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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-06-1987

Reported in : (1987)(12)LC950Tri(Delhi)

Appellant : Johnson and Johnson Ltd.

Respondent : Collector of Customs

Judgement :

1. The appellants manufacture, among other things, sutures for medical use. For this purpose, they imported aluminium foil of two varieties.

One variety was 'aluminium foil laminated to paper and heat-seal coated' and the other variety was 'aluminium foil heat-seal coated'. At the time of importation, the goods were classified under H. 76.03/0(2), C.T.A., and paid duty accordingly. In this appeal before us, there is no dispute about the classification. The appellants, subsequent to importation and payment of duty, claimed refund of a part of the duty paid by them. In respect of 6,600 sheets of aluminium foil, the appellants claimed the benefit of Notification No. 173-Cus/77 and Notification No. 67-Cus/79. In respect of 256 kg. of aluminium foil (only heat-seal coated), they claimed the benefit of Notification No.173-Cus/77. The Assistant Collector rejected the claim recording, inter alia, as follows :- "The party has elaborately argued that the contents of aluminium in respect of the foil imported by them. While it is not defined that the purity is of definitely 97% but the point for consideration is whether the foil is laminated and coated or plain. This Notification, against which concessional assessment is only extended for aluminium foil which is plain.

Assessment already made is in order and the claim is rejected." 2. Aggrieved, the appellants filed an appeal before the Appellate Collector. He rejected the appeal by an order, which is reproduced below :- "I have carefully gone through the appeal petition as well as copy of order impugned therein.

The appellant had sought concessional rate of duty under 173/77-Cus., notification, under which aluminium manufacturers containing more than 97% aluminium are liable to basic customs duty 27.5% instead of at 100% + 20% AD and CVD. Their claim was rejected by lower authority on the ground that the notification applies only to plain aluminium foil whereas the goods imported are coated and not plain.

Heard representative of appellants. He produced sample and a photo-copy of specification. He further added that in the impugned item aluminium is 60 to 65% and rest is paper, resin and adhesive.

It has therefore been stated by the appellants that the percentage of aluminium in the product imported is only 60 - 65% and the balance is paper, resin and adhesive. It is observed therefore that the wording of notification 173/77 is such that it allows concessional rate of duty to those "Aluminium Manufacturers which contain more than 97% aluminium. The issue is, therefore, not the purity of Aluminium in the manufactured article but it's content in the composite product. Judged by this criteria, it is 'seen that the item imported has only 60-65% of Aluminium as stated by the appellants and therefore has less than the stipulated 97% and hence the original assessment is in order and appeal is accordingly rejected as untenable.'" 3. Aggrieved by this, the appellants filed a revision application before the Government of India and this application, on statutory transfer to the Tribunal, is now an appeal before us. Shri D.B.Engineer, the learned Counsel for the appellants, argued that the goods were assessed as 'foils of unalloyed aluminium' [the words as they appear in H. 76.03/04(2)]. He submitted that this classification was totally correct, and invited our attention to Notification No.173-Cus/77. He submitted that, according to this Notification, aluminium manufactures containing more than 97% of aluminium, other than etched aluminium foil but including foil in any form or size ordinarily used as parts

and fittings of tea chests, and failing under H. 76.03/04, were exempt from payment of duty exceeding 27.5%. Shri Engineer submitted that the imported goods were aluminium manufactures; they contained more than 97% of aluminium; and that they were foils.

Thus, they satisfied all the conditions of the Notification.

4. Elaborating on his arguments, Shri Engineer submitted that the percentage of 97 referred to the 'aluminium' content of the aluminium-foil and not of the entire product. Referring to the Order-in-Original, he submitted that the Assistant Collector recorded that it was not denied that the purity is definitely 97%. He explained the contents of the Appellate Order stating that, in that order, the aluminium content was calculated with reference to the whole product, which was wrong because the resin and paper - which, form part of the product - were 'accessory' material to aluminium foil. Shri Engineer averred that the imported goods could not be considered as a composite-product (as held by the Appellate Collector), and submitted that the Customs accepted the Bill of Entry description of the goods as 'manufactures of unalloyed aluminium' (aluminium foil). Assessment was also done accordingly. Shri Engineer argued that there cannot be two standards - one for assessment and another for the purposes of the Notification. Comparing the words used in Notification Nos. 67/79 and No. 173/77, Shri Engineer submitted that plain aluminium foil is covered by Notification No. 67/79, whereas Notification No. 173/77 covered aluminium manufacture. Pointing out the difference, Shri Engineer submitted that the Assistant Collector mis-read the two Notifications.

