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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-26-1985

Reported in : (1986)(24)ELT604TriDel

Appellant : Rotopack

Respondent : Collector of Central Excise

Judgement :

1. When an aluminium foil has paid the duty under Item 27(c) of the Central Excise, tariff it cannot be required to pay that duty again.

This is on account of the tariff item or rather sub-item itself under which aluminium foil is excised. The item runs :- "Foils (whether or not embossed, cut to shape, perforated, coated, printed or packed with paper of other reinforcing material) of a thickness (excluding any backing) not exceeding 0.15 mm".

2. The item does not provide for duty on each of the varieties of aluminium foils viz. coated, printed, perforated backed etc. It provides that the duty under that head shall be charged on the foil "whether or not" it is embossed, coated, printed etc. etc. Thus no factory can claim its foil was coated or was printed, or was perforated, and so was not assessable under the head foil. The words embossed, cut to shape, perforated, coated, printed do not list items of goods to be assessed individually ; they do not sanction duty from one process to another such as can be performed when a plain foil is printed, and then to be subjected to another visitation if it is cut to shape, and so on and so forth. They only say that whatever

may be done to the foil, duty must be paid : plain, cut, printed, coated, they are all foils under this head. A foil, whether printed or not, whether coated or not, whether embossed or printed or not, must pay duty. In short, there is no escape for an aluminium foil from this duty ; it is this duty the foil, whatever its condition or appearance must pay, and no other.

3. The Collector wrote that by printing, coating etc. a foil became a new product, and so it does. A printed/coated foil is certainly a new product; one does not need to be an expert to see this. And the printing and coating etc. is a manufacture that brings out a printed/coated foil where only a plain foil used to be. The cost alone is higher. This cost difference is not possible unless a manufacture has been undergone. No product enhances its intrinsic value by remaining what it was, and no product will carry the same intrinsic value after it has undergone a manufacture. When the foil is printed/coated, a manufacture takes place and a new product is born, a printed/coated foil. But in what way does this affect excisibility 4. A manufacture, to be relevant to central excise, must be a manufacture that brings out a good or a product that has not paid that duty before. There must, first of all, be a duty, meaning thereby a heading or description prescribing a duty of excise for such product.

The good or product must be tested against the head description. It is allowed entry only when it finally qualifies. It can be disqualified for several reasons-one of the strongest disqualifications is that it had already paid that duty. Once this is found to be the case, there is nothing to be done but to reject its entry into that head. And, contrary to popular belief, the judgment of the Supreme Court in the DCM case, does not say that whenever a manufacture is perceived, the produced article must yield to excise, no matter whether it had paid that very same duty or not. Order No. V-Adj. (27) 15-1/79 dated 16-12-1983 of the Collector of Central Excise, Baroda is the result of that belief. It is a mistaken belief and we set that order aside. We rule that no duty is leviable under Item 27(c)-C.E.T. on the printed aluminium foils made by M/s. Rotopack from aluminium foil which has paid duty under the same Item 27(c)-C.E.T. All confiscations and penalties are countermanded and monies received thereunder shall be refunded at once. This decision is in line with our decision in 1986 (23) E.L.T. 217=1985 (6) E.T.R. 605

Swatick Packaging Bombay, [Order No. 93/85-B dated 30-9-1985].

5. We read with not a little sadness, however, that M/s. Rotopack advised some of their customers to avoid speaking out "printing" in their orders. Instead they described the work as "slitting and rewinding" just to be able to show the central excise that they had not "printed" and the foils would not attract duty. It puzzled some customers because they had placed orders not for slitting their foils but for printing them. It is techniques such as these that feed the widespread distract in the minds of people regarding businessman and industrialists.

6. The learned counsel for the Department said that the Swatick Packaging decision 1985 (6) E.T.R. 605 relied upon by the Counsel for .

Rotopack was based on the 1985 (20) E.L.T. 202 (S.C.) Oriental Timber Industries judgment and was a matter that related to the RG. 1 stage and not whether duty was leviable on panel or circle. In any case, this judgment has been negatived by the recent decision of the Supreme Court in 'Empire Industries Limited 1985 (20) E L.T. 179. The Court ruled that a cotton fabric, which had paid duty as grey unprinted fabric, may be charged again to duty when it is dyed or printed or processed in other ways under the same item 191 of the central excise tariff. This clear ruling, said the learned counsel for the department, must reverse all other interpretations to the contrary. Even if the printed etc.

foil continued to be a foil, it must pay duty again because it has undergone what is clearly a process of manufacture.

