

Nu Tech Packaging Vs. Commissioner of Central Excise

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Overruled by : Nu Tech Packagings vs. Commnr. of Central Excise, Noida Dated: 27.11.2008

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-18-2003

Reported in : (2003)LC373Tri(Delhi)

Judge : S Kang, a T V.K.

Appellant : Nu Tech Packaging

Respondent : Commissioner of Central Excise

Judgement :

1. In these three appeals, arising out of a common Order-in-Original No. 8/2001, the issues involved are whether the process undertaken by M/s. Nu Tech Packaging amounts to manufacture, classification and valuation of the impugned product and whether the extended period of limitation for demanding duty is invocable. Revenue has also filed one Appeal against non-imposition of penalty and interest under Section 11AC and Section 11AB of the Central Excise Act respectively and against non-imposition of Penalty and interest under Rule 57-1(4) and (5) of the Central Excise Rules, 1944.

2. Shri M.P. Singh, learned Advocate, mentioned that M/s. Nu Tech Packaging (NTP in short) manufacturer of boxes/cartons of Duplex Paper Board and varnished printed paper sheets; that on 29-1-97 they had sent sheets of laminated

Duplex Paper Board for screen printing to a job worker in a three-wheeler which was intercepted and seized by the Central Excise officers on the ground that proper procedure as prescribed under Rule 57F(4) and (6) of the Central Excise Rules was not followed; that the officers also seized carton/ boxes valued at Rs. 1,20,681/- and varnished paper valued at Rs. 2,59,065.50 which had not been accounted in the statutory records; that the Commissioner, under the impugned Order has ordered as under : (i) Inputs (imprinted/laminated Duplex Paper Board) cleared for printing on job work should have been removed after debiting 10% duty; (ii) Lamination and Varnishing of Paper sheets is excisable under Heading 48.11 of the Schedule to the Central Excise Tariff Act; (iii) Cost of packing is required to be added to the assessable value; 3. The learned Advocate submitted that the Appellants receive orders for printed laminated/varnished paper sheets; that the lamination/varnishing is undertaken either on printed or unprinted paper sheets; that in case lamination/varnishing is required on printed sheets, the sheets are printed and thereafter laminated/varnished by them; that in such cases, the nature and use of the goods namely, printed sheets, does not change after its lamination/varnishing; that thus the process of lamination/varnishing does not bring into existence a new commodity with different name, character or use and as such, the process of lamination/varnishing does not amount to manufacture as the process provides only durability and beauty. He relied upon the decision in Union of India v. J.G. Glass Ltd. - 1998 (97) E.L.T. 5 (S.C.). He contended that identity, name and use of the laminated printed sheet are not changed; that mostly printing is done first and then lamination is undertaken by them. He also mentioned that unprinted laminated sheets are not marketable; that such laminated sheets are produced for the purpose of screen printing and are not in the nature of final product; that there is no evidence even to suggest that such laminated sheets are the final products ready to be sold to buyers as laminated paper sheets; that laminated sheets are in the nature of semi-finished intermediate product and hence non-marketable. Reliance has been placed on the following decisions :CCE, Baroda v. United Phosphorus Ltd. - 2000 (117) E.L.T. 529 (S.C.).Moti Laminates Pvt. Ltd. v. CCE (3) Diamond Rubber Mills v. Superintendent - 1985 (21) E.L.T. 646 (All.)Cadila Laboratories Pvt. Ltd. v. CCE - 2003 (152) E.L.T. 262 (S.C.) = 2003(1) Supreme Court 981 4.1 He, further, submitted that printed paper

sheets, even after lamination/varnishing, are classifiable under Heading 49.01 since printing gives the essential character to the impugned goods as such printed sheets are used as cover of books; that the printed sheets contain the details of the book concerned and as such cannot be treated as incidental; that Note 11 to Chapter 48 of the Tariff clearly states that except for the goods of Heading 48.14 or 48.21, paper and paperboard printed with motifs, character or pictorial representations, which are not merely incidental to the primary use of the goods, fall in Chapter 49; that thus the impugned product is to be classified under Chapter 49 and not under Chapter 48. Reliance has been placed on the following decisions :Webimpressions (India) Pvt. Ltd. v. CCE, Calcutta-I - 2002 (141) E.L.T. 370 (T).

