Nova Impex Vs. Collector of Customs

Nova Impex Vs. Collector of Customs

SooperKanoon Citation : sooperkanoon.com/4264

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-23-1988

Reported in : (1988)(17)ECC56

Appellant : Nova Impex

Respondent : Collector of Customs

Judgement :

1. This is an appeal against the order of the Collector of Customs (Appeals) Madras. The appellants had filed the appeal on various grounds. One of the grounds is for re assessment of the imported goods, namely Desmophen 7186B, described in the appeal as Polyether polyol.

The lower authority had assessed the goods under 39.01/06 CTA read with 15A CET for cv duty purposes. The appellants pleaded for reassessment under heading 38.01/19(1) CTA read with Item 68 CET. Collector (Appeals) in this regard accepted the reasoning given for rejection of the appellants claim by the original authority. He gave no further findings in the matter.

2. Learned Consultant for the appellants stated that he is not pressing the other grounds of appeal and he restricted his pleas in respect of reassessment of the goods. He drew our attention to the reasoning given by the Assistant Collector and which was adopted by the Collector (Appeals). The findings of the Assistant Collector for convenience of reference are reproduced below : "As per the Bayer's preliminary leaflet furnished by the claimants the material in question, viz.,

Desmophen 7186(B) (Polyether polyol) is a trifunctional polyether based on propyleneoxide. It could be seen from the CCCN Explanatory Notes under sub-chapter E under chapter 39.01 that polyethers based on polyoxy propylene (propylene oxide) are classified under chapter 39.01(E)(4) under "Certain other polycondensation and poly addition products". Chapter Note (2)(c) under chapter 39 states (C) Resols, liquid polyaddition products".

Since, as shown above, polyethers are grouped under "39.01 (E) certain other polycondensation and polyaddition products", the contention that "similar artificial polycondensation or polymerisation products" in chapter note 2(c) refers to only Resols and liquid polyisobutylene is not correct.

"As regards the contention that the goods are not artificial plastic material and hence are not covered by the heading 39.01/06 under the heading "General" under chapter 39 of CCCN of "A" it is stated "Resols and liquid polyisobutylenes and similar artificial products which have been less intensively transformed by polycondensation or polymerisation than the corresponding artificial plastic materials".

This means that Resols and liquid polyisobutylene and similar artificial products (polyethers) have been less intensively transformed by polycondensation or polymerisation and hence are intermediate to the corresponding finished artificial plastic materials.

The point regarding very low molecular weight and number of monomers should not be taken as applying to all polymers but only to mixed polyethylene glycols. In any case the claimants have not furnished any information as to the molecular weight, number of propylene oxide monomer units in a molecule of the polyether etc. with any supporting documents.

The claim against his ground for reassessment under heading 39.01/19/(1)/68 CET is therefore rejected as inadmissible." The learned Consultant produced leaflet covering the products under assessment. He stated that the goods are essentially polyether and can be foamed for making polyurethane. He stated that the goods imported by them are neither resins nor plastics but conceded the same

was a polymerised product. He stated Tariff Heading 39.01/06 and T.I. 15A CET were similarly worded and that in terms of these headings, for any goods to fall within the ambit thereof these should be polycondensation, polyaddition, polymerisation and copolymerisation products, produced by chemical synthesis answering to one of the following description : (c) resols, liquid polyisobutylene and similar artificial polycondensation or polymerisation products.

He pleaded that so far as (a) and (b) are concerned, they do not cover the goods imported by them and that for goods to fall under the said tariff heading these have to be similar to resols or liquid polyisobutylene. He pleaded so far as resols and liquid polyisobutylene are concerned, these can be further polymerised by application of heat or pressure as such but the goods imported by the appellants can be further polymerised only by the chemical reaction. In this context he draw our attention as to how polyurethane is formed and referred to the entry Polyurethane in the Condensed Chemical Dictionary Tenth Edition-Revised by (essner G. Hawley which is reproduced below : "A Thermoplastic polymer (which can be made thermosetting) produced by the condensation reaction of a polyisocyanate and a hydroxyl-containing material e.g. a polyol derived from propylene oxide or trichlorobutylene oxide. The basis polymer unit is formed as follows: R1NCO+R2 OB - Rl NHCOOR2.

