

Camteck Labs Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-17-2004

Reported in : (2005)(100)ECC107

Judge : S T S.S., T Anjaneyulu

Appellant : Camteck Labs

Respondent : Commissioner of Central Excise

Judgement :

1. a) The Appellants manufacture medical requisites / instruments for humans. The issue in this appeal, relates to classification and duty on intermediate plastic articles (Pouches / bags), arising in the course A manufacturing of "Life saving Equipments" viz., Urocom. Urocom-CVC and Urocom Legbag sets, which were classified and approved by the Assistant Collector under S.H. No. 9018.00 of C.E.T.A 1985 and were granted full exemption from duty under item No. 28 of Notificaiton No. 339/86 - CE (as amended) being 'Ostomy Products'. These intermediate pouches / bags of plastic (herein after referred to as PPVC for brevity), which were in crude and unfinished form, were manufactured from plastic sheets i.e. plastic goods falling under heading No. 39.20 as obtained from Bhore Industries. In such PPVC, a plastic inlet tube and a catheter outlet tube of Plastic material, with a valve arrangement was thereafter placed. Such PPVC pouch with tubes were sealed to make them an air-tight leak proof set. Thereafter on sterilisation, Urocom Set, Urocom CVC or Urocom L.B. sets came into existence which was marketed as a life saving equipment for draining out urine and other

waste from a Human patient as Ostomy Products. The unfinished, intermediate pouch i.e. PPVC, were exclusively consumed captively in the manufacture of an urine drainage set.

b) The Superintendent of Central Excise, vide letter dated 21.9.1992, on his own, holding that PPVC is an "article of plastic for conveyance or packing of goods" falling under H. No. 39.23, called upon the Appellant to provide some information with a view to issue Show Cause-cum Demand Notices.

c) The Appellants, vide their letter dated 1.10.92, replied that PPVC was captively consumed as a component of "Urocom sets", it was not used for conveyance or packing of any goods as required under H. No. 39.23, since 'Urine' was not 'goods' under Central Excise and Salt Act, 1944 and / or C.E.T.A. 1985, therefore PPVC was not classified under H. No.39.23 but was claimed under H. No. 90.18, & it stood wholly exempted under Sl. No. 28 of Notification No. 339/86 CE dated 11.6.1986 as amended. It was also claimed if PPVC was classifiable under H. No.39.23, it was wholly exempted under Sl. No. 37 of Notification No.14/92 read with orders on the subject viz. Board's letter / Telex etc no.

d) The notices were contested on the ground, it was submitted, that Plastic articles of general use were falling under Ch. No. 39 and all other articles were classified along with the machine/apparatus/equipment of which they were parts/components. The demands were time barred Under Section 11A and the notices issued by Range Superintendent was bad in law and that Assistant Collector was not competent to adjudicate the same.

e) Adjudication in respect of the notices listed at S. No. 1 to 4 of para 1(c) above, was completed before the then Assistant Commissioner of Central Excise, Division-H, Bombay-I, who passed a common Order-in-Original No. M/34/93-94 dated 17.5.1993. In an appeal, the Commissioner (Appeals) vide his Order No. 329 to 332/94 dated 3.5.1994 remanded the notices at S. No 1 & 2 in para 1(c) abovedated 6.10.92 and 10.12.92 & confirmed the Assistant Collector's finding with regard to the classification and liability of duty on the PPVC and ordered determination of the value and demands to be worked out accordingly in accordance with the principles of natural justice.

f) In appeal, the Tribunal at New Delhi, vide its final order dated 24.3.1999 dismissed the appeal for non prosecution. An application filed for restoration, of this export order is pending. However the Assistant Commissioner took up, all the 13 notices mentioned in para 1(c), herein above, including the ones in the matter remanded, and vide order dated 7/3/2003 confirmed the demands by holding.

" It is observed that after filing an appeal with CEGAT party neither gave any importance to the above referred cases and nor even made any effort to find the status of the cases, where as in some other cases they complied the orders passed by Hon'ble Tribunal i.e.

stay order No. CE/2744/WZB/99 dated 5.11.99 during the same period.

