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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-30-1990

Reported in : (1991)(33)ECC46

Appellant : Collector of Central Excise

Respondent : Densons Engineers

Judgement :

1. This is Revenue's Appeal by which they have sought for setting aside the impugned Order-in-Appeal No. 344-DLH/86 dated 7-2-1985 passed by the Collector of Central Excise (A) New Delhi.

2. The question that arises for consideration in this Appeal is as to whether 'Green Pack' prepared by the respondents which constitutes 'Cable jointing kits (Mould type and cast type)' would merit classification under TI 15A(1) or TI 68 and as to whether the product is entitled for exemption under Notification No. 182/82, dated 11-5-1982. The main basis on which the Revenue seeks to classify this product Green pack under TI 15A(1) of the Schedule to the Central Excises & Salt Act, 1944 the report of the Chemical Examiner who, after analysing the sample, has reported that the sample contained 16.5% synthetic resin mixed with organic fillers. It is contended by the Revenue that the product remains a resin meriting classification under TI 15A(1) of the Excise Tariff Schedule. They have relied upon the literature of the respondents in which the product is described as resin made of epoxy based synthetic resin. The Revenue have contended that the paste in green pack cannot be treated as an article of plastic. To be an article, the goods should

have a permanent shape and should be capable of retaining the shape for the purpose of its subsequent use for which it is intended. An epoxy based reinforced plastic sheet, for example, is an article of epoxy resin which has a permanent and durable shape of its own. It is further submitted by the Revenue that sealant/caulking compound of the nature as in this case are nothing but adhesive formulations required for jointing purposes and an article of any shape does not emerge out from such compounds.

So, the respondents are not entitled to the benefits of exemption under Notification No. 182/82, dated 11-5-1982. The Collector of CE (A) in the impugned order has upheld the respondents contention that duty had been paid on the epoxy resin. The respondents had only mixed this epoxy resin with fillers in which process there was no chemical reaction and it was only a simple mixture and hence, there was no manufacture resulting in a new product. The Collector, therefore, held that since epoxy resin was classified under TI 15 A (1) and by mere additions of fillers, it will not result in a new product and no further duty can be charged again.

3. Shri L. N. Murthy, learned JDR reiterated the grounds of appeal and submitted that homogenisation of the resin by mixing with fillers is a process of manufacture resulting in a new product and therefore, the green pack manufactured by the respondents is liable for duty under TI 15A(1) and will not be entitled for the benefit of the Notification No.182/82. He has referred to the citation of the Supreme Court in the case of Shaw Wallace & Co. Ltd. v. State of Tamilnadu [1976 (37) STC 523] and also in the case of Devidass Gopalkrishan v. State of Punjab [1967 (20) STC 43].

4. Shri J. S. Agarwal, Advocate arguing for the respondents, submitted that duty paid epoxy resin was merely mixed with fillers which did not result in a process of manufacture and there was no new product coming into existence. He submitted that the epoxy resin as well as the epoxy resin mixed with fillers perform the same functions and there is no chemical change by mixing of the fillers. He relied upon several citations and stated that no new product has come into existence and the process of mixing with fillers will not result in coming into existence of any new product. He also relied upon extracts from Hand book of Epoxy Resins by Henry

Leed Kris Neville published by McGraw-Hill Book Company. He further submitted that Board had also issued its circular MF (DR) F.No. 93/2/82 C-3 dated 6-10-1982 clarifying that the modification of epoxy resin by fillers will not result in manufacture and bringing into existence of any new product.

He also relied upon Cochin Trade Notice No. TI/15A Plastics/Circular No. 5/83 dated 23-5-1983 appearing in [1983 ECR 123-B] by which it has been clarified that the process of making moulding powders from urea/melamine/polyester resins by the addition of fillers/additives would not constitute manufacture under Section 2(f) of the Central Excises and Salt Act, 1944. He has also relied upon the following rulings :- (1) Gujarat Steel Tubes v. State of Kerala [1989 (23) ECR 161 SC = 1989 (42) ELT 513 (SC)].Collector of Central Excise, Hyderabad v. Jayant Oil Mills [1989 (22) ECR 161 SC]Collector of Central Excise v. Popular Cotton Covering Works [1989 (43) ELT 742 (Tribunal)] This has been confirmed by Supreme Court as reported in 1990 (45) E.L.T. A33.Collector of Central Excise, Aurangabad v. Anil Chemicals [1986 (6) ECR 375 = 1985 (21) ELT 889 (Tribunal) 5. We have heard both the sides, examined the rival contentions and perused the citations referred to by the counsel. The question for consideration is whether mixing of fillers with epoxy resin will produce any new article and whether such a process will amount to manufacture. It is well settled that the process should bring change in name, character or use in the product and all process will not result in manufacture. In the instant case, the epoxy resin which is duty paid, has been mixed with fillers. The mixing of fillers has not brought about any chemical change. The literature produced by the learned advocate shows that this mixing of epoxy resin with fillers has been made with a view to make it more readily usable as contended by the learned advocate. There is no evidence placed by the Revenue to suggest that mixing of fillers with epoxy resins will bring out a chemical change and the resultant product will have a different name, character or use other than those the original product namely epoxy resin and fillers. The Board in their circulars referred supra has accepted the position that even after mixing of epoxy resin with filler, additions etc. the resultant product remains phenolic resin in the form of moulding powder. They have further accepted the position that such mixing of fillers, additions etc with phenolic resin does not amount to 'manufacture' of a new or distinct product, as can be seen by going through the circulars referred

