Collector of Customs Vs. Pyrosystems Pvt. Ltd.

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SooperKanoon Citation : sooperkanoon.com/3477

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-20-1987

Reported in : (1989)(42)ELT273TriDel

Appellant : Collector of Customs

Respondent : Pyrosystems Pvt. Ltd.

Judgement :

1. M/s. Pyrosystem (P) Ltd. - the respondents before us - imported at Madras a consignment of metallic refractory sheaths. The Customs Authorities assessed the goods to customs duty under Heading 69.03 of the First Schedule to the Customs Tariff Act, 1975 and to additional duty of customs under Item No. 23B(4) of the Central Excise Tariff Schedule (CET). After clearance of the goods on payment of the duty so assessed, the respondents filed a claim for refund of duty on the ground that the goods were correctly classifiable under Heading 90.28 or 90.29(1) of the Customs Tariff Schedule, without additional duty of customs, in terms of Customs Notification No. 362/76, dated 2-8-1976.

The Assistant Collector of Customs, by his order dated 7-6-1980, rejected the claim as unsubstantiated as the respondents did not produce the catalogue and the analysis certificate called for by the A.C. In appeal, the Appellate Collector of Customs, by his order dated 28-3-1981, accepted the respondent's claim and ordered consequential refund. It is this order that the Central Government, in exercise of its powers under Section 131(3) of the Customs Act, proposed to set aside (simultaneously restoring the Assistant Collector's order) by issue of notice

F. No. 380/38/82-Cus.II, dated 8-4-1982 to the respondents. The proceedings so initiated have come on transfer to this Tribunal under Section 131(B) of the Customs Act, for disposal as a deemed appeal.

2. The basis on which the Central Government came to the tentative view that the impugned order was not correct is set out in Para 4 of the show cause notice in the following terms: "4. The Central Government is, however, tentatively of the view that the decision of the Appellate Collector holding the goods in question classifiable under Heading 90.29 of Customs Tariff Act read with Heading 90.28(1) of the Customs Tariff Act without liability to additional customs duty in terms of Customs Notification 362/76 was not correct. It appears to Government that the imported goods were of a material consisting of high alumina, silica and high temperature metal alloy. As such these were not made of glass and or porcelain alone. Under Notification 362/76 articles of glass and porcelain alone and which fell within Chapter 84 - 92 of the First Schedule to the Customs Tariff Act, 1975 (other than those which are specifically excluded) are exempt from the whole of the additional duty leviable thereon under Section 3 of the said Act. Further as the goods were of composite nature these appear to the classifiable for countervailing duty under Entry 68 of the Central Excise Tariff.

In view of this it appears that those would not be exempt from levy of additional duty of customs under Notification No. 362/76. In allowing the benefit of Notification Cus. 362/76 to the goods in question it appears that the Appellate Collector has erred in his decision." 3. From the record received on transfer from the Central Government, it appears that though M/s. International Clearing and Shipping Agency (presumably Custom House Agents for the respondents) sought time for submission of a reply to the notice and of the relevant literature, even while maintaining that the Appellate Collector's order wa correct, no reply was, in fact, filed. Though the paper book filed by the appellant was furnished to the respondents along with the notice of hearing of the appeal (a copy of the notice was sent to the Custom House Agents also), no one appeared in the Court on the day of hearing.

We have, therefore, heard Shri K.C. Sachar, D.R. for the appellant and have perused the record.

4. It is seen from the impugned order that the Appellate Collector had the benefit of examining the manufacturer's application catalogue and a write-up on the goods (these are not available on record). The Appellate Collector has noted from the write-up that the imported metallic refractory sheaths are used along with immersion thermocouples for ascertaining molten metal temperatures, that these sheaths can withstand temperatures of 1650C. The composition of the sheaths (which is a trade secret of the manufacturer) is noted as a material comprising of high alumina, silica and high temperature metal alloy. It was explained to the Appellate Collector in the course of the hearing that the sheath, along with other attachments, was used by the respondents in producing thermocouples which were used as immersion thermometers in molten metals. From these, the Appellate Collector concluded that the subject sheaths are used only as part of thermocouples and, being part of thermocouple assembly, they were classifiable under Heading 90.29 read with Heading 90.28(1) of the Customs Tariff Schedule without additional duty of customs in terms of Notification No. 362/76-Cus.

5. As against the above, the reason put forth in Government's notice is that the goods being made of composite material and not of glass or porcelain alone, Notification No. 362/76 does not apply to them and that they correctly fell under Item 68-CET.6. The department seeks to place these goods under Heading No. 69.03 of the Customs Tariff Schedule which reads thus :- "Other refractory goods (for example, retorts, crucibles, muffles, nozzles, plugs, supports, cupels, tubes, pipes, sheaths and rods)." Shri Sachar points out that refractory sheaths are specified in the heading. But, it has to be noted that Chapter 69 covers only Ceramic products. Statutory Note 1 to Chapter 69 lays down: "The Headings of this Chapter are to be taken to apply only to ceramic products which have been fired after shaping." No evidence has been placed before us to show that the subject goods fit this description. Even if they do, one has to remember that the goods are comprised also of metal It has already been noted that the goods are comprised of alumina, silica and high temperature metal alloy. By virtue of Statutory Note 2(b) to Chapter 69, "Cermet" falling within Chapter 81 are excluded

from Chapter 69 ("Cermet" - a combination of ceramic particles and a metal matrix - see Chambers 20th Century Dictionary). We do not know whether the goods are made of "cermet". In the state of evidence - or the paucity of it - we do not feel justified in upsetting the Appellate Collector's finding particularly because the department is not disputing that the imported goods are to be used as parts or accessories of thermocouples. In this view of the matter, we uphold the Appellate Collector's finding that the goods are classifiable under Heading 90.29 read with Heading 90.28(1) of the Customs Tariff Schedule.

7. Turning to the applicability of Customs Notification No. 362/76 to the subject goods, it is to be noted that the notification exempts articles of glass or porcelain falling within Chapters 84 to 90 of the Customs Tariff Schedule. As we have seen, the subject goods are not made wholly of glass or of porcelain. They are composite goods consisting also of metal. There is no evidence as to the relative percentage of the constituents to enable us to see which is the pre-dominant or main constituent. In this state (or the lack) of evidence, we cannot sustain the finding of the Appellate Collector that the goods were eligible for the benefit of the said notification. The goods must be held to fall not under Heading 23-B(4) but under the residual Item No. 68 of the CET. (a) the subject goods fell under Heading No. 90.29 of the Customs Tariff Schedule; (b) they were not eligible for duty exemption under Notification No. 362/76; and (c) they were liable to additional duty of customs with reference to Item No. 68 CET.