Party filed an Restoration of appeal only after the hearing dates were granted by this office. From the above facts it is evident that party unnecessarily trying to delay the proceedings of the govt.

which is in turn would result in delayed recovery of govt. dues. I do not see it is a fit case to impose any penalty as there is no suppression of facts as it is a dispute regarding classification and excisability of the product PVC Pouch." And confirmed the duly demands in all the 13 notices by directing the department to quantify the demand in notice at S. No. 1 to 8 & in 9 to h) The Assistant Commissioner's finding have been confirmed by the Commissioner of Central Excise (Appeals) and he has ordered as.

"Therefore taking into consideration all the facts and as the Appellant's factory is closed since 1.1.1996, without insisting for a pre-deposits, I do not find any valid grounds to interfere with the OIO No. H/16/2002 dated 6.12.2002 passed by the D.C.C.Ex H Division of Mumbai- IV Commissionerate. The appeal petition and waiver application are disposed off accordingly".

b) The matter of classification of PPVC claimed under 90.18 is now settled under Heading 39.23 as per the another Order dated 30.4.1996 of Assistant Commissioner holding classification of these claims under 39.23 and extending the benefit of Notification No. 15/94 dated 1.3.1994, which has been confirmed by

the Commissioner of Central Excise (Appeals) vide his Order No. SDK (312) 21/98 dated 11.2.1998. In fact there is no appeal filed against this order, by both sides as regards this classification.

c) The present proceedings as regards demands in the 13 show cause notices for the period April 1992 to November 1995 can be split into two broad categories.

i) Notices at Sl. No. 1 to 6, proposing denial of exemption of Notification No. 53/88, which was not in existence during the Notice period and notices at Sl. No. 1 to 5 were also without jurisdiction as per Board Circular No. 3/92-CE dated 14.5.1992.

ii) Notices at Sl. No. 7 to 13 are covered by the exemption under Notification No. 15/94 dated 1.3.1994 as settled by the Commissioner of Central Excise (Appeals) Order No. SDK (312) 21/98 DT. 11.2.1998.

d) The PPVC are fully exempted from duty, on reading and by application of Board Circular instruction number.CCE v. K.L.J PLASTICS Ltd -2004 (114) ECR 982 (T).

a) The demands were challenged before the Commissioner Appeals claiming the benefit of Notification 14/92. This was denied vide order dated 3.5.94, on the ground that the said Sl. No. claimed was applicable only to such goods which were manufactured from raw-material falling under 39.01 to 39.15. Whereas PPVC herein are not manufactured out of such material. Therefore Benefit under Sl.

No. 38 of the notification No. 14/92 was disallowed and subsequent protective demands were issued.

b) The remand is for quantification of duty as per CAs certificate.

Appeal against this order of CC (Appeals) dated 3.5.94 was dismissed by the Tribunal vide order dated 24.3.99 and the order has attained finality. Upon remand the adjudicating authority has decided all the notices covered from April 92 to May 93 as well as protective demands for the period June 93 to December 95. All these 13 notices have been now adjudged as per Tribunals order dated 24.3.1999 by Order-in-Original No. 7.3.2000 which is under challenge.

c) Reliance by the appellant on O-I-O dated 17.3.1995 approving classification list which allows benefit of Notification No. 15/94 at Sl. No. 37 is not available. It is submitted that the Notification No. 15/94, Sl. No. 14 has the same description as Sl.

No.37 of erstwhile Notification No. 14/92 except the restricting conditions of the raw-material falling under heading No. 39.01 to 39.15 has been deleted. Since the goods satisfy the conditions prescribed this O-I-O was not challenged by Revenue, and has been confirmed in appeal by Commissioner (Appeal).CCE Baroda v. Cotspun Ltd. (1999 (119) ELT 353 SC) the approval of the Classification List is binding and would apply only from the date of approval. Therefore reliance on the said O-I-O dated 17.3.95 and allowing the benefit of Notification would be only from 17.3.1995 and not for the earlier period.

b) The other notices are not barred by limitation, as submitted, since they were protective demands raised for six months period only. The averments of the Appellant that they are barred by limitation since the word "suppression" is alleged in the notices is not acceptable in view of the decision of the Apex Court in the case of CCE Baroda v. Safari Industries -1996 (84) ELT 9 SC wherein the Hon'ble Supreme Court has held that these SCNs which were issued by the Superintendent and valid for six months period are not barred by limitation.