to above. The citations referred to by the Revenue in the grounds of appeal referred to in two cases, one pertaining to M/s. Shawallace and Co. (supra) and another pertaining to Devidass Gopal Krishan (supra). In the former case, fertilizer mixture prepared by the company by manual dry mixing of various chemicals, fertilizers and fillers like china clay and gypsm etc resulted in a different commercial product. In the Devidass case (supra), the appellants produced steel scrap and steel ingots and converted them into rolled steel sections. The Supreme Court held that when "iron scrap is converted into rolled steel, the scrap iron ingots undergo a vital change in the process of manufacture and are converted into a different commodity viz. rolled steel sections. During the process, the scrap iron looses its identity and becomes a new marketable commodity. The process is certainly a process of manufacture".

6. In the instant case, mere mixing with fillers has not brought about any change in the epoxy resin except to make the resin more readily usable. As no new commercial product has emerged, duty for the second time cannot be levied as has been held by the Collector in the impugned order. Therefore, we do not find any infirmity in the impugned order and hence the appeal is liable to be rejected and the same is dismissed.

I have carefully perused the order proposed by learned brother Shri Peeran. However, in view of the Tribunal's Order No. 35/1990-C dated 17-1-1990 [1990 (15) ETR 592] (not cited before us), I regret that I have to differ from the conclusion reached in Shri Peeran's order. In the aforesaid order which disposed of appeal No. E. 1670/85-C Collector of Central Excise, Hyderabad v. Bakelite Hylam Ltd., Hyderabad - [1990 (48) ELT 90] the issue was whether a product called "dough moulding compound" prepared out of duty paid polyester resins and inorganic fillers and cellulosic fibres would be classifiable under Item No.15A(1) of the Central Excise Tariff Schedule of 1944. After discussing the matter at length and taking note of certain authorities, the Bench came to the conclusion that the compound was liable to be charged to duty under Item No. 15A(1) GET and that the assessee would be eligible for the benefit of Central Excise Rule 56A, that is to say, he would be eligible to take credit of the duty paid on the resin towards payment of duty on the dough moulding compound. In the present instance the

only difference is that the product is made of epoxy synthetic resin and organic fillers. In my opinion the principle of the Tribunal's decision in the Bakelite Hylam case (supra) applies to the facts of the present case. I would, therefore, propose an order holding that there has been manufacture and that the subject product was classifiable under Item No. 15A(1) of the GET.8. The following point of difference has arisen between the two Members comprising the Bench which heard the appeal and, accordingly, further action as provided for in Section 35D(1) of the Central Excises & Salt Act, 1944 read with Section 129C(5) of the Customs Act, 1962, is indicated:- Whether the product 'Green Pack' manufactured by the respondents from dutypaid epoxy synthetic resin and organic fillers was a new commercial product attracting duty under Item No. 15A(1) of the First Schedule to the Central Excises & Salt Act, 1944, as it stood at the material time, OR the processes applied by the respondents to duty-paid epoxy resin did not result in the emergence of a new commercial product and, therefore, duty cannot be levied on the product as held by the Collector (Appeals) in the impugned order? Jyoti Balasundaram, Member (J) for herself and for D.C. Mandal, Member (T) and P.C. Jain, Member (T) 9. The two learned members, who heard the appeal relating to classification of the product "Green Pack" manufactured from duty paid epoxy synthetic resin & organic fillers, expressed different opinions.

