hand, the affidavits produced before the Appellate Collector were of greater probative value and could not be dismissed on the ground that they were of a stereotyped nature. Affidavits duly affirmed were evidence unless the averments therein were effectively rebutted.

(c) Much was being made of the Respondents having classified the subject papers as pulp-board prior to the 1976 Budget. During that period, there was no advantage to be gained by such declaration.

Moreover, there was no estoppel in matters of taxation. The Respondents were not estopped from contending that the earlier classification was incorrect and the classification contended for now was the correct one. (In his reply, Shri A.K. Jain accepted the position that there was no estoppel in taxation matters).

(d) Maplitho paper upto 180 GSM was recognised as printing and writing paper. In this connection, the following documents were cited: (i) Patua Collectorate Trade Notice dated 21.9.1975. (This notice pertained to the pre-1976 Budget period)-(Page A25 of Paper Book 1); (ii) Patna Collectorate Trade Notice dated 21.2.1977. (This notice pertained to the post-1976 Budget period)-(Page A26 of Paper Book 1); (iii) DGTD's recommended rationalisation of nomenclatures paper and paper board contained in his Circular dated 26.8.1976 (Pages A27 and A28 of Paper Book 1); (iv) Invoices at pages A44 and A45 of the Paper Book 1 issued by Ashok Paper Mills Ltd. and Straw Products Ltd. in which maplitho paper of grammages higher than 85 GSM had been assessed to duty as printing and writing paper at 25% ad val.

(v) The affidavits at pages A29 to A36 of Paper Book 1 which have not been controverted by the Department.

The cumulative effect of the above evidence would show that the DGTD the Excise Department and the Trade considered maplitho paper as printing and writing paper. Since the Department had not rebutted the evidence placed on record by the Respondents, it cannot be said to have discharged its onus. In this context reliance was placed on the Bombay High Court decision in Advani-Oerlikon Ltd. and Anr. v. Union of India and Ors. 1981 ELT 432 and this Tribunal's decision in Indian Tools Manufacturers Ltd., Nasik v. Collector of Central Excise, Pune (vi) Indian Standard Glossory of Terms IS: 4261-1967 which denned board as paper of substance not below 180 GSM (generally above 250 GSM), characterised by its rigidity.

The Indian Standard Specification was a good guide and index to the trade understanding of excisable products. This was the ratio of the Supreme Court decision in Union of India v. Delhi Cloth and General Mills Co. Ltd and Ors. in 1977 ELT J 199 : ECR C 216 SC and the Delhi High Court judgment in Porrits and

Spencer (Asia) Ltd v. Union of India and Anr. 1980 ELT 679 :1980 Cen-Cus 489D. This was the view also taken by the Tribunal in Gujarat Machinery Manufacturers Ltd. v. Collector of Central Excise, Baroda (vii) The Tariff Commission Report relied upon in the review show cause notice was not relevant.

(viii) The Respondents' case was fully supported by the Tribunal's decision in the sirpur Mills case (Supra) and by the Government of India's decision in revision in Andhra Pradesh Paper Mills Ltd., Rajamundhri 1982 ELT 300 : 1982 ECR 330D.8. In reply, Shri A.K. Jain, the Departmental Representative, besides reiterating some of the points urged by him in his opening address, stated that the DGTD's Circular relied upon by the Respondents had no reference or relevance to Central Excise Tariff item No. 17 nor did it follow that scheme. Some of the customers whose evidence had come on record had slated that, if the grammage exceeded 140, the paper ceased to be maplitho paper. What the Respondents wanted was to call the subject paper as pulp board when it suited them and now to call it as printing and writing paper. The ISI Glossory did not contain a definition of printing and writing paper and was thus of no help. The Tariff Commission's report, which fixed 85 GSM as the dividing line for printing and writing paper and other paper was a relevant document prepared after full discussions with the trade. Even at this stage, the Respondents had not led any evidence to show that the subject maplitho paper had been used as printing and writing paper. The Tribunal's decision in the Sirpur Paper Mills case was not applicable to the present case since the grammage of the paper in that case was not over 120 GSM.9. We have considered the submissions of both sides carefully. The question which arises for determination is whether Maplitho of grammage ranging from 140 GSM to 179 GSM cleared by the Respondents during the period from 13.4.1976 to 31.1.1977 were classifiable as "printing and writing paper" under item No. 17(1) CET or as "other kinds of paper" under item No. 17(2).

10. The classification of Maplitho paper of above 85 GSM came up for consideration before this Bench in Sirpur Paper Mills Ltd. case reported as 1984 (15) ELT 461 :1983 ECR 957. The manufacturer had, in that case, sought classification of the paper as printing and writing paper under item No. 17(3) CET (the relevant year being 1972) but the Assistant Collector classified the goods

under item No. 17(2) as other kinds of paper. The Tribunal held in that case that, to assess Maplitho paper under item 17(2) because of its grammage and because of its supposed indistinguishability from cartridge paper, was wrong. The declaration cannot be changed simply because of a putative similarity to some other goods or because of a factor like weight or substance which did not and had not been shown to be a determinant. It was further held that Maplitho paper did not cease to be so because of its grammage.

11. The tariff item 17 relating to paper does not lay down any demarcating line between printing and writing paper and other kinds of paper dependent on the grammage of the paper. Grammage alone would not constitute the basis for classification of a paper as printing and writing paper or another kind of paper.