7. The Empire Industries judgment does not support this argument. The Supreme Court had to adjudge the dutiability of the processed fabric against the background of the amendment of Section 2(f) of the Act and two items in the tariff, items 191 and 22 with retrospective effect. In para 20, the Hon'ble Court put down the problem as being this : "if the impugned Act is valid, then no other question need be examined except the question as to what should be the actual levy of the duties." 8. At para 22, the Court recorded that the main contention of the petitioner was that the impugned Act was ultra vires of entry 84 of List I of the Seventh Schedule (of the Constitution). This impugned Act was the Central Excises and

Salt and Additional Duties of Excise (Amendment) Act, 1980.

9. The impugned legislation, said the Court in para 46 was only making "Small repairs", and quoted the following from the Harvard Law Review : "It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect...The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government amount those who benefit from it." 10. There would not be a need for small repairs had a defect not been found ; but because a defect was found and that defect was critical enough to need removal, small repairs had to be carried out. Repairs, even small ones, are not carried out except to make good defects. There was nothing wrong in this particular small repairs, ruled the Court, thus conveying its perception that they repaired a defect or a numbsr of defects that needed repairing. And we know what the defects were that were repaired. They were the structure of the tariff item 191 and 22 and the definitions in Section 2(f) of the Central Excises and Salt Act in providing duty payment on processed fabric when such fabric had paid duty as grey fabric. By reason of the defects a grey fabric that pays duty cannot be required to pay duty if it is printed, dyed etc.

even though that was the desire of the law makers. This is a recognition that, as it stood, the law did not sanction recovery of duty on processed fabric that had paid duty as a grey fabric. By means of these repairs, the law was amended, retrospectively, to provide that printing dyeing etc. would make a fabric dutiable even if it had paid duty as a grey fabric. And hence, when an imprinted fabric is printed, "manufacture" in the Central Excise context takes place, and so the court

ruled in para 49 that : "the conclusion that inevitably follows that in view of the amendment made in Section 2(f) of the Central Excises and Salt Act as well as the substitution of the new item 191 and Item 22(1) in Excise tariff in place of the original items, the contentions of the petitioners cannot be accepted." 11. It is clear from the above that the Empire Industries judgment sanction excise a second time on the printed fabric after it had paid duty as a grey fabric because of the existence of a specific head in the tariff for printed fabric. This was a manufacture in Central Excise terminology and would call down duty on the product regardless of whether or not the market or anybody else regarded the printing as a manufacture. Once a product qualifies for an entry or an item and had never paid duty under that entry or item, it must pay that duty. This judgement does not support the department's case in any way. The Court explicitly ruled as in order the retrospective amendment saying that the legislature had the authority to do so. The court did not say what the department attributes to it as saying, that levy of duty on the printed etc. fabric was permissible even under the unamended law. And the legislature itself recognizing such to be the case i.e. that the old items would not permit duty on the printed fabric, brought into operation its infrequently used power of retrospective legislation. A look at the iron and steel item in today's Central Excise tariff (Item 25) will confirm the statement that only a definite item can subject a product to duty even when it has paid a duty under another item, however, similar in type, nature etc. the description may be.

12. I am generally in agreement with Brother H.R. Syiem. I cannot read in the following observation of the Supreme Court in Empire Industries Ltd. and Ors. v. Union of India and Ors. 1985 (20) E.L.T. 179 (S.C.) given in the context of textile fabrics and items relating thereto which have their own special features and characteristics :- "The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes 'manufacture' takes place and liability to duty is attracted".

That based on this observation, liability to duty is attracted ignoring the scheme of tariff, the items and sub-items and groupings therein. I would, however, qualify my agreement with Brother H.R. Syiem with the observation that it is open to the

legislature by use of unambiguous language to subject the same article or goods to multiple taxation as happened by the use of word 'manufacture' in Union of India v. Hindu Undivided Family business known as Ramlal Mansukhrai Rewari and Ors.

(S.C.) 1978 E.L.T. J 389. The present case, however, is squarely covered by our decision in Swastik Packaging, Bombay v. Collector of Central Excise, Bombay now reported in 1986 (23) E.L.T. 217 Tribunal where following the Supreme Court decision in Oriental Timber Industries case 1985 (20) E.L.T. 202 (S.C.), it was held that printing on duty paid aluminium foils did not attract duty again.

13. With these observations and qualification, I agreeing, with Brother H.R. Syiem, I would allow the appeal.