The learned Member (Judicial) took the view that the product merited classification under T.I. 68 and eligible for exemption under Notification No. 182/82, dated 11-5-1982, and he therefore, proposed an order dismissing the Collector's appeal. On the other hand, the learned President proposed an order, allowing the appeal on the ground that mixing of resin with fillers amounted to manufacture, resulting in a new commercial product classifiable under Item 15A(1) of the GET.10. In view of this difference of opinion, the following point was formulated for consideration by us in terms of sub-section (1) of Section 35D of the CESA read with the proviso to sub-section (5) of Section 129C of the Customs Act :- "Whether the product 'Green Pack' manufactured by the respondents from duty-paid epoxy synthetic resin and organic fillers was a new commercial product attracting duty under Item 15A(1) of the First Schedule to the Central Excises & Salt Act, 1944, as it stood at the material time, OR the processes applied by the respondents to duty-paid epoxy resin did not result in the emergence of a new commercial product and, therefore,

duty cannot be levied on the product as held by the Collector (Appeals) in the impugned order"? 11. We have heard Shri L. Narasimha Murthy, DR for the appellant Collector & Shri J. S. Agarwal, advocate for the respondents. The facts of the case have been set out in detail in the order of reference and it is therefore not necessary to repeat them. It is an admitted position that the product in question remains a resin after the synthetic resin is mixed with inorganic fillers. The technical literature of the product placed before us by the learned advocate explains the process of mixing resin with hardener to form a compound (emphasis supplied): "The resin and hardener are supplied in the form of sticks of equal cross sections. The resin stick is white in colour whereas the hardener is black. Depending upon the quantity required, equal lengths of the resin and hardener are cut with a knife as shown in diagram. The polythene wrapping is stripped and the compound is thoroughly mixed by hand. Mixing is done till the compound attains uniform grey colour and is free from patches, etc. The compound is now ready for use". We have also seen the samples of the product which is sold in sets consisting of green pack (resin) & black pack (hardener). The two components are mixed at the user's end to form the cable seal epoxy based tough set compound. We are here concerned with the classification of "green pack" alone. The decision of the Tribunal in the case of Collector of Central Excise, Hyderabad v. Bakelite Hylam Ltd. [1990 (48) ELT 90] relates to the classification of a product called "dough moulding compound" composed of synthetic resin (phenolic) inorganic fillers & cellulosic fillers. The relevant paragraphs of this citation is paras 12, 13 & 14 which are reproduced below for easy reference:- "12. The classification of PVC moulding compound came up for detailed consideration in this Tribunal's order in the case of Indian Cable Co. Ltd. -1984 (15) ELT 434 (supra). It was held that PVC compound manufactured out of duty paid PVC resin was liable to be charged with duty under Item No. 15A(l)(ii) of the CET from 13-6-1977 to 28-6-1977, when it was exempted from duty by Notification No. 206/77. Shri Shankar, for the respondents, has urged inter alia that the said decision has no application to the present case since the manufacturing process here was simple mixing whereas that in the Indian Cable Co. case was complicated. We do not think that this makes for any difference. Whether the mixing process was simple or complicated, the facts remains that resin was mixed with inorganic fillers and cellulosic fibres

and the resultant product was no longer known as resin but as "dough moulding compound". The only question to be considered is whether such compound made out of duty-paid resin would attract duty again. This was precisely the question in the India Plastic Corporation (supra), before the Bombay High Court, the provision which fell for interpretation was Notification No. 122/71 dated 1-6-1971. The Court construed the inclusive definition of "phenolic resin" to include not only chemically modified phenolic resins but also physically modified phenolic resins. The Court held that resin and moulding powder were not two different substances and that moulding powder was eligible for exemption in terms of the said notifiction. This decision has been considered in the Tribunal's decision in the Indian Cable Co. case (supra) and it has been held that the Bombay High Court judgement had no application. In fact Shri Shankar's submission also is that that the said decision has no application to the present case.

13. The Andhra Pradesh High Court judgment in Writ Petition No. 3320 of 1976 was based on the Bombay High Court judgment in the Indian Plastic Corporation case (supra) which, as we have already noted, the Tribunal held it had no application to the facts and circumstances of the Indian Cable Co. case. It may be noted that the Andhra Pradesh High Court has held that there cannot be any levy of excise duty on phenolic moulding powder and that the manufacturers are entitled to the benefit of Notification No. 122/71. This would mean that the classification of moulding powder under Item No. 15A(1) was not doubted. As far as Notification No. 122/71 is concerned, it was no longer in force during the period material to the present dispute.

14. In the circumstances, we hold that the dough moulding compound in the present case was liable to be charged to duty under Item No. 15A(1) of the CET. However, the respondents will be eligible for the benefit of availment of Central Excise Rule 56A. In other words, they will be eligible to take credit of the duty paid on the resin towards payment of duty on the dough moulding compound." 12. From the above, it is obvious that the product in dispute therein was dough moulding compound and therefore, with due respect, the above decision is not applicable to the facts of this case. We are of the view that the process of adding inorganic fillers to duty paid epoxy resin did not result in the emergence of a new

commercial product.

13. In the light of the foregoing discussion, we are in agreement with the opinion of the learned Member (Judicial) that mere mixing with fillers has not brought about any change in the epoxy resin, no new commercial product has emerged and that, as a consequence, the appeal is liable to be dismissed. The point of difference is decided accordingly.

14. The appeal is returned to the original Bench, for passing appropriate orders in conformity with our decision.

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