

Collector of Central Excise Vs. Mrf Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-24-1990

Reported in : (1990)(29)ECC315

Appellant : Collector of Central Excise

Respondent : Mrf Ltd.

Advocate for Def. : Shri. Nariman

Judgement :

1.01 On 3-3-1986 the respondents herein filed a classification list No.5/85-86 claiming classification of 'vulcanising solution' under Chapter sub-heading 4006.90. This classification list was given approval by the Assistant Collector on 10-6-1986.

1.02 Subsequently as per advice of the departmental authorities, the respondents filed the revised classification list No. 21/86-87 dated 31-3-1987 under sub-heading 4005.00 claiming exemption under Notification 377/86 dated 29-7-1986. The revised classification list was filed without prejudice to the claim of the respondents herein for classification of the said product under sub-heading 4006.90.

1.03 The Assistant Collector issued a show cause notice to the respondents as to why their claim for the benefit of Notification 377/86 be not disallowed. The respondents in their reply dated 22-5-1987 contended that the product 'vulcanising

solution' merited classification under sub-heading 4006.90 as it was a finished article.

The Assistant Collector vide his order-in-original dated 8-1-1988 held the product classifiable under sub-heading 4005.00 attracting duty at the rate of 40% ad valorem and demanded differential duty for the period 1-11-1986 to 30-9-1987 amounting to Rs. 25,61,791.72.

1.04 On appeal before the Collector of Central Excise (Appeals) by the respondents herein the said authority has held that the CEGAT decision in Elgi Polytex Ltd., Coimbatore v. Collector of Central Excise, Coimbatore - 1988 (34) ELT 404 (Tribunal) will be applicable. That authority has further held that the reasons stated by the Tribunal are also applicable in the present appeal before it. Accordingly, the said authority modified the order of the Assistant Collector.

1.05 It is appropriate at this stage to look at the decision of the Tribunal in Elgi Polytex Ltd. mentioned (supra). The product under consideration is known as Rubber Cement or Black Vulcanising Cement whose composition is as follows :- In para 11 of the said Report, it is further stated that the product in that case contains, apart from rubber compound and solvent, sulphur carbon black, stearic acid, zinc oxide, fillers and accessories.

1.06 The product under consideration in this case has the following composition :- It has further been stated that rubber compound contains 80% rubber and the rest carbon black and other chemicals. Further, '3% rubber chemicals' include vulcanising agents, accelerators and zinc oxide.

1.07 The Tribunal in the case of Elgi Polytex Ltd. has held that the product in that case was an adhesive based on rubber compound and therefore, it appropriately fell under Heading 35.06 of Central Excise Tariff Act, 1985. This heading, it may also be mentioned at this stage was introduced in Central Excise Tariff Act, 1985 w.e.f. 10-2-1987 as mentioned in the case of Elgi Polytex Ltd. 1.08 In other words, the impugned order holds that the product under consideration in this case also falls under Tariff Heading 35.06 Central Excise Tariff Act, 1985.

2. Arguing for the appellant-Collector, learned D.R. Shri Sunder Rajan has urged that the facts in Elgi's case are different from the facts available in this case, competing entries for classification are different, composition of the product is different. Further, Heading 35.06 to Central Excise Tariff Act, 1985 is not applicable in the instant case because the product under consideration here is packed in packings of more than 1 Kg. which alone, according to the Explanatory Notes and Heading of H.S.N. 35.06 would make it fall thereunder. He further urges that since Heading 35.06 was never a competing entry for classification of the product before the original adjudicating/assessing authority, the matter may be remanded to the original authority after setting aside the impugned order.

3. The learned Sr. advocate Shri F.S. Nariman appearing for the respondents has urged that the product is 'vulcanising solution' and is clearly an adhesive for helping the cushion rubber compound, compound to adhere to the old tyre after buffing. Composition of the product under consideration here is similar to the product under consideration before the Tribunal in Elgi's case mentioned (supra).' In any case similarity on the crucial issue that both the products in this case and in Elgi's case are rubber based adhesives cannot be doubted. It is, further, urged by the learned advocate that if Heading 35.06 is not accepted, then Heading 40.06 as articles of rubber with sub-heading 4006.90 should be acceptable because the product under consideration is a finished article of rubber having its own specific use of adhesion, it cannot by any means be called a compound rubber because the rubber compound content is only 12% to 15%. He, therefore, submits that appeal deserves to be rejected and impugned order may be upheld. His further submissions is that there is no case for remand because all the primary data for determination of the classification of the product under consideration is available on record.