5. The learned Counsel argued that the calculation of percentage of aluminium should be based on the aluminium part of the foil and not on the total weight of the product. Further, if the imported goods were to be considered as a composite-product, Interpretative Rule 3(b) would come -into play, and it was the essential character of the goods that should be taken into consideration. In this case, the essential character is given not by the paper or the adhesive but by the aluminium foil. The learned Counsel further submitted that the 256 kgs.

of aluminium foil, with thickness of 0.05 mm, are not covered by Notification No. 67/79 but the remaining goods (6,600 sheets of aluminium foil) are 0.04 mm thick and are, therefore, entitled to the benefit. He further referred to a circular of I.P.C. (No. 82/79 dated 10-12-79) and submitted that this circular, which clarified the entry 'Aluminium foil (plain)', reflected the thinking of the Government.

Shri Engineer also relied upon an order of the Appellate Collector of Customs, Bombay (Np. S/49-756/80R dated 5-6-80) in respect of the same appellants, and submitted that this was a 'thumping order' and examined both, the Notifications thoroughly.

6. The learned Counsel referred to a judgement of the Tribunal in '1983 ELT 1104' in the case of Pfizer Limited, Bombay v. Collector of Customs, Bombay, and submitted that the present case can be distinguished as, in the cited case, the percentage of aluminium was not known whereas, in the present case, the Assistant Collector has admitted that it is more than 97%. He further relied on the 'Foreign Suppliers Specifications'.

7. Finally, the learned Counsel made an alternative argument that, if the imported goods are not considered as 'foils of unalloyed aluminium' their classification would be under 76.03/04(1) and not under Sub-item (2) thereof.

8. Shri 1. Gopinath, the learned SDR, opposing the arguments, submitted that the copy of the Invoice, filed by the appellants, does not show the particulars of the goods. He called our attention to paragraph 7(b)(i) of the Raw-Material Specification, and submitted that the goods imported did not contain 97% of aluminium. According to the learned SDR, the imported goods were a 'composite product' consisting of paper, aluminium-foil and resin. He referred to Note-5 of Section XV of the First Schedule and justified the classification. He further submitted that the Interpretative Rules, including Rules 2(b) & 3 are intended for interpreting the Tariff and not Notifications. Shri Gopinath emphasised that Notification No. 173/77-Cus refers to the aluminium content of the product and not to the purity of the aluminium used, and submitted that the Assistant Collector's order referred only to the purity of the aluminium whereas the Appellate Order clearly recorded an admission by the appellants that the aluminium content was 60

- 65% only. Shri Gopinath relied upon two orders of the Tribunal - both in respect of the same appellants. These orders were (1) No. 1153/76-B2; and (2) No. 1154/86-B2, both dated 18-11-1986. He submitted that the only difference between the present case and the cited appeals was that, in the present case, the aluminium foil was coated with paper whereas in the cited cases, there was polythene coating.

9. Shri Engineer, in his rejoinder, submitted that Note-5 to Section XV referred to composite articles consisting of two metals whereas, in the present case, the imported goods consisted of only one metal. He further submitted that the present appeal is distinguishable from the facts of the case of M/s. Pfizer Ltd., Bombay (supra), and also the two other cases cited by the SDR.¹¹ The arguments of the appellants are built up on the premise that the imported goods are not composite products. We have seen the samples of the aluminium foil imported by the appellants. These samples were produced by them and there was no objection from the Revenue side. Even a cursory perusal of the samples shows that these are composite goods.

The aluminium sheet laminated to paper and heat-seal coated is a complete and composite product. The paper in adhesive cannot be separated without doing complete damage to the product. The argument that the paper in the adhesive are only accessories cannot be accepted.

12. In respect of the heat-seal coated foil also, the coating in the aluminium foil are inseparable. Any attempt to separate them would fail and would inevitably result in destroying the product itself. We, therefore, proceed on the basis that the imported foil is a composite product. We accept the submissions of the learned SDR in this regard.

13. Once it is held so, the provisions of the notifications have to be applied to the whole product and not to the aluminium content alone.

The appellants' plea have been that it is the purity of the aluminium contents that matters for the purpose of both the notifications and not the percentage of aluminium contained in the product.

In exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Department of Revenue and Banking No. 266-Customs, dated the 2nd August, 1976, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts aluminium manufactures containing more than 97% of aluminium, namely, plates sheets, circles, strips and foils other than etched aluminium foil but including foil in any form or size ordinarily used as parts and fittings of tea chests, falling within Chapter 76 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), from so much of that portion of the duty of customs leviable thereon which is specified in the said First Schedule as is in excess of 17.5 per cent ad valorem."

Plain aluminium foils:- In exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts plain aluminium foil of the thickness of 0.02 mm to 0.04 mm. containing more than 97 per cent of aluminium and falling within Chapter 76 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India from the whole of the Additional duty leviable thereon under Section 3 of the second mentioned Act, subject to the condition that the exemption contained herein shall be applicable only to those importers who produce a certificate issued by the Director General of Technical Development to the effect that :- (i) the importer has an approved programme for the manufacture of drugs and medicines; and (ii) the aluminium foil thus imported will be used only for strip-packing of drugs and medicines.

2. This notification shall be in force upto and inclusive of the 30th June, 1979."

Notification 173 refers to aluminium manufactures containing more than 97% of aluminium. This word could have only one meaning, namely, that the manufacture should have 97% or more of aluminium. This percentage could only be in respect of weight or the contents. In the present case, it is the admitted position that in so far as laminated foil is concerned, the percentage is less than 97%, taking into consideration the total weight of the product and the aluminium content thereof. In so-far-as the heat seal coated aluminium foil is concerned, the percentage has been worked out on the basis of raw material specifications No. 7-B-2, Issue 2, April 1977 - Nos. 4051000001 to 4051000000. The material is described as

follows: "135 g/m Aluminium Foil lacquered on the matt side with 6.5 g/m² Vinyl Lacquer..." That means, in every square the total weight of the material (aluminium plus vinyl lacquered) is 141.5 gms. and the weight of vinyl lacquered is 6.5 gms. This shows that the percentage of aluminium in the product is less than 97. Thus in both the products, the percentage of aluminium is less than 97.

15. The learned Counsel for the appellants argued that the imported goods having been considered as unalloyed aluminium for the purpose of classification, they cannot be considered as composite goods for the purpose of interpretation of Notifications No. 173/77 and No. 67/79.

16. Both the learned Counsel for the appellants and the learned SDR put forward arguments about the applicability of Interpretative Rules 2(b) & 3. In our opinion, these arguments are not relevant as what is in dispute before us is the interpretation of Notifications issued under Section 25 of the Customs Act. Rules of interpretation, contained in the schedule to the Customs Tariff Act, 1975, are intended for the interpretation of the headings contained therein. Even the Interpretative Rules make it clear that they are to be applied for the interpretation of 'this schedule' meaning the various chapters, headings and sub-headings therein. The notifications have to be interpreted according to the words used in them. In this particular case, the words used are quite clear and do not call for any interpretation. In this view, we reject the claim for the benefit of Notification No. 173/77 to the imported goods.

17. The appellants have claimed that the benefit of Notification No.67/79 should be extended to aluminium foil laminated with paper and heat seal coated. We had earlier reproduced this notification. The provisions contained therein show that the concession is applicable to 'plain aluminium foil'. According to the appellants, since the aluminium foil used in the imported goods is plain, Notification No.67/79 covers it. We had already discussed and found that the imported goods are composite articles. One of the meanings of the word 'plain' is 'without addition' (Chamber's Twentieth Century Dictionary). In this, the aluminium foil has not been imported as it is, but lamination and heat seal coating have been added to it. We, therefore, reject the claim for refund under Notification No. 67/79. If the imported goods are

not unalloyed aluminium, the correct classification would be 76.03/04(1) and not Sub-item 2 thereof. We have examined this argument keeping in mind the submissions made by both the sides. It appears that Interpretative Rule 2(b) read with Rule 3(b) are applicable to composite articles, like the imported goods. We reproduce these two rules :- "2(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule 3." "3(b) Mixtures and composite goods which consist of different materials or are made up of different components and which cannot be classified by reference to (a) shall be classified as if they consisted of the material or component which gives the goods their essential character, in so far as this criterion is applicable." 18. These two rules, read together, show that in the instant case, aluminium being the material component which gave the goods their essential character, it was correctly classified under Heading 76.03/04(2).

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