

Patel Plastics Vs. Union of India

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Court : Gujarat

Decided On : Sep-11-1991

Reported in : 1992(59)ELT247(Guj)

Judge : M.B. Shah and; R.D. Vyas, JJ.

Acts : Central Excise Rules, 1944 - Rule 9(2); [Central Excise Act, 1944](#) - Sections 11A and 11A(1); [Central Excise Tariff Act, 1985](#)

Appeal No. : Special Civil Application Nos. 5313 and 5487/84, 7247/88 and 533/91

Appellant : Patel Plastics

Respondent : Union of India

Advocate for Def. : P.M. Rawal, Addl. A.G. and; M.R. Rawal, Adv.

Advocate for Pet/Ap. : K.B. Trivedi and; Rakesh Gupta, Advs.

Judgement :

M.B. Shah, J.

1. In these petitions the common question which arises for determination is whether Plastic Battery Tops manufactured by the petitioners are covered by Tariff Item 42 which provides rate of duty for pilfer proof caps for packaging. The

petitioners are manufacturing the plastic battery tops (cap seals) out of LDPE/HDPE granules by the process on moulding machines. The cap seals manufactured are used for packaging dry battery cells. The petitioners were clearing the said goods on the basis of residuary Tariff Item 68. The respondents took the view that the said product would be covered by Tariff Item 42 and it would not fall within Tariff Item 68.

2. After the introduction of [Central Excise Tariff Act, 1985](#), it is the contention of the respondents, that the petitioners' products, which are known as Plastic Battery Tops, are part of primary cells and primary batteries and, therefore, the petitioners are liable to pay excise duty as per Tariff Heading 85.06. It is the contention of the petitioners that plastic battery tops are not part of the primary cells or in any set of circumstances, with regard to parts of the battery, there is no separate Tariff Heading which provides levy of duty of excise on parts of primary cells or batteries.

3. For determining the aforesaid controversy it would be necessary to reproduce Tariff Item 42 which was in force prior to 1986. It reads as under :

'Item No. 42 - PILFER PROOF CAPS

Rate of duty-----			Item No. Tariff Description		
42 Pilfer proof caps for packaging, all Two paise eachsorts, with or without washers or other fittings of cork, rubber, Polyethylene or any other material.-----			After introduction of Central Excise Tariff Act, 1985 , the relevant Tariff Heading 85.06 reads as under :		
Description of Goods			Heading No. Sub-heading		
Rate of dutyNo.-----			xxx xxx xxx		
xxx85.06	8506.00	Primary cells and 35%primary batteries	xxx	xxx	xxx
xxx-----					

4. In the affidavit in reply, it is stated that the petitioners' product plastic battery tops or cap seals are used to protect the leakage of electrolyte from within the cell,

to protect positive terminal from corrosion and to avoid short circuit of the cell during transportation and display on shelf and, therefore, it should be classified as goods falling under Tariff Item 42; cap seals on the dry battery cells give guarantee to the consumers that the cell is not tampered; that the battery cells cannot be used without destroying the cap seals and, therefore, also it would fall within the Tariff Item 42. Further it is stated that the phrase 'pilfer proof caps' should be given wide meaning and as the cap seals are used, with the purpose that there would be no tampering with the contents of the material packed in any container and the main purpose of pilfer proof caps is to prevent the pilferage, substitution or alteration of the contents packed in the container, the petitioners' product would be covered by Tariff Item No. 42.

5. The learned advocate for the petitioners Mr. Trivedi submitted that the petitioners' product, that is, plastic battery tops, cannot be considered to be pilfer proof caps by any standard. He has relied upon the definition of the phrase 'Pilfer Proof Closures' given by the Indian Standard Specification. It is as under :-

'Pilfer proof closures are intended to provide to the contents in a container protection against substitution, adulteration or pilfering. Once the pilfer proof cap is fixed on the package, it is ordinarily not possible to tamper with the contents of the package without destroying the special device i.e. the closure which is intended to provide such protection.'

'The roll seal aluminium closure is one of the most extensively used pilfer proof closure fitted on the glass bottles, containing products, such as liquor, pharmaceuticals, chemicals, syrups and squashes. These closures have a security ring which breaks away from the cap as soon as it is unscrewed.'