4.2 He also stated that HSN Explanatory Notes for Chapter 48 makes it clear that Chapter 48 includes printed paper provided that the printing is merely incidental to the use of the paper for wrapping, writing, etc. and that the goods do not constitute printed matter of Chapter 49; that Note 4 to Chapter 49 of HSN and Explanatory Notes relating to Heading 49.01 of HSN make it abundantly clear that the product in question is classifiable under Heading 49.01 only.

5.1 He further submitted that the Adjudicating Authority has erred in holding that the art and development charges as well as packing charges are includible in the assessable value; that the development work is undertaken only in cases where positives of the art work are not provided by the customers; that thus, the art and development charges are not a pre-condition for sale; that the buyers have not consented to the payment and the amount has not been paid by the buyers in most of the cases; that such optional payment cannot be made a part of the assessable value; that in any case if such charges are held to be includible in the assessable value, it has to be spread over the entire use of such art work and only proportionate value is to be added in the assessable value in view of the decision of the Larger Bench in Mutual Industries Ltd. v. CCE, CCE v. Supreme Industries

5.2 Regarding confiscation of excess stock found in the factory, the learned Advocate submitted that the goods had not reached marketing stage and were not concealed; that there is no allegation of any intention to clear those goods clandestinely and accordingly the goods are not liable for confiscation. Reliance has been placed on the decision in Flex Industries Ltd. v. CCE, - 2003 (151) E.L.T.

198 (T).

He also contended that in respect of the goods seized from three-wheelers, there was no suppression of fact as the goods were cleared under challan; that there cannot be an intention to evade payment of duty in view of the fact that they are entitled to get the credit of duty so paid on receipt of the material from the job workers; that this is a clear case of Revenue neutrality. Reliance has been placed on the decision in the case of Jay Yushin Ltd. v. CCE - 2000 (119) 718 (T-LB).

5.3 He further contended that the extended period of limitation is not invocable as they were submitting all the reports/returns/declarations giving full details; that the unprocessed or semi-processed modvatable inputs were cleared after making necessary entries in the statutory records under the challans; that there was no intent to evade payment of duty. He relied upon the decision in the case of New Decent Footwear Industries v. Union of India - 2002 (150) E.L.T. 71 (Del.) and CCE v. Chemphar Drugs and liniments - 1989 (40) E.L.T. 276 (S.C.) and T.N.Dadha Pharmaceutical v. CCE, Madras - 2003 (152) E.L.T. 251 (S.C.) = 2003 (1) Supreme Court Cases 974.

5.4 Finally, he submitted that penalty under Section 11AC of the Central Excise Act can be imposed only in cases of fraud, collusion, etc. with intent to evade payment of duty which is conspicuously absent in the present matters; that penalty on the Directors and Manager has been imposed under Rule 209A without discussing their role in making the goods liable to confiscation and as such the same is bad in law. He relied upon the decision in G.S. Enterprises v. CCE - 2002 (144) E.L.T.387 (T).

6. Countering the arguments, Shri Vikas Kumar, learned Senior Departmental Representative, reiterated the findings as contained in the impugned Order and submitted that no material/evidence has been brought on record to show that the Appellants are mostly undertaking the printing first followed by lamination/varnishing; that the very fact that the impugned product is being sent for screen printing is sufficient to prove its marketability. He further submitted that Heading 48.11 of the Central Excise Tariff covers coated or covered paper or paper Board (printed or surface decorated); that lamination/varnishing process