"A polyether such as polypropylene glycol is treated with a diisocyanate in the presence of some water and a catalyst (amines, tin soaps, organic tin compounds). As the polymer forms, the water reacts with isocyanate groups to cause cross linking, and also produces carbon dioxide which causes foaming. In other cases trifluoromethance or similar volatile material may be used as blowing agent." He stated that so far as resols mentioned under 39.01/06 CTA and 15A CET are concerned, resols itself is described as a resin and polyisobutylene is also thermoplastic polymer. He stated that the goods imported by them were neither resin nor thermoplastic polymer commonly known as synthetic rubber. He pleaded that the product imported is not similar to resols and polyisobutylene and therefore fell out of the purview of Tariff Headings 39.01/06 CTA and T.I.15A CET and would be therefore classifiable under 38.01/19(1) CTA and 68 CET.3. The learned SDR for the Department stated it was not disputed that the goods were

product of chemical synthesis and for the purpose of classification being similar in nature to resols and polyisobutylene therefore fall under 39.01/06 CTA and 15A CET. He stated that for the product to fall under 39.01/06 CTA and 15A CET, the goods are required to be similar to the resols and polyisobutylene. He stated in the present case the goods are polymerised product and can be formed into polyurethane which is a plastic. He pleaded that in the case of resols and polyisobutylene also further processing of these results in the formation of resins or plastics. She pointed out that it was not necessary that the products mentioned under item(c) referred to supra i.e., resols etc. si.,"ld be such that further polymerisation of the same should take place by application of further heat and pressure alone. She stated so far as the resols are concerned in the book on Plastic Materials by J.A. Brydson - Fourth Edition at page 578 on Phenolic Resins (photocopy of the page isi supplied) it has been mentioned as under : "The resols may be hardened by heating and/or by addition of catalysts." 4. The question that calls for our consideration is whether the goods imported by the appellants are similar to resols or polyisobutylene.

We observe that so far as the degree of polymerisation of the goods is concerned it has been conceded by the learned Consultant that it is similar to that in the case of resols and polyisobutylene. From the pleas made before us it is seen the goods imported are utilised for the manufacture of polyurethane foam, a thermoplastic polymer by condensation reaction which as set out in the Condensed Chemical Dictionary Tenth Edition - Revised by Gessner G. Hawley referred to supra. To appreciate the issues in the correct perspective, it is necessary to set out the scope of the items Resol and Polyisobutylene as given in the Chemical Dictionary by Gessner G. Hawley : "Resol - A-Stage resin (resole; one-step resin). An alkaline catalyzed thermosetting phenol - formaldhyde type resin consisting primarily of partially condensed phenol alcohols. At this stage the product is fully soluble in one or more common solvents (alcohols, ketones) and is fusible at temperatures below 150C. On further heating and without use of a catalyst or additive, the resin is eventually concerted to the insoluble, infusible cross-linked form (C-Stage). The A-Stage resin is a constituent of most commercial laminating varnishes, and is also used in special moulding powders." "(Polybutene, polyisobutylene, polyisobutene) Any of several thermoplastic isotatic (stereo

regular) polymers of isobutene of varying molecular weight; also polymers of butene-1 and butene-2.

Butyl rubber (q.v.) is a type polyisobutene to which has been added about 2% of isoprene, which provides sulfar linkage sites for vulcanization. Isobutene can be in chains containing from 10 to 1000 units, the viscosity increasing with molecular weight. It is combustible and essentially non-toxic.

It is seen from the above that both these products lend themselves to further polymerisation resulting in the products which are different in character and use on their further getting polymerised. The appellants product as shown in the literature produced by the appellants is described as under : "Desmophen 7186B is a trifunctional polyether based on propylene oxide. It is mainly suitable for the production of low density flexible polyurethane foam exhibiting good load bearing properties." "Generally this polyether can be foamed under the same conditions as standard polyols. Desmodur T 80 can be used as the isocynate in all formulations. We recommend Stabiliser OS 20 or OS 25 as stabilisers and Desmorapid PS 207 or Dabeo as catalysts".