4. We have carefully considered the pleas advanced on both sides. We find from the composition and the use of the product as given above and not controverted by the appellant that its primary function is as an adhesive; composition of the product is also similar to the composition of the product under consideration before the Tribunal in the Elgi's case mentioned (supra). The classification list which is under consideration before us was filed by the respondents on 31-3-1987 i.e.

after the introduction of Tariff Heading 35.06 in Central Excise Tariff Act, 1985. Arguments advanced by the learned representative for the department are not tenable and all of them are answered in the judgment of the Tribunal in the Elgi's case. Competing entries, which have been mentioned in para 8 of the Elgi's judgment are 40.05 (as the department would have it) and the Heading 35.06 (as urged by the appellants).

Regarding the objection of packing being more than 1 Kg. and therefore, Heading 35.06 being inapplicable, the Tribunal in 1988 (34) ELT 404 (Tribunal) has observed as follows :- "Explanatory Notes under Heading No. 35.06 of Brussels nomenclature show that the heading covers inter alia adhesives consisting of a mixture of rubber, organic solvent, fillers, vulcanising agents and resins. The notes under Heading No. 40.05 (corresponding to Heading No. 40.05 of the Central Excise Tariff Schedule) show that prepared glues and other prepared adhesives consisting of rubber solutions or dispersions with added fillers, vulcanising agents and resins, and rubber solutions and dispersions put up for retail sale as glues or adhesives, not exceeding a net weight of 1 Kg. (Heading 35.06) are excluded from the said Heading 40.05. The clause regarding rubber solutions and dispersions put up for retail sale, not exceeding a net weight of 1 Kg. has relevance only to the Brussels nomenclature because its Heading 35.06 (reproduced earlier) has a specific description to that effect. Whereas, as may be seen from Heading 35.06 of the CET (reproduced earlier), there is no corresponding description. The subject product, as seen from its composition, contains rubber, in solution in an organic solvent, sulphur (a vulcanising agent), fillers and resin. Its use is admittedly as an adhesive in retreading of tyres. There can, therefore, be no doubt that the correct classification of the product is as a prepared adhesive or glue in Chapter 35 of the Central Excise Tariff Schedule." We have no reason to differ in this case from the earlier judgment of the Tribunal in that of Elgi Polytex Ltd. Accordingly, we uphold the classification of the product under consideration under Heading 35.06.

5. As already stated Tariff Heading 35.06 has been introduced w.e.f.

10-2-1987 in the Central Excise Tariff Act, 1985. Accordingly, there will be no demand of duty on the respondents w.e.f. 10-2-1987.

6. However, from the perusal of the show cause notice leading to the impugned order, we find that the respondent company was asked as to why duty on their past clearances should not be demanded at 40% ad valorem under Section 11A of the Central Excises and Salt Act, 1944. As a result of this notice the Assistant Collector demanded differential duty w.e.f. 1-11-1986. The question, therefore, remains to be considered as to what would be the classification during the period 1-11-1986 to 9-2-1987 for the purpose of the present matter. The contending entries under Central Excise Tariff Act, 1985 during this period are 4005.00 as contended by the department and entry 4006.90 as contended by the respondent company herein.

8. For the sake of resolving the controversy it is appropriate at this stage to reproduce the competing entries

:-----Heading No. Sub-		
Heading	Description	of goods
No.-----		
		40.05 4005.00

Compounded rubber, unvulcanised, primary forms or in plates, sheets or strip. 40.06 Other forms (for example, rods, tubes and profile Further, Note 3 Chapter 40 lays down that the expression 'primary forms' used inter alia, in Tariff Heading 40.05 "applies only to liquids and pastes (including latex, whether or not prevulcanised and other dispersions and solutions) and blocks of irregular shape, lumps, bales, powders, granules, crumbs and similar bulk forms". The department contends that the product being a solution of compound rubber is covered by Heading 40.05 in view of Note 3 to Chapter 40. The respondents, on the other hand, contend that the product being a final article in its own right having a specific use would be covered as an article of unvulcanised rubber under sub-heading 4006.90.

