

Jayesh Plastics and Others Vs. Commissioner of Central Excise,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-15-2001

Reported in : (2001)(137)ELT1320Tri(Mum.)bai

Appellant : Jayesh Plastics and Others

Respondent : Commissioner of Central Excise,

Judgement :

1. Jayesh Plastics, Guru Plastics, Allied Instruments Pvt. Ltd., Liba Enterprises, Altop Industries, Rozey Plastics, Zain Plastics and Krishna Plastics are job workers who manufacture goods under consideration out of material supplies by Barish Plast Pvt. Ltd. (Barish for short). The other appellants are employees or partners of either one of the job worker or of Barish.

2. We are concerned in these groups of appeals with classification of goods manufactured by the job workers out of materials supplied by Barish, their consequent liability to duty related to limitation and liability to penalty. The goods manufactured by the job workers are described as fittings for running water gutters. The eight job workers in question did not pay duty upon these goods and notice was issued to them demanding duty for the clearances made between April 1995 to May, 1998, by invoking the extended period contained in the provision under sub-section (1) of Section 11A of the Act. The notice also proposed penalty on the manufactures, their directors or managers as also on Barish. The last on the ground that it "aided and abetted" the manufacturing of these structures. The notice demanded duty on the fittings at the rate applicable to heading 3917.00-

pipes and fittings.

3. It was the manufacturer's contention that the goods were classifiable under heading 2926.90 as other articles of plastics not elsewhere specified. The contention before us on behalf of the manufactures is for classicisation under sub-heading 2926.00. This is the claim before us by the manufactures with an alternative claim of classification under heading 29.25 as builder'-ware of plastics not elsewhere specified.

4. We do not find satisfactory justification in the Commissioner's order for classification of goods under heading 39.17. The reasoning that she advances is that since these goods are used for carriage of liquids i.e., rainwater, they perform the same function as pipes, tubes and, therefore, classifiable thereunder. She also seems to suggest that people dealing with theses consider them as fittings under heading 29.17. This last conclusion is entirely unsupported by any evidence. It is difficult for us to accept that a trader in any goods would refer to them by their classification under the Excise tariff. It verges on the absurd. There is, in any event, no evidence that the people dealing with theses goods consider them to be pipe fittings. As a matter of fact these gutters themselves cannot be classified as pipes. The note 8 to Chapter 39 on which exceptionally the Commissioner places reliance excludes from classification under this heading with the exception of lay flat tubing of certain kinds of regular pipes, i.e., having an internal cross-section other than oval, rectangular, or in the shape of a regular polygon. The gutters in question satisfy these requirements.

Their internal cross-section is semi-circled. Therefore they will not be classifiable under heading 39.17. Therefore the Commissioner's conclusion that the fittings if at all necessarily be fittings for pipes cannot be supported. That being the case there is no material in the Commissioner's order to rule out the classification claimed by the appellant. For the appellants initial claim of heading 39.26 to be accepted it will have to be established that these goods will not be classified in the heading elsewhere. This is not possible for us to .

According to note 11(c) to Chapter 39 gutters and fittings therefore are classifiable under heading 39.25. If the appellant's claim that the goods are fittings does not

have and used exclusively with gutters they will really be classifiable under that heading. It is possible to say that there might be common fittings for gutters and pipes i.e., fittings which could be used either to secure pipes ;to one another or two, the supporting structure or gutters. This would, however, amount to making out a new case. These were not the department's claim and there is in any event no evidence produced in support. We are therefore of the view that atleast some of the fittings such as elbows, those having the semi-circled profile shape and clearly cannot be used a pipes fittings. On balance therefore we are satisfied that the goods in question are properly classifiable as fittings for gutters under sub-heading 3925.99.

5. The departmental representative rightly points out that the classification under heading 29.25 was not considered by the Commissioner and she was given the option of deciding between headings 39.17 and 39.26. We agree that heading 39.17 is more appropriate.

Placed with the situation both sides suggest that the applicability of heading 39.25 be considered afresh by the Commissioner. We agree with the suggestion.

6. That takes us to the next question of valuation. It is the contention of the manufacturers that the goods' valuation should be on the basis of cost of manufacture as held by the Supreme Court in Ujagar Prints Vs. union of India 1989(34)ELT 493. The Commissioner in her order arrives at he same value by a different route-deduction from the sale price of various elements. The counsel for the manufactures contends that this was inaccurately done. Various elements such as trade discount, etc., were not considered by the Commissioner. He also says that the figures relating to cost of raw material and cost of manufacture was provided to the Commissioner and the value should be determined on this basis. If theses factors are known there would not be any difficulty in arriving at the cost of manufacture by most straightaway method that will have to be arrived. We therefore remand the matter to the Commissioner for re-determination of the matter on these lines, making it clear that he is at liberty to consider evidence produced by either side as to the actual cost. We also agree that in determining the duty, if any, payable the Commissioner should take into account the modvat

credit that would be available of the duty paid on the inputs used in the manufacture of these products subject to evidence of such duty payment and utilisation of such duty paid products in the manufacture of final products. We clarify that failure to file declaration under Rule 57A or maintain the prescribed records should not be a bar for availing credit.

7. We are unable to accept the claim that the demands are barred by limitation. Its claimed that four of eight manufactures had filed classification list and declaration claiming exemption but there is no evidence produced. We do not find, in other words, any material to rebut the Commissioner's finding with regard to limitation. Nor are we able to say that the benefit of notification 1/93 would be available to these goods. The counsel for the appellants does not rebut that these fittings when they emerge out of the machines bore upon them the brand name "Barish" of the raw materia supplier and that the raw material supplier is not entitled to the notification. His contention is that these manufactures did not consciously and deliberately affix the brand name and that they emerged bearing the name only by use of the mould for making fittings supplied by the raw material supplier, which contained the brand name. This contention is not acceptable. It is the manufacture by putting to use the mould that resulted in the emergence of articles in question with the brand name. The presence of the brand name, therefore, is the result of the conscious action on the part of the manufacturers.

8. Penalty has been imposed under Section 11AC equal to the duty sought to be evaded. We are also of the view that in view of these observations, penalty also to be redetermined after considering the gravity of the offence and amount of duty sought to be evaded.

9. The appeals are therefore disposed of accordingly. The Commissioner shall adjudicate on these points afresh.

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