It is seen that the product gets further polymerised be reacting with isocynate. The appellants have pleaded while resols and polyisobutylene get further converted into resin and plastic by application of heat and pressure while the appellants products get converted into thermosetting plastic by chemical condensation reaction. The point therefore that arises is whether on account of the difference in the process of further polymerisation or condensation, the product for the purpose of Tariff merits consideration as a product not similar to resols aid polyisobutylene.

It is seen that the item imported, according to the catalogue of the appellants, is a trifunctionai polyether based on propyleneoxide and is intended for the manufacture of polyurethane foam by foaming it with other proprietory product of the suppliers company which is in the nature of isocynate with the addition of stabilizers and catalysts.

Polyether as seen from the tariff entry are not by name covered by descriptipn of the items set out therein. The case of the revenue is that since the product is

similar to liquid polyisobutylene or resol, it would by virtue of Note 2(c) to Chapter 39 CTA be classifiable under 39.01/06 and by virtue of the explanation under 15A GET, it would classifiable under that entry. The Assistant Collector in his reasonings for assessing it under 39.01/06 and which reasonings have been adopted by the Collector (Appeals) has stated that in terms of CCCN Explanation sub-chapter E under 39.01 page 574, polyether based on polyoxide propylene are covered under 39.01 and for that reason is one of the category of other polycondensation and polyaddition products. He has held that this heading correspondents to 39.01 of CTA and therefore on account of this correspondence polyether imported by the appellants would fall under the mischief of 2(c) of the Explanation to the Tariff Item. The appellants advocate took the objection that the items covered in the chapter to heading 39.01 of CCCN covers polyether based on polyoxy propylene but the appellants products are based on polyoxide and two are different entities. It is seen from the Condensed Chemical Dictionary that propylene oxide has been described as under : "40th highest-volume chemical produced in US (1979). Properties : Colorless liquid, elhereal odor. Sp.gr.0.8304 at 20/20C; b.g.33.9; vapor pressure 445 mm(20C) flash point - 35F(-37.2C); wt 6.9ibgal (20C); Freezing point -104.4C; partially soluble in water; soluble in alcohol and either.

Derivation : (1) Chlorohydration of propylene, followed by saponification with lime; (2) peroxidation of propylene; (3) expoxidation of propylene by a hydroperoxide complex with molybdenum catalyst.

Hazard: High flammable, dangerous fire risk; explosive limits in air 2 to 22%. Tolerance 20ppm in air; Moderately toxic and irritant.

Uses: Polyols for urethane foams; propylene glycois; surfactants and detergents; isopropanol amines; fumigant; synthetic lubricants; synthetic elastomer (homopolymer) solvent.

Shipping regulations: (Rail/Air) Flammable Liquid lable. Not acceptable passenger." It is seen from the book "Plastic Materials' by J.A. Brydson 4th Edition Chapter 27.5.4 : Polyether One-shot Foams: that propylene oxide - Is used as input raw material and is polymerised in the presence of.propylene glycol as an

initiator and a caustic catalyst. The relevant portion in this regard is reporoduced as under : "Propylene oxide polymers are less hydrophilic and also lower in cost may be prepared by polymerising the oxide in the presence of propylene glycol as an initiator and a caustic catalyst at about 160C. They have the general structure The secondary hydroxyl groups of these poly (oxyprophylene) glycol diols are less reactive than the primary hydroxyl groups of the earlier polyesters. At the time of the introduction of these polyethers, the catalysts then available were insufficiently powerful for one-shot processes to be practical and so these polymers have been used primarily in prepolymer processes." Today the bulk of the polyethers used for flexible foams are produced by polymerising propylene oxide using trihydroxymethylpropane, hexane 1,2,6-triol or glycerol as initiators.

This leads to triols of the following general type : OH.(C[3]H[6]O)[n.]CH[2.]CH(OH). CH[2:](C[3]H[6]O)n. OH The higher functionality of these polymers leads to foams of better load bearing characteristics. Polymers of molecular weights in the range of 3000-3500 are found to give the best balance of properties.

Even more reactive materials may be produced by tipp'ing the ends of the chains with ethylene oxide thus replacing the secondary hydroxyls with primary hydroxyl groups. They are known as tipped polyols.