7.01 We have carefully considered the submissions in this behalf from both sides. We find on the admission of the respondents themselves that the product under consideration is a solution of compound rubber i.e.

cushion compound. As between the Heading 4005.00 and 4006.90, the former sub-heading is more specific and should, therefore, prevail over the latter sub-

heading. Accordingly, it is held that for the period prior to 10-2-1987 the classification of the product of vulcanised solution under consideration would be Tariff sub-heading 4005.00. It is clear that the Notification 377/86 dated 29-7-1986 did not apply to the product because it was being used for retreading of tyres. Accordingly, the demand of duty from 1-11-1986 to 9-2-1987, as demanded in the show cause notice dated 31-3-1987, being within six months preceding the date of show cause notice is clearly sustainable under Section 11A of the Central Excises and Salt Act, 1944. The demand of duty be revised accordingly.

9. I have carefully gone through the order proposed by my learned brother Shri P.C. Jain, Member (Technical) and I am unable to agree to the conclusions arrived at by him regarding classification of the product of vulcanising solution under sub-heading 4005.00 for six months period prior to 10-2-1987.

10. Shri A.S. Sunder Rajan, Departmental Representative had submitted that the Collector (Appeals) had not discussed the facts and had not applied his mind and hence the order was not a speaking order.

Therefore, he had sought for remand of the case.

11. Shri F.S. Nariman, Sr. Counsel appeared for the appellants and submitted that vulcanising solution does not come under compound rubber and therefore, will not be covered under sub-heading 4005.00 of Chapter 40. He submitted that cushion compound in limited form is cut into small pieces and mixed with rubber solvent in a cement mixing churn.

The cushion compound dissolves in the solvent and forms a homogenous solution. Thereafter, this solution is packed in 20, 25 and 200 litres containers ready for sale. The ingredients and its percentage composition are as under - He, further submitted that vulcanising solution is a finished article ready for sale and use. The vulcanising solution has the same use in the retreading process as cushion compound. The vulcanising solution helps the cushion compound to adhere to the buffed surface of the tyre and the cushion compound helps tread rubber to adhere to itself. Thus cushion compound and vulcanising solution act as adhesives in the tyre retreading process. He submitted that the product was therefore, classifiable

under chapter subheading 4006.90 which had been accorded final approval by the Asstt. Collector. He submitted that the product is not compound rubber and this is finished product. It contains approximately solvent 85% and it is only a rubber based adhesive which was not disputed.

12. I have gone through the submissions of the learned counsel for the respondents. It is more convincing. The vulcanising solution has been prepared from cushion compound solvent. Cushion compound is already classified under sub-heading 4006.10. Therefore, any goods falling under sub-heading 4006.10 if prepared further into another product, can go only to next sub-heading namely 4006.90. The product is admittedly used for retreading. It is an article even though it is in solution form. Hence this does not deserve to be classified as compound rubber etc. as under 4005.00 or camel-back strip tread rubber, cushion compound etc. under sub-heading 4006.10. I am of the considered opinion that the product deserves to be classified under sub-heading 4006.90 and there is no merit in the appeal and hence the appeal has to be dismissed. The same is dismissed.

13. The point of difference between the two learned Members who heard the appeal in the first instance, as formulated by them, reads thus :- "Whether the product under consideration in this appeal would fall under Tariff sub-heading 4005.00 or 4006.90 of the Central Excise Tariff Act, 1985 before 10-2-1987?" 14. Since the appeal involves determination of an issue relating to the rate of duty leviable on the goods in question, the aforesaid point was referred to the President in terms of Section 35D of the Central Excises and Salt Act read with Section 129C(5) of the Customs Act, 1962. While the learned Technical Member opined that sub-heading 4005.00 was the appropriate entry, the learned Judicial Member opined that subheading 4006.90 was the appropriate one.