makes the article a different article known as laminated or varnished paper and as such the process amounts to manufacture; that packing charges are includible as the impugned goods are removed from the factory in the said packing and in view of the judgment of the Supreme Court in Government of India v. MRF Ltd. - 1995 (77) E.L.T. 433 (S.C.), the cost of such packing will form the part of the assessable value; that as art and design development is essential for the purpose of manufacture of the product, the cost thereof is includible in the assessable value. Finally, the learned Senior Departmental Representative submitted that the extended period of limitation is invocable as the Department had no knowledge of the Appellants manufacturing laminated sheet/varnished papers, the cost of packing and art and design being not included in the assessable value and removal of goods without debiting 10% of the value; that the fact of sending the goods to job worker was not mentioned in RT 12 returns; that penalty is imposable on all the three partners - Company, Director and the Manager; that Shri Jatinder Shroff and Mukul Maindiratta were in complete knowledge about manufacture and clearance and as such were liable to discharge Central Excise duty; that once the duty demand regarding packing charges, art and design development cost has been held to be payable and credit has been disallowed, interest and penalty should have been imposed.

7. We have considered the submissions of both the sides. It is not in dispute that M/s. NTP undertake the process of lamination/varnishing on printed/unprinted paper sheet. This process brings into existence a new and different article having a distinctive name, character or use. It has been held by the Supreme Court in Laminated Packaging (P) Ltd. v.CCE - 1990 (49) E.L.T. 326 (S.C.) that "Lamination, indisputably by the well settled principles of excise law, amounts to 'manufacture' We are, therefore, of the opinion that by process of lamination of Kraft paper with polyethylene different goods come into being. Laminated Kraft paper is distinct, separate and different goods known in the market as such from the Kraft Paper." The judgment in the case of J.G.Glass Industries case is not applicable to the present matter as in that matter only printing/decoration was carried out on the plain glass bottles. In fact two fold test laid down by the Apex Court in J.G.Glass Industries case is satisfied in the present matter as by the process of lamination/varnishing undertaken by M/s. NTP, a different commercial

commodity comes into existence and the identity of the original commodity ceases to exist. Further, the paper without lamination/varnishing would have not served the purpose which laminated/varnished paper serve. Accordingly, the process of lamination/varnishing undertaken by M/s. NTP amounts to manufacture. We also find no substance in the contention of the learned Advocate that the products in question are not marketable. For the purpose of levy of Central Excise duty the basic requirements are that the goods should be manufactured and it should be capable of being brought to the market for being bought and sold. Mere fact that the product is an intermediary product is not sufficient to hold that it is not marketable. The learned Senior Departmental Representative has rightly contended that if the laminated sheets were not properly done, the same could not be sent for screen printing. The goods are not in semi-finished conditions. We also observe that the laminated/varnished goods are being sent to the job worker. This fact also goes to show that the products are capable of being brought to the market for being bought and sold. The decisions relied upon by the learned Advocate are not applicable to the facts of the present matter as the products were found to be not capable of being brought to market for being bought and sold. For instance in the case of United Phosphorus, Supreme Court observed that the impugned products - Mercuric Acetate, Para Chloro Phenyl & Valeric and Chloro Synthetic Acid Chloride - came into existence at a certain stage of a multiple stage integrated chemical process leading to the final products and the Department failed to show if any facility existed for separation of the said three products and whether in the form in which the said three products came into existence in the reaction process were capable of being marketed. On the other hand, the Apex Court has observed in United Phosphorus case that "Intermediate products even if captively consumed may be liable to levy of excise duty if they satisfy the test of being goods on the touchstone of marketability." It is thus apparent that goods being "intermediate" per se does not make the goods non-marketable but it is the nature of the product which is the determining factor about its marketability. We, therefore, hold that the products are capable of being marketed.

8. Coming to the question of classification, we find that Heading 48.11 of the Central Excise Tariff applies to Paper and Paper Board coated, impregnated, covered, surface coloured, surface decorated or printed, in rolls or sheet. We have

already held that the process of lamination/varnishing amounts to manufacture and thus the paper or paperboard obtained as a result of process of lamination and varnishing would fall appropriately under Heading No. 48.11 of the Tariff. Note 11 to Chapter 48 mentions that Paper, Paperboard etc. printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, fall in Chapter 49. There cannot be any dispute about the classification of unprinted paper/paperboard laminated/varnished under Heading 48.11 as it is not at all printed and subsequent printing cannot affect its classification under Heading 48.11 of the Tariff. Explanatory Notes of HSN mentions that Headings 48.06 to 48.11 relate to certain special papers or paperboards which have been subjected to various treatments, such as coating, design printing, ruling, impregnating, corrugating, creping, embossing and perforation. Once even the printed paper is subjected to the process of lamination/varnishing, it will fall under Heading 48.11.