6. The learned advocate for the petitioners Mr. Trivedi has further referred to the decision of the Customs, Excise and Gold (Control) Appellate Tribunal in the case of Top-O-Plast, Baroda v. Collector, Central Excise, Vadodara, 1990 (48) E.L.T. 128 (Tri.) = 1990 (3) ECR 109, wherein the Tribunal has held that battery tops produced by the petitioners cannot be classified under Tariff Item No. 42 as pilfer proof caps and it is covered by Residuary Tariff Item 68. He further submitted that the aforesaid judgment is accepted by the respondents and no appeal is filed

against that judgment. It is required to be noted that M/s. Top-O-Plast, Baroda, has filed Special Civil Application No. 7247 of 1988.

7. Admittedly, plastic battery tops are made not to prevent any pilferage, adulteration or substitution. Its purpose, as contended by the respondents, is to protect the leakage of electrolyte from within the cell, to protect positive terminal from corrosion and to avoid short circuit of the cell during transportation and display on shelf and, therefore, it cannot be said that the plastic battery tops manufactured by the petitioners would fall within the Tariff Item 42. As plastic battery tops are not meant for protection against pilferage, it would be difficult to hold that it can be termed as pilfer proof caps. It is not the case of the respondents that the contents of the cells or batteries can be pilfered by anyone and to protect such type of pilferage, pilfer proof caps are used by the producers of cells or batteries. As per the definition to the phrase 'Pilfer Proof Caps' or 'Closure', stated above, it is apparent that it is meant to prevent pilferage or to protect against substitution or adulteration. In this view of the matter it cannot be held that the petitioner's product plastic battery tops are required to be classified under Tariff Item 42 as pilfer proof caps.

8. The next question which is required to be decided is whether the plastic battery tops can be considered as primary cell or primary battery which is covered by Tariff Heading 85.06. On the face of it, it cannot be said that plastic battery tops are primary cell or primary battery.

The learned advocate for the respondents contended that battery tops or seals are parts or components of battery or cell and as such it would be covered by the aforesaid Heading 85.06. For this purpose, reliance is placed on Note 2(b) (c) and 5 of Section XVI of the [Central Excise Tariff Act, 1985](#).

9. In our view, the aforesaid contention is devoid of any substance. For deciding the said contention it is necessary to refer to Notes 2 and 5 of Section XVI of the Act. Notes 2 and 5 read as follows :

'2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of Heading No. 84.84, 85.44,

85.45, 85.46 or 85.47) are to be classified according to the following rules :-

(a) Parts which are goods included in any of the headings of Chapter 84 or Chapter 85 (other than Heading No. 84.85 and 85.48) are in all cases to be classified in their respective headings.

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of Heading No. 84.79 or Heading No. 85.43) are to be classified with the machine of that kind. However, parts which are equally suitable for use principally with the goods of Heading Nos. 85.17 and 85.25 to 85.28 are to be classified in Heading No. 85.17.

(c) All other parts are to be classified in Heading No. 84.85 or Heading No. 85.48.
xxxxxxxxx'

'5. For this purposes of these Notes, the expression 'machine' means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.'

Note 2 deals with as to how parts of machine are to be classified under Chapter 84 and 85. It provides that : (a) parts of machine which are goods included in any of the headings of Chapter 84 or 85 are in all cases to be classified in their respective headings; (b) other parts if suitable for use solely or principally with a particular kind of machine or with a number of machines of the same heading, are to be classified with the machines of that kind; and (c) all other parts are to be classified under Heading 84.85 or Heading 85.48. Admittedly, clause (a) is not applicable because Heading of Chapter 84 or 85 nowhere provides for 'Plastic Battery Tops'. It is not the contention of the respondents that it is covered by clause (c). However, the learned advocate for the respondents submitted that it can be covered by clause (b) of Note 2 as it can be termed as parts of the machine. In our view, this is truncated reading of clause (b) of Note 2. Note 2 only provides that other parts of the machine if suitable for use solely or principally with a particular kind of machine or with a number of machines of the same heading are to be classified with that machine. As stated earlier, battery tops or seals are not parts of

any machine. For the time being even if we assume that primary cell or battery can be said to be part of the machine, still, however, the aforesaid clause (b) nowhere provides that parts of part of the machine are to be classified with that machine. If this contention is accepted, in our view, it would lead to absurdity as in that case each and every part of machine or parts of part of the machine from which the machine is prepared will be liable to pay duty of excise. Therefore, clause (b) of Note 2 has no bearing in arriving at the conclusion that the plastic tops used by the petitioners would be covered by Heading 85.06 which provides for levy of duty of excise on primary cells and primary batteries. However, the learned advocate for the respondents further relied upon Note 5 for contending that as the expression 'machinery' is broadly defined to include machine, machinery, plant, equipment, apparatus or appliance, battery cells can be considered as part of the machine and, therefore, parts of battery cells are also covered by the aforesaid definition. In our view, Note 5 does not in any manner support the contention of the learned advocate for the respondents. It only provides that the expression 'machine' means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85. Plastic battery tops are nowhere cited in the headings of Chapter 84 or Chapter 85.