15. The facts of the case and the submissions of both parties have been set out in the orders of the two Members and there is no need to repeat them.

16. Though the referring order was made on 17-10-1989, it could not be taken up for hearing so far since the office of the President was lying vacant.

17. The hearing was spread over two days -11-5-1990 and 16-5-1990. Shri V. Chandrasekharan, SDR, represented the appellant-Collector on the first day and he, alongwith Shri S.S. Khosla, CDR, Shri L.P. Asthana, Jt. CDR and Shri A.S. Sunder Rajan, JDR, appeared on the second day. On both the days Shri F.S. Nariman, Senior Counsel with Shri K.R. Nambiar, Shri S.C. Sharma, Advocates and Shri S. Ignatius, Corporate Manager, represented the respondents.

18. The referring Bench has relied on the Tribunal's decision on the classification of a similar product in the case of Elgi Polytex Ltd., Coimbatore v. Collector of C. Ex., Coimbatore -1988 (34) ELT 404. The Technical Member's order specifically notes :- "We find from the composition and the use of the product as given above and not controverted by the appellant that its primary function is as an adhesive; composition of the product is also similar to the composition of the product under consideration before the Tribunal in the Elgi's case mentioned (supra)".

Thereafter, the previous decision of the Tribunal is considered and then the learned Member has recorded that there is no reason to differ in the instant case from the earlier judgment of the Tribunal in the Elgi Polytex case. Accordingly, the order upholds the classification of the product under Heading 35.06. This classification, however, is for the period commencing 10-2-1987. Thereafter the order proceeds to consider the classification of the product for the period prior to 10-2-1987 and opines in favour of subheading 4005.00. The Judicial Member's order differs from Shri Jain's order only as regards the conclusion regarding classification of the product under sub-heading 4005.00 for the period prior to 10-2-1987. After discussing this question, the learned Judicial Member has opined in favour of sub-heading 4006.90. It may be noted at this stage that in the Elgi Polytex case, the Tribunal had considered and decided the classification of the product therein during the period prior to 10-2-1987 also, viz., heading 3501.90. The two opinions recorded by the two Learned Members do not discuss this sub-heading. It is thus evident that the fact that the Tribunal's decision in the Elgi Polytex case had classified the product therein (admittedly similar to the product herein) under sub-heading 3501.90 during the period prior to 10-2-1987 was not brought to the notice of the Bench. When the learned counsel for the respondents brought up before me the question of classification under this sub-heading, the

question arose whether the President, could, in terms of the proviso to Section 129C(5) of the Customs Act, decide the classification following the previous decision of the Tribunal in the Elgi Polytex case or would he be bound to agree with one or the other of the two opinions rendered by the two Members of the referring Bench. Both sides were, therefore, invited to make submissions on this point.

19. For a proper appreciation of the submissions, it would be expedient to reproduce here Section 129C(5) of the Customs Act :- (5) If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case including those who first heard it: Provided that where the members of a Special Bench are equally divided, the point or points on which they differ shall be decided by the President".

20. Now, before dealing with the question, I would like to note an objection raised by Shri Sunder Rajan, learned Departmental Representative, to my hearing the matter. His objection was based on the following provision in the President's Order No. 137 of 1983 dated 19-9-1983 which reads thus:- Where a Member of the Bench having jurisdiction in a matter has decided or dealt with that matter in any other capacity, or does not consider it proper, for any reason, to deal with that matter, President shall allot the matter to a reconstituted Bench which does not include that member, or to another Bench, as he may consider appropriate." The submission was that since I was one of the Members comprising the Bench which had heard and decided the Elgi Polytex case, I should be deemed to have already formed a view in the matter and that, therefore, I should not hear the present matter involving a similar issue. The objection is not, in my opinion, tenable. The point is not that I had occasion to deal with the M.R.F. matter (which is the instant case), in any other capacity in the past. The point, therefore, would appear to be that having formed a view in another case involving a similar issue, it could not be

expected that I would form a different view in the present matter. On the face of it, such an objection cannot be entertained. If the point made is correct, then, sooner or later, most of the Members of the Tribunal at any given point of time would have to be considered as disqualified from hearing many future appeals on the ground that they had already heard and decided appeals involving similar issues. Secondly, as the learned Counsel for the respondents put it, the Elgi Polytex case decision is not the decision of an individual Member. It is the decision of a Bench, of the Tribunal.