As per HSN, Impregnated papers and paperboard are used largely for protective wrapping or as insulating material. The decisions relied upon by the learned Advocate do not apply to the facts of the present matters as facts are different. In Webimpressions case, supra, the classification in dispute was of printed Gay wrapper. In the said decision, the Appellants had undertaken printing job on duty paid paper which was held to be classifiable under sub-heading 4901.90. In Metagraph's case, supra, the Supreme Court has held that printed aluminium labels are products of printing industry as the printing of the label was not incidental to its use but primary. The aspect of lamination was not involved in these decisions, as well as in Johnson & Johnson case and Sri Kuwar Agencies case. We, therefore, hold that products in question are classifiable under Heading 48.11 of the Tariff.

9. The Commissioner has included packing charges in the assessable value as he has given finding that the goods are ordinarily removed from the factory in the said packing. This has not been controverted by the Appellants before us. Thus following the ratio of the judgment of the Supreme Court in MRF case, the cost of packing in which the goods are sold in the wholesale market is to be included in the assessable value. We also agree with the findings of the Commissioner that

art and development charges are to be included as they form part of the intrinsic value of the product. However, as contended by the learned Advocate, proportional cost has to be included in the assessable value in terms of the decision of the Larger Bench in Mutual Industries Ltd. v. CCE - 2000 (117) E.L.T. 578. The jurisdictional Commissioner has to recompute the duty on these aspect after affording a reasonable opportunity of hearing to the Appellants. The duty demand has to be recomputed by the Commissioner as held in Superior Vanaspati Ltd. v.CCE, Meerut-I - 2001 (130) E.L.T. 826 (T) = 2000 (37) R.L.T. 109 (CEGAT).

10. The extended period of limitation is invocable in the present matter in view of the finding in the impugned Order that M/s. NTP had not furnished any substantial document which revealed that the department had knowledge of their manufacturing laminated sheets/varnished papers as intermediate goods or final goods." The goods found in excess in the factory premises are liable for confiscation as these were not entered in RG-I register. As per provisions of law, they are required to enter the excisable goods in the RG-I register and if goods are found in excess than the balance shown in RG-I register, they are liable to confiscation and no allegation of any intention to remove them clandestinely is prerequisite for confiscating them. Similarly the goods found in three-wheeler are liable to confiscation as the goods were removed in contravention of the provisions of Central Excise Rules as these had been removed without debiting an amount equal to 10% of the value of inputs under Rule 57F of the Central Excise Rules. Penalty on M/s. NTP is leviable. The Appellants are also liable to deposit the said amount.

However, no case has been made for imposing penalty on the Director and Manager of M/s. NTP. As the penalty is being imposed on M/s. NTP and in absence of any specific finding about the personal knowledge of Shri Jatinder Shroff and Shri Mukul Maindiratta, we set aside the penalty imposed on both of them under Rule 209A of the Central Excise Rules.

Taking into consideration all facts and circumstances of the case, we reduce the amount of redemption fine and penalty as under : Penalty on M/s. NTP is reduced to Rs. 2 lakhs only. Interest under Section 11AB will be imposable only from the

date of insertion of the said section in Central Excise Act, i.e. 28-9-1996. As the penalty already imposed has been ordered to be reduced, the Appeal filed by Revenue for enhancing the Penalty on account of Packing Charges etc.

merits no consideration. Further, provisions of Sub-rule (4) and (5) of Rule 57-1 of the Central Excise Rules cannot be invoked for imposing penalty and interest for not debiting an amount equal to 10% of the price of the inputs at the time of clearance of inputs or processed goods for further job work.

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