It is seen what has been imported is polyether based on propylene oxide and since polyoxy propylene are a variety of polyether and is produced from propylene oxide, it is correct to deduce that what the appellants had imported is a product which answers to the description of polyether given in CCCN. But the question still remains whether the range of the products covered under Chapter 39.01 CCCN can be taken to be covered under the tariff item 39.01/06. It is seen in the CCCN vast range of products have been specified by name and the polyethers are mentioned as one category of the items. In the CTA there is no specific mention of the products covered. It is seen that the items described in the CCCN under 39.01 are under group headings Phenoplasts; Aminoplasts, Alkyd resins; Expoxide resins and Silicones and 'other polycondensation and polyaddition products'. In respect of these no mention is there that these products are like resol or

polyisobutylene. In fact, resols are covered under 39.01 under group heading phenoplasts at page 573.

Liquid isobutylene is covered under Chapter 39.02 under the Group Heading: 'Polyisobutylene'., Therefore answer to the question as to whether the goods imported by the appellants are similar to resol or polyisobutylene cannot be found from the rationale of the description of the items in the CCCN since polyether of the type imported are specified under 39.01. So far as the CCCN is concerned, Polyisobutylene falls under 39.02. So far as Customs Tariff however is concerned an answer to the issues before us has to be found as to the commonality of the characteristic of the goods imported, with those of resole and polyisobutylene. Resols, as is seen from the technical books and also CCCN, belong to the group of thermosetting phenolic formaldehyde resin which may be in the form of liquid paste or solid and'can be used for varnish, paint, impregnation and can be further polymerised into recitol and after complete reaction to form powder and finally after complete reaction in the form of sheets laminates etc. Polyisobutylene is polymerised product available both in the form of rubber and also slightly polymerised plastic materials. It is seen that resol and polyisobutylene apart from having different chemical compositions have different physical and chemical characteristics and uses. The two are however alike in respect of the following characteristics: For any item, therefore to fall under item 39.01/06 or 15A(1) CET these apart from being condensation, polycondensation, polyaddition or polymerised products, should have characteristics similar to resols and polyisobutylene. The similar in different context has different meaning. The same is set out in Condensed Oxford Dictionary as under : "a. like, alike; having mutual resemblance or resemblance to; of the same kind, nature or amount; (Geom) shaped alike, hence or..." The Law Lexicon by T.P. Mukherjee, VOL.11 1982 also gives meaning of the term 'similar' as held by Courts as under : "The word "similar" has not been defined in the Punjab Security of Land Tenures Act 1953. However, its meaning as given in Oxford English Dictionary, Volume IX of the Definition, reads as under: "Similar" means nearly corresponding; resembling in many respects; somewhat like; having a general likeness. Royer V.Brown N.H. 93 A 2d 667, 668. The word 'Similar' in its primary sense means nearly corresponding, resembling in many respects, somewhat like having a general likeness.

(Rubenstein v. File, ments Fund Ins. Co.NE 2d 289, 291, 339 III App.

404) The term 'similar' does not mean 'Identical' as respects degree of similarity that must exist between property sold and that condemned to make evidence of the sale admissible but means having a resemblance and property may be similar though each possesses various points of difference". (City of Chicago vs Vaccarro, 97 NE 2a 766/ 773, 4O8 III 587; Syam Das V. Financial Commissioner, A.I.R. 1973 Punj). 50 52) The word 'similar' may be said to be a word of ambiguous import in the sense that the mere stipulation in a statute that something should be done similarly is insufficient by itself to Signify the degree o'f similarity with which that thing must be done. A thing can be done similarly without its being slavish copy of the model (Commissioner of Income-tax v. T.V.S.I, and Sons, A.I.R. 1976 SC 255 at 2 0)." The entry 39.01 and 15A CET cover a wide range of products under the category of resin and plastic and polycondensation and polymerisation products etc. word 'Similar' in the context of the tariff entry, cannot be read as being identical and degree of similarity has to be in respect of the commonality of characteristics with the examples of materials given. As we have stated the degree of similarity between resols and polyisobutylene is in respect of two characteristics as set out above. The other product to be similar therefore firstly should be polycondensation, polyaddition; polymerisation; (2) these should be resinuous in character; (3) these should be capable of being further polymerised. So far as first criterion is concerned, it is not disputed that it is satisfied. In the present context there is no averment that the goods imported can be used as such as resin. But that should not be a handicap for consideration of classification of the item under 39.01/06 or 15A CET, so long as it is resinuous in character and it satisfies, the other two criteria. The tribunal in a similar case CC, Cochin vs M/s. Premier Tyres: 1985 (20) ELT 124 also had an occasion to consider the scope of the item that can be covered under 15A CET and 39.01/06 in terms of Chapter Note 2(c) of Chapter 39 and they have held it as under : "It is clear from the above quoted passages read with the CCCN explanatory notes (supra) that resols and polyisobutylene are recognised as resins or substances which have polymerised up to a stage and which, on further polymerisation, result in more fully cross-linked resins.