Thirdly, the law, as it stands today, casts a duty on the President to hear cases involving difference of opinion in Special Bench matters.

21. Reverting to the question posed in para 18, the submission of the learned Departmental Representatives is that there is no difference between the main clause of Section 129C(5) of the Customs Act and its proviso. The basic concept of the appeal being disposed of in the light of the majority opinion which is explicitly stated in the main clause is implicit in the proviso also. The only difference is that in Special Bench matters the law requires that the President himself should decide the point of difference. This, however, would not mean that the President has the jurisdiction to either expand the scope of the reference or to decide the point in a manner not in conformity with the opinion expressed by one or the other of the two Members of the referring Bench. If the question posed by the Members is as to what would be the correct classification of the product, then, the President could consider even a heading not mentioned in the two separate opinions. If, however, the question is whether the product should be classified under one heading or the other, then, the President would have to agree with one or the other of the two Members. In this context, reference was made to the then President's decision in *Collector of Central Excise, Chandigarh v. Himachal Pradesh Horticulture Produce Marketing & Processing Corporation Ltd.* -1988 (34) ELT 160. I have perused this decision. The points of difference are set out in para 29 of the report and the President has given his decision in para 52. In that case, the present question was not posed and naturally, therefore, the President had no occasion to go into it. This decision is, therefore, of no help in resolving the present question.

22. Shri Nariman, Learned Counsel for the respondents, submitted that the proviso to Section 129C(5) of the Customs Act was unique. Such a provision was not to be found in the Income Tax Act or the Administrative Tribunals Act. There are a number of judicial pronouncements with reference to the provisions of the Income Tax Act which are analogous to the main clause of Section 129C(5) of the Customs Act. Having regard to these pronouncements, the law is well-settled that the Third Member to whom a point of difference between two Members is referred has no jurisdiction to go outside the two opinions recorded by the referring Bench. In other words, he cannot form and record an opinion independent of the two opinions. However, Shri Nariman relied on a judgment of the Full Bench of the Madhya Pradesh High Court in *Firm Ladhuram Rameshwardayal v. Krishi Upaj Mandi Samiti, Shivpuri and Ors.* - AIR 1978 MP 10 and the Full Bench judgment in *Royal Calcutta Turf Club v. Kishan Chand* - AIR 1943 Lahore 84 in support of the submission that the President hearing a point of difference in a Special Bench matter would have the discretion and jurisdiction to record an opinion which may not necessarily be that of one or the other of the two Members of the referring bench.

23. In para 12 of the report of the judgment of the Full Bench of the Madhya Pradesh High Court reference has been made to a Full Bench judgment of the Lahore High Court in *Royal Calcutta Turf Club v. Kishan Chand* - AIR (30) 1943 Lah. 84. The relevant portion is extracted below :- "It appears to me doubtful whether even the referee Judge has jurisdiction to decide the point of difference. The clause says that the appeal shall be heard upon that point by the referee Bench and the point shall be decided according to the opinion. It does not specifically lay down that the point shall be decided by the referee Judge as the legislature could very easily have stated if it had been the intention to transfer jurisdiction for deciding the point, from the Division Bench seized of the case, to the referee Judge. It appears to me, therefore, that the jurisdiction for the decision not only of the appeal as a whole but also of the point of difference, remains with the referring Bench; and all that the clause lays down is a method by which in the case of a difference of opinion, the difficulty is to be resolved." 24. Section 129C(5) of the Customs Act provides for a procedure to be followed in the event of the Members of a Bench being equally divided on a point or points. Till the proviso