4. After hearing both sides and considering the material and submissions it is found - a) The classification of the entity PPVC is settled under Chapter 39.23; benefit of Notification 15/94 dated 1.3.1994 Sl. No. 14 thereof has been correctly granted by the Assistant Commissioner, and that order is confirmed by the Commissioner (Appeals) and attained finality. Therefore there is no merits in the appellant's contentions about the marketability of PPVC being intermediate product & marketability not established, therefore not exigible.

Further no reasons are found to deny the exemption on clearances of such PPVC for the period 1.3.1994 onwards in the light of benefit of Notification No. 15/94 at Nil rate of duty already settled. The demands for the period 1.3.93 onwards, as made, would stand discharged since no demands could be made and are required to be confirmed as PPVC is accepted to be exempt fully from duty. The notices at

Sl. No. 6 to 13 in the list in para 1 (c) herein above and duty Demands therein are ordered to be discharged after setting aside the notices.

b) As regards notices of demand at Sl. No. 1, 2, 3, 4, 5 in para 1(c) above the perusal of the notices shows, that these notices cover a period from April 1992 to November 1993. Duty is demanded, denying the benefit of Notification No. 53/88, which was not in existence during the periods. Notification No. 14/92 dated 1.3.92 covers the period in the notices at Sl. No. 1, 2, 3, 4, 5 in para 1(c). The notices issued without application of mind are not good to fasten demands of duty.

c) The plea made of appellants of the benefit of Board Circular No. 13/22/82 CX-1 dated 5.6.84, 13/87/85- CEX -1 dated 26.12.85 and Telex F. No. 10/5/86-TRU dated 11.4.86 to set aside the demands at S. No. 1 to 6 of para 1 herein above & consider the grant of notification benefit 14/92 dated 1.3.92 covering (his period of demands , by interpreting the manufacture, of PPVC, a plastic product, from duty paid sheets obtained from M/s Bhor Industries under 39.20 is considered, and it is found- " (i) Such articles are made out of goods falling under heading No 39.01 to 39.15....." ii) Admittedly, PPVC is made from plastic material falling under 39.20 which is in turn is made from goods of 39.01 to 39.15. Such PPVC can never be directly made from goods of 39.01 to 39.15, lay flat tubing & sheets have to emerge at intermediate stage which are classified out of 39.01 to 39.15.

Board has, issued instructions, applicable to manufacture of plastic bags/pouches, by non-continuous manufacturers and these instructions on perusal reveal.

" EXEMPTION TO ARTICLES OF PLASTIC WOULD BE AVAILABLE UNDER SERIAL NO. 38 OF THE TABLE ANNEXED TO NOTIFICATION NO. 132/86-CE DATED 1.3.86 EVEN IF AT THE INTERMEDIATE STAGE IN THE OF SUCH ARTICLES OF PLASTICS, ANY OF THE PRODUCT FALLING WITHIN CHAPTER 39 EMERGES, SO LONG AS SUCH ARTICLES ARE MADE OUT OF GOODS FALLING UNDER HEADING NOS. 39.01 TO 39.15 ON WHICH EXCISE DUTY OR THE ADDITIONAL DUTY UNDER SECTION 3 OF THE CUSTOMS TARIFF ACT, 1975, HAS ALREADY BEEN PAID (.) IN THIS CONNECTION INSTRUCTIONS ISSUED VIDE F. NO. 13/22/83-CX DATED 5th AND 20th JUNE, 1984, MAY ALSO BE REFERRED TO (.) ATTENTION IS ALSO DAWN TO

INSTRUCTIONS ISSUED VIDE F. NO. 13/87/85-CX.I DATED 26TH DECEMBER 1985 (.)" and the letter LETTER F. No. 13/87/85-CX.I dated 26th December 1985 reads.