"Note 2(c) requires a polycondensation or polymerisation product should a similar to resols or liquid polyisobutylenes so as to attract its mischief. The similarity required does not stop with the product under consideration being a polycondensation or polymerisation product. In our view, the notes require similarity in characteristics with resols and polyisobutylene, i.e. of either being resins polymerised up to a particular stage or being capable of producing by further polymerisation a more fully polymerised resin".

In this respect, PEGs are similar to them Hence Note 2(c) is attracted, we think this is to miss the real point of Note 2(c). We have already discussed at length this aspect and concluded that the similarity referred to in Note 2(c) implies that a polycondensation or polymerisation product to be covered by this note should be less intensively transformed than the corresponding plastic material (i.e. polymerised upto a stage, e.g. A-Stage resin: resols) or capable of being converted into resins by further polymerisation.

And, on this aspect, we do not have any help from the Deputy Chief 'Chemist's note".

It need not be doubted that polyethers including polyoxyethylene and polyoxypropylenes conforming to the stipulations in chapter note 2 would fall under heading 39.01 CCCN and 39.01/06 of CTA 1975." The Tribunal in that case, it is seen, ruled that since the good though polymerised product were not resinous in character, and these could not be considered similar to resols and polyisobutylene. This case was not brought to the notice of the Bench by either side. It has been conceded by the appellants Consultant that the goods are polymerised product and can be further formed into plastic product namely polyurethane. Thus, it is seen, it is amenable to further polymerisation. The product imported is a polyether manufactured from propylene oxide as the base material and therefore as set out above, belongs to the category of polyoxy propylene group. This item as it is seen is covered under 39.01 of the CCCN. Item 39.01 and 15A CET though are based on the scheme of the CCCN and Chapter note 2 of Chapter 39 of the CCCN is similar to the note in Chapter 39 of CTA and the explanation appended to item 15A(1) CET yet in the absence of any specific

list of goods mentioned in the CTA, merely because the goods answer to a description of the gooas in corresponding heading in the CCCN, cannot be the basis by itself for asessment of the goods under 39.01/06 CTA and 15A(1) CET. The goods must satisfy the criteria as set out by us above and as held by the Tribunal in the decision cited supra. Out of the three criteria set out by us above, two we find stand satisfied. Regarding the third criterion whether the product is resinous in character, there is no material before us. No evidence in this regard has been laid by either side. We therefore hold for this limited purpose the matter requires to be re-examined by the lower authority. We, therefore, set aside the order of the lower authority and order that the matter be decided de novo in the light of our findings above. We therefore allow the appeal by remand.

5. I have carefully gone through the order proposed by Brother Gulati, Member (Technical). I agree with him that CCCN would not be of any help in resolving the present controversy. The goods in question Polyether Polyol is not specified in Heading 39.01 CTA or Item 15A(1) CET and its classification under the two depends on similarity with resols and liquid polyisobutylene. While it bears resemblance on the two points set out by Brother Gulati, it appears that there is no material on record on its resemblance to resols and liquid polyisobutylene on the point of resinous character or plasticity which qualities appear to be the essential character of the two products with which it should bear similarity. I agree with Brother Gulati that the matter requires remand for examination of similarity on the third point.