was inserted by the Customs (Amendment) Act, 1985, there was no special provision in respect of Special Bench matters since Special Benches consisted of not less than three Members. However, with the insertion of the proviso the section underwent a qualitative change. The main clause, as it stands after the amendment, refers to non-Special Bench matters. In such matters, if the Members of a Bench are equally divided, they shall state the point or points on which they differ and the case shall be referred by the President for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case including those who first heard it (emphasis supplied). It is clear that the decision on the point or points of difference is not left to the referee Member or to the referee Bench but to the original Bench which shall decide the point of difference according to the opinion of the majority of the Members who have heard the case including those who first heard it. The proviso, on the other hand, provides that where the Members of a Special Bench are equally divided, the point or points on which they differ shall be decided by the President (emphasis supplied). It appears to me, therefore, that in Special Bench matters, the duty is cast on the President to decide the point. The methodology followed in non-Special Bench matters of deciding the point according to the majority opinion does not seem to be axiomatically applicable in Special Bench matters. If the position was otherwise, the proviso would have read somewhat as follows: Provided that where the members of a Special Bench are equally divided, the point or points on which they differ shall be heard by the President.

This view finds support from the Full Bench judgment of the Lahore High Court which has been followed by M.P. High Court also. Lahore High Court was concerned with Clause 20 of the Letters Patent reading as follows :- "And if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the

Judges who have heard the case including those who first heard it." It is with reference to this provision that the Court said that it appeared to be doubtful whether the referee Judge had jurisdiction to decide the point of difference. The clause said that the appeal shall be heard upon the point of difference by the referee Bench and the point shall be decided according to the majority opinion of the Judges who had heard the case including those who first heard it. The Court further observed that the clause did not specifically lay down that the point shall be decided by the referee Judge, as the Legislature could very easily have stated if it had been the intention to transfer jurisdiction for deciding the point from the Division Bench, seized of the case, to the referee Judge. In the present instance, as earlier noted, the proviso to Section 129C(5) of the Customs Act requires the President to decide the point of difference. The law does not say that the decision on the point of difference shall be according to the majority opinion. It is not for this Bench to speculate on why such a different procedure has been prescribed by law. But in a case of the present type, where a precedent decision of the Tribunal has already determined the classification of a similar product for the period prior to 10-2-1987, and this position is brought to notice by parties, it would indeed be anomalous for the President to ignore the said decision and give a decision which is not in conformity with the said decision especially when the learned Member of the referring Bench had, after noting the similarity of the products, applied the precedent decision for the period from 10-2-1987.

25. Shri Sunder Rajan submitted that the existing Section 129C(5) of the Customs Act is being substituted by the Finance Bill, 1990, by a new provision in which the special provision requiring the President to decide the point of difference would not find a place. While that may be so, it is still in the future. For the present, what is in issue is the scope of the present provision.

26. As to the merits of the classification, the learned Departmental Representatives submitted that the classification should be decided as between 4005.00 and 4006.90 - the two sub-headings recorded in the opinions of the two learned Members. Shri Nariman, on the other hand, contends that the classification should be in accordance with the Tribunal's decision in the Elgi Polytex case which has been followed by the referring Bench in respect of the

period on and from 10-2-1987.

Since the product in the present case is similar to that in the Elgi Polytex case (and the two Members are agreed on this), I am of the view that its classification should be decided in accordance with the Tribunal's decision in the Elgi Polytex case. The appropriate heading would therefore be 3501.90 during the period prior to 10-2-1987.

27. During the hearing, both sides agreed that after the decision on the point of difference is recorded, the papers must go back to the referring Bench for passing orders disposing of the appeal, since the President has not been empowered to dispose of the appeal. I am of the view that this is the correct procedure to be followed. Accordingly these papers shall now be placed before the referring Bench.

[Final Order]. - In view of the unanimous decision of the Bench in Misc. Order No. 117/90-C in the above appeal, the appeal is dismissed for the period beginning from 10-2-1987.

2. So far as the period prior to 10-2-1987 is concerned, Hon'ble President's order dated 21-5-1990 is self-evident. In the view taken by the Hon'ble President, the Bench is of the opinion that no further orders are required to be passed by it. Appeal should be deemed to have been disposed of in terms of the Hon'ble President's order dated 21-5-1990.

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