Subject : Exemption to polythene bags made out of layflat tubing and films regarding ----- I am directed to invite your attention to Board's instruction contained in F. No. 13/22/82-CX.I dated 5.6.85 and F. No. 13/22/83-CX.I (part) dated 20.6.85, in terms of which, it was advised inter alia , that the context of Notification No. 182/82-CE dated 10.5.82, so long as finished articles of plastic are made out of plastic materials falling under TI 15(A) (I) of the purpose of exemption.

It is clarified that principle contained in these instructions would not be restricted only in respect of polyethylene bags made from lay flat tubing. In this connection, it may be seen that the Appeal filed in the Supreme Court by the Department in the case of M/s Shellaya Industries Limited against CEGAT Order No. 194/84-C dated 11.7.83, regarding plastic sacs known as HDPE woven sacks, where Department's stand had been inconsistent with the above principle, has since been withdrawn and the withdrawal has already been communicated vide circular No. 32/85-AU dated 20.11.82 from F. No. 386/13/83-AU. would indicate, that Board has been consistently & constantly of the view that if during the manufacture of an article of plastic, exempted intermediate products not conforming to primary form of plastic falling under 39.01 to 39.15 emerge & are thereafter classified under 39.20 or elsewhere, such manufacture gets the benefit of being considered to be made from duty paid goods/material of 39.01 to 39.15, not only in continuous manufacture process but even in interrupted factories & exemption would be available.

Tribunal vide its Order in the case of CCE v. K.L.J Plastics Ltd -2004 (114) ECR 982 (T) has also upheld this view. It is also found that revenue has withdrawn appeals filed in Supreme Court to press contra view considering to the above. No material has been brought out on record as to why Board instructions are not applicable in this case. Therefore, PPVC emerging in the present appellant factory from duty paid sheet under heading 39.20 has to be considered has emergence of

an article of plastic from primary form of plastic falling under heading 39.01 to 39.15 when there is no material that this plastic sheets obtained from M/s Bhor Industries were not made from primary form of plastic falling under 39.01 to 39.15. Nothing contra has been shown to us. No reason are therefore found to deny the benefit of notification 14/92 on the grounds as pleaded. The lower authorities in confirming & quantifying the demands against the terms and stipulations of the Boards instructions were not correct in law. They were bound by these instructions which have been ignored, such orders cannot be upheld. The demands in SCNS 1 to 6 are to be set aside. Revenue has also withdrawn the appeals filed by them in Supreme Court. Therefore no reasons are found to deny the benefit of Notification No. 14/92 to the PPVC by interpretation being placed on the PPVCs not made from goods falling under SL. No. 39.01 to 39.15 in the present goods when they are made from duty period plastic articles. Therefore the denial of benefit of Notification No. 14/92 as arrived at and therefore duty demanded cannot be upheld. The notices at Sl. No. 1 to 6 cannot be sustained and have to be discharged after setting aside the amounts determined there.

d). There is force in Appellant's submissions as regards valuation under Rule 7 of Central Excise (Valuation) Rules, 1975 since we are not able to sustain the duty liability on the PPVC in the facts of this case as per the notices issued, We do not arrive at any further findings on the plea of valuation.

e) In view of our findings herein above we do not propose to go into the question of jurisdiction of the Assistant Collector and the Superintendent in having issued the notices.

f) The plea of the Revenue that the order has attained finality and the approval of the classification list from 17.3.1995 by the Assistant Collector and grant of the eligibility of notification has to be from the date of approval of classification list and reliance on the case of CCE v. Cotspun Ltd-1999 (113) ELT 353 (SC) is not upheld in light of subsequent development in law and the amendments effected in to Section 11A of the Central Excise Act 1944. We find that the Classification list will have to be upheld from the date of filing of the same.

Similarly the benefit of the Notification 14/92 as per the Board's Circular on the subject has to be granted even at the requantification stage as no quantification of duty can be arrived by ignoring an exemption. These Boards circulars were applicable & were in existence at that time and the department is bound by them, therefore the benefit of exemption can be extended to the notices at Sl. No. 1 to 6 & 7 to 13 of list herein above as per findings herein.

5 In view of our findings the determination of demand of duty are to be set aside, the show cause notices ordered to be discharged and appeal allowed.

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