12. The learned Counsel for the Respondents has, in our opinion, rightly contested the right of the Department in introducing into the proceedings at this stage certain letters written by paper dealers in response to the enquiries nude by the Central Excise authorities on samples of Maplitho paper made by Rohit Pulp & Paper Mills. These documents were apparently not disclosed to the Respondents despite their having, at the earliest opportunity, asked for disclosure of the material gathered during the trade enquiries and specifically reiterating this position in their reply to the review show cause notice and further making a grievance that their rights would be prejudicially affected by breach of the principles of natural justice if these documents were relied upon without disclosing them to the Respondents. Apart from this, as Shri Hidayatullah has pointed out these very letters go to show that the subject Maplitho paper finds use as printing an 1 writing paper besides in making cards, title covers, etc.

13. The Patna Collectorate's notice No. 7/CUS/75 dated 21.9.1975 is, as pointed out by the Departmental Representative, in the context of an export ban and, therefore, may not have any direct relevance to the dispute before us. Even so, it gives a clue to the Government's own understanding of the coverage of the expression "writing and printing paper, all sorts". The notice shows that the Ministry of Commerce, Govt. of India, had clarified the expression would, Inter alia, include Maplitho paper.

14. The trade notice No. 12/CUS/77 dated 21.9.1980 again of the Patna Collectorate, is specifically on "writing and printing paper" with reference to tariff item No. 17. The notice lists different varieties of paper which would be covered under "writing and printing paper".

Again, Maplitho paper is shown to be one such variety.

15. The letter No. DPI-3(15)/75/NC/1216 dated 26.8.1976 from the Directorate General of Technical Development, Government of India (a highly placed technical authority) addressed to the President of the All-India Small Paper Mills Association, Bombay, is on the subject of rationalisation of nomenclature of paper and paper boards. From the letter, it is clear that the rationalisation came about as a result of the report of the Committee set up by the Development Council for Paper, Pulp and Allied Industries to examine the nomenclatures of various types of papers & paper boards as obtaining in the industry with a view to rationalise the same keeping in view the needs of the market and the consumers. The letter further says that all paper mills should adopt the approved nomenclature for reporting production to DGTD and marketing their production. In the list attached to the letter, Litho-printing paper (including Maplitho) is lifted under the heading "printing' papers".

16. The Respondents had submitted the affidavits of certain papers dealers before the Appellate Collector. These affidavits are to the effect that the paper manufactured by Rohit Pulp and Paper Mills Ltd. and marketed by them under the nomenclature of Maplitho paper of a substance of 140 to 179 GSM is known in and accepted by trade circles and commercial parlance as printing and writing paper. These affidavits also say that the said Maplitho paper is not used for any purpose other than printing and writing. Two of these affidavits are from members of the paper trade and two from members of the printing industry.

17. The Departmental Representative suggested that these affidavits should be ignored because they are drawn up on similar lines and follow a stereotyped pattern. While this is so, their probative value or otherwise has to be decided in the light of evidence, if any, adduced in rebuttal of the statements in the affidavits.

18. The glossary of terms relating to paper and pulp based packaging materials IS: 4261 -19 67 published by the Indian Standards institution defines "Board" as paper of a substance not below 180 GSM (generally above 250 GSM) characterised by its rigidity. Since, the case before us is not that the subject paper is a variety of board, we do not think, this evidence is of relevance to the present dispute, For the same reason, the draft International Standard ISO/DIS/4046 containing a vocabulary of "Paper, Board, Pulp and Related Terms" also is not relevant. We are not, therefore, referring to the decisions cited on the subject of relevance of IS1 Standards to interpretation of entries in the CET.19 As against the aforesaid evidence adduced by the Respondents, the Department has not led any evidence in rebuttal apart from the two letters obtained in the course of trade enquiries to which we have already adverted.

20. ft is a well settled principle that in a fiscal or taxing statute, the burden is heavily on the Department seeking to recover the revenue or tax. The burden of proving the necessary ingredients laid down by law to bring goods within a taxing entry is upon the taxing authority (See 1981 ELT 432 - Advini-Oerlikon Ltd. and Anr. v. Union of India and Ors. and 1983 ELT 1170, Indian Tools Manufacturers Ltd., Nasik v.Collector of Central Excise, Pune).

21. We also observe that the Government of India itself in its Order-in-revision in re : Andhra Pradesh Paper Mills Ltd. 1982 ELT 300 : 1982 ECR 330D took, the view that plain Maplitho & creamwove papers are known to the trade as printing and writing paper.

22. The Departmental Representative suggested that since the Respondents had themselves classified the paper as pulp board prior to the 1976 Budget, they could not resile from that stand when it suited them. This argument does not appeal to us since there is no estoppel classification matters. If the assessee had rightly or wrongly asked for classification of goods under a particular entry, that would not come in the way of their later pressing for classification under another entry which they consider more appropriate.

23. Considering all the facts and circumstance we are of the opinion that while the Respondents have adduced sufficient evidence in support of their contention that

the subject Maplitho paper was printing and writing paper, the appellant has not discharged the onus on him nor has produced satisfactory evidence in rebuttal. This is not thus a case where two views are equally possible, as the Deptt. Representative contended. Consequently, we vacate the show cause notice and reject the appeal.