Commissioner of Central Excise Vs. Essen Plastic Industries and Ace

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-18-2006

Reported in : (2006)(110)ECC472

Judge : J Balasundaram, Vice, S T Chittaranjan

Appellant : Commissioner of Central Excise

Respondent : Essen Plastic Industries and Ace

Judgement :

1. These two appeals and two cross objections are taken up for hearing together as a common issue is involved. Heard Shri Vimlesh Kumar Ld.

SDR for both the appeals filed by the applicant Commissioners and heard Shri Ravindra Narain Ld. Advocate for the respondents M/s. Essen Plastic Industries No one appeared for the respondents M/s. ACE Plastics Pvt. Ltd. despite notice and there is also no adjournment request from them.

2. In both the cases, the dispute relates to durability of the impugned product "tooth-brush handle" made of plastic. In the case of M/s. Essen Plastic Industries, the lower appellate authority has held the impugned goods to be classifiable under Heading 96.03 as essential part of the brush and hence chargeable to nil duty under his order dt. 3.8.99. In the case of M/s. ACE Plastic Pvt. Ltd. the lower appellate authority under his order dt. 31.8.99 has followed the lower appellate authority's aforesaid order dt 3.8 99 in respect of M/s. Essen Plastic Industries and

has allowed similar relief The two appeals filed by the applicant Commissioners challenge these two orders of the lower appellate authority and seek classification of the impugned goods under sub-heading 3926.90.

3. Shri Vimlesh Kumar Ld. SDR points out that the HSN Explanatory Notes to Heading 96.03 excludes brush mountings and handles, which are required to be classified according to their constituent materials. He also states that as per Chapter Note 2 (v) of Chapter 39, articles of Chapter 96 are excluded which cover brushes but brush handles, which are only parts of brushes, are to be covered under chapter 39, in view of Chapter Note 1(d) of Chapter 96. He further adds that impugned goods in question are manufactured Items which are produced from plastic granules by the extrusion process and are sold by both the manufacturers to M/s. Colgate Palmolive India Ltd. for further manufacture of toothbrushes. According to him, since the impugned goods are actually sold, their marketability cannot be in question.

4 Shri Ravindra Narain Ld. Advocate appearing for one of the respondents argued at length to say that the impugned goods are classifiable under heading 96.03 as they are nothing but unfinished toothbrushes. He tries to draw support from the Interpretative Rules 2(a) and states that even blanks are covered by the said Rules According to him, the impugned goods are nothing but blanks of toothbrushes and hence are required to be classified as toothbrushes under heading 96.03 attracting nil rate of duty. He further argues that in case the impugned goods are held to be classifiable under Chapter 39, the same should be held to be non marketable as it is not a product which is ordinarily bought and sold and hence the same cannot be deemed to be excisable goods. In support of his argument he relies on the decision of the Hon'ble Supreme Court in the case of Union of India v.Sonic Electrochem (P) Ltd. 5. We have considered arguments from both sides and perused the case records including the cited case law As regards the classification of the impugned goods, we find that the same do not have the essential characteristics of a toothbrush, which is a vital requirement to satisfy the condition under Interpretative Rule 2(a) to merit for classification under the same heading as the finished toothbrushes. In our view the essential characteristic of toothbrush is cleaning of the teeth and the same is lacking of the

impugned goods, as the handles do not have the bristles, which are required to clean the teeth. The arguments of the Ld. Counsel that the impugned goods should be considered as 'blank' and therefore as incomplete/unfinished toothbrush cannot be accepted, because as noted above, it lacks the essential characteristic of the toothbrushes in the absence of the bristles.

Taking cognizance of the Chapter Notes and the HSN Explanatory Notes cited by the Ld. SDR, we are of the opinion that the impugned goods being handles of toothbrushes are excluded from being classified under Heading 96.03 and that the same are appropriately classifiable under sub-heading 3926.90 which covers other articles of plastics.

6. It is well settled that an article to be excisable must satisfy the twin requirements of manufacture and marketability. It is not enough that the impugned goods are classifiable under a Tariff Heading attracting excise duty, if these twin tests laid down under various pronouncements of the Hon'ble Supreme Court are not meet. In case of the impugned goods, it is not in question that these are manufactured products. However, the dispute has been raised in regard to their marketability. The Ld. Advocate appearing for ore of the respondent has stated that these toothbrush handles are not marketed and there is no market existing where such handles can be bought and sold. He further states that the respondents undertake manufacture of these handles only for supplying to M/s. Colgate and even the name 'Colgate' is embossed on the handles. We have perused the cited decision of the Hon'ble Supreme Court in the case of Sonic Electrochem (P) Ltd. (supra). In the said case, the issue in question was whether plastic body of Electro Mosquito Repellent can be considered as a marketable commodity and hence, whether excisable or not. We reproduce below paragraph 9 of the said decision for better appreciation of the ratio of the said decision of the Hon'ble Supreme Court.

It may be noticed that in the case referred to in the passage, quoted above, the reasons for holding the articles 'not marketable' are different, however they are not exhaustive. It is difficult to lay down a precise test to determine marketability of articles.

Marketability of goods has certain attributes. The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant. The plastic body of EMR does not satisfy the aforementioned criteria. There are some competing manufacturers of EMR. Each is having a different plastic body to suit its design and requirement. If one goes to the market to purchase plastic body of ER of the respondents either for replacement or otherwise one cannot get it in the market because at present it is not a commercially known product. For these reasons, the plastic body, which is a part of the EMR of the respondents, is not 'goods' so as to be liable to duty as parts of EMR under para 5(d) of the said exemption notification.

7. We find that the Hon'ble Supreme Court has observed that it is difficult to lay down a precise test to determine the marketability of articles and that the essence of marketability is neither form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The Hon'ble Supreme Court has decided that if one goes to the market to purchase plastic body of EMR either for replacement or otherwise one cannot get it in the market because at present it is not a commercial (sic) known product. Hence, the Hon'ble Supreme Court has held that the same did not meet the test of marketability and hence not 'goods' liable to excisable duty.

8. In our view, the ratio of the Hon'ble Supreme Court in the case of Sonic Electrochem (P) Ltd. (supra) clearly applies to the case at hand since the plastic handles of the toothbrushes made for Colgate is not at present a commercially known product and one cannot get it in the market. Hence, respectfully following the ratio of the decision of the Hon'ble Supreme Court, we hold that though toothbrush handles are classifiable under sub heading 3926.90, the same not being marketable, cannot be considered as excisable goods and charged to excise duty. We note in passing, though our decision is not based an this observation, that the legislature has exempted toothbrushes from duty by

prescribing nil rate and collecting duty at an earlier stage on handles would partly defeat the purpose of exempting toothbrushes.

9. In view of our findings recorded above, holding that the impugned goods are not marketable and hence not excisable, we dismiss both the appeals filed by the department. The cross objections filed by the respondents also stand disposed off.