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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-22-2003

Reported in : (2004)(92)ECC373

Judge : J Balasundaram, S T C.

Appellant : Commr. of Cen. Excise

Respondent : Garware Polyster Ltd.

Judgement :

The respondents herein manufacture X-ray film and photographic paper falling under Chapter 37 of the Schedule to the CETA, 1985, during the course of manufacture of which coated polyester films waste/scraps arise. Such waste/scrap was cleared without filing any classification list and without declaring the correct assessable value thereof, at Nil rate of duty. On the basis that waste/scrap in question was covered by CET subheading 3915.90 attracting effective rate of 30% adv.duty by virtue of Notification No. 15/94 dated 1.3.94, two show cause notices proposing recovery of Rs. 14,357/- and Rs. 35,903.90 were issued and adjudicated by the Asstt.Commissioner who confirmed the demands and also imposed penalties of Rs. 2,000/- and Rs. 3,000/- respectively. The Commissioner (Appeals) set aside the demands confirmed and the penalties holding that the waste/scrap arising during the course of manufacture of X-ray film and photographic paper are outside the purview of Central Excise Tariff and hence not dutiable. Hence this appeal by the Revenue.

2. We have considered the rival submissions. Note (1) to Chapter 37 which covers photographic films/paper and X'ray films clearly states that this chapter does not cover waste/scrap. The Department seeks to classify the waste/scrap under heading 39.15 in view of the base material i.e. polyester film falling under Ch.39. However, as rightly noted by the Commissioner(Appeals), although there is no specific exclusion of waste of X'ray film in Chapter 39, by virtue of Note (1) to 39 which states that the word "plastic" means those materials of heading Nos. 39.01 to 39.14, waste/scrap of X'ray films/photographic films/paper are outside the scope of Chapter 39 as the goods after coating do not remain as plastic nor and they known as plastic within the meaning ascribed thereto in Chapter 39. The Revenue has also not placed any material on record to show that the waste in question is known as plastic waste, and the argument of the ld.D.R. that since the base material is plastic, the waste and scrap of X'ray film has to be considered as plastic waste, is not tenable as X'ray film/photographic film/paper are covered under Chapter 37 and the waste arising during the course of manufacture of goods of Chapter 37 cannot be treated as waste of goods of Chapter 39. We also find that in the case of Kamath Packaging (P) Ltd. vs. CCE [1992(60)E.L.T.666], the Tribunal has held that HDPE circular bag waste and HDPE laminated fabric waste being waste material not specifically provided for in the Tariff are not excisable goods. Therefore, the lower Appellate Authority has correctly held that the item in question is not covered by any entry in the CET and hence not excisable.

3. In the light of the above discussion, we uphold the impugned order and reject the appeal.

I have carefully gone through the order recorded by my learned Sister.

I find that the earlier decision of the Tribunal in the case of Kamath Packaging (Supra) was rendered in the context of the Old Central Excise Tariff. The structure of the New Central Excise Tariff is quite different from the structure of Old Central Excise Tariff. The new tariff is based on the H.S.N. based Customs Tariff and has a set of interpretative rules to determine classification of various products.

It is common knowledge that all the products have to be classified under some heading/sub-heading or other under any H.S.N. based tariff in view of the various

provisions in the interpretative rules. The department's claim to classify the impugned goods under heading 39.15 as waste and scrap of plastic is well founded and is supported by Rule 4 of the interpretative rules which requires classification of the impugned goods under a heading appropriate to the goods to which they are most akin. In view of the fact that the base material in the case of the impugned goods is polyester film, undoubtedly they are most akin to the waste/scrap classifiable under heading 39.15 and therefore, they merit classification thereunder in view of the Interpretative Rule 4.

Accordingly, I am of the opinion that the impugned order passed by the Commissioner (Appeals) requires to be set aside. However, while upholding the duty demand confirmed in the order-in-original, I am inclined to set aside the penalty of Rs. 2,000/- imposed thereunder in the circumstances of the case.

The following difference of opinion is placed before the Hon'ble President for reference to Third Member: Whether the appeal is required to be rejected as proposed by Member(Judicial) Whether the impugned order of the Commissioner(Appeals) requires to be set aside, as proposed by Member(Technical).

1. The question as has been referred to me is whether the waste of photographic film having base of polyester is to be classifiable under Chapter 39 as waste of plastic or is to be held non-excisable on account of no heading in the Tariff to cover it.

3. It is with greatest respect not possible for me to subscribe to the view expressed by the Member (Technical) that it is common knowledge that all conceivable goods can be classified in some heading or other of a tariff which is based upon the Harmonized System of Nomenclature..

Harmonized System of Nomenclature on which the Central Excise tariff is based, no doubt attempts to take into its scope various kinds of goods of all possible kinds bought and sold in international trade. However, between the publication of the tariff and its subsequent amendment, developments in technology may result in the emergence of products which the tariff as it then exists would not be able to

take within its coverage. It is also to be noted that the Central Excise tariff is not a verbatim reproduction of the Harmonized System of Nomenclature even at the level of the headings. There have been significant departures from the Harmonized System of Nomenclature. It is quite possible to conceive of goods which cannot, by application of interpretative rules, be classified in the Tariff. Examples are electricity, rice, wheat and other cereals before being subjected to milling, cut flowers.

Electricity has been held to be "goods" by the Supreme Court (NTPC v.State of Madhya Pradesh). It figured as item 11E in the earlier tariff.

Spirulina has been held to be non-excisable by the Tribunal.

4. Having said this, however, I must agree with the conclusion of the Member Technical for different reasons than those that he has cited.

The answer is that the classification of films waste found in the Explanatory Notes to Chapter 37 of the Harmonized System of Nomenclature. They provide that waste of film is not be classified in Chapter 37 but say, "Photographic waste and scrap containing precious metal compounds of all kinds used principally for the recovery of precious metal is classified in heading 71.12. Other photographic or cinematographic waste and scrap is classified according to constituent material (e.g. if of plastics, heading 39.15, if of paper, heading 47.07)." 5. On being shown these notes, counsel for the appellant has no answer.

The record does not show that the waste is used for the recovery of precious metals. Therefore, the waste will be classified, based upon the constituent material, in heading 39.15.

The appeal is partly allowed by upholding the duty demand under Chapter heading 39.15 of the Schedule to the CETA, 1985 confirmed by the adjudicating authority but setting aside the penalty of Rs. 2,000/-imposed in the adjudication order.

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