10. In view of the aforesaid discussion, in our view, it is not necessary to refer to the judgment of the Supreme Court in the case of Income-tax Commissioner v. Mir Mohmad Ali, AIR 1964 SC 1693 and the decision of this Court in the case of The State of Gujarat v. Sukan Industries, 1979 (43) STC 344 which are relied upon by the learned advocate for the petitioners to contend that plastic tops cannot be considered as 'Machine'. In that case the Court referred to the decision of the Privy Council in the case of Corporation of Calcutta v. Chairman Cossipore and Chitore Municipality AIR 1922 P.C. 27 in which the definition of 'Machine' is broadly stated as under :

'The word 'machinery' when used in ordinary language prima facie, means some mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify or apply direct natural forces with the object in each case of affecting so definite and specific a result.'

11. Further in the present petitions, it would not be necessary to decide whether the petitioners' product plastic battery tops can at best be termed as accessories of the battery and not as part of the battery. Mr. Trivedi, learned advocate for the petitioners contended that these plastic battery tops are not necessary for proper functioning of the battery or cell; cell or battery can function without the plastic tops. He contended that some portion of plastic top is required to be removed for operating cell or battery. As against this Mr. Rawal, learned counsel for the respondents, submitted that the plastic tops prevent the leakage of power and, therefore, it would be part of the cell or battery.

12. Now, we would deal with the facts of each matter.

13. In Special Civil Application No. 5313 of 1984 the petitioner inter alia prayed that directions issued by the respondents by the letter dated 22nd August 1984 and 12th October 1984, directing the petitioners to apply for licence on the basis that the petitioners' product falls within the Tariff Item 42 and not under Tariff Item 68, be quashed and set aside. It is further prayed that it be declared that the petitioners' product, plastic battery tops, is covered under Tariff Item 68 of the Schedule. At this stage it be noted that by an interim order this Court has permitted the respondents to make provisional assessment on the basis of adjudication. The said order reads as follows :

'Notice returnable on 17th December 1984. Heard the petitioners' counsel and Shri H. M. Mehta. The interim order passed on 19-10-1984 will continue subject to the modification that there will be adjudication subject to the result of the petition. Payment and guarantee for such payment shall not be insisted. This is just to safeguard the petitioners as well as the Revenue.'

In spite of the aforesaid order, the respondents have not adjudicated the matter. But, as we have arrived at the conclusion that the plastic battery tops or seals are not chargeable to duty of excise under Tariff Item 42 for the period prior to 28th February 1986, the show cause notice dated 20th September 1984 issued by the Superintendent, Central Excise and Customs, does not survive. In this view of the matter, the respondents are directed not to proceed with the adjudication on the basis of the show cause notice dated 20th September 1984, Annexure-G to the

petition, for adjudicating whether the petitioners' product would be covered by Tariff Item 42 as pilfer proof cap. Accordingly this petition is allowed. Rule made absolute with no order as to costs.

14. In Special Civil Application No. 5487/84 the petitioners have prayed that the directions issued by the respondent No. 4 on 28th July 1984, 25th August 1984 and 12th October 1984 directing the petitioners to obtain licence for the petitioners' product on the basis that it is covered by Tariff Item 42 as pilfer proof caps be quashed and set aside. Here also, it should be noted that by interim order the Court has directed as under :

'.... The fact that a provisional licence has been taken showing Item No. 42 in the First Schedule or that an assessment pursuant thereto has been made, will, it is agreed, in no way prejudice the petitioners' contention that the goods are liable to be assessed under T.I. 68. We are passing this order with a view to see that in the event the petitioners do not succeed in the petition, no loss is caused to the Revenue. Any adjudication proceeding will be subject to the final result of the petition.'

In spite of this the respondents have not started any adjudication proceedings. As stated earlier, as the plastic battery tops are not covered by Tariff Item 42, we direct the respondents not to initiate any adjudication proceedings on the said basis. In this view of the matter the orders dated 12th October 1984 and 28th July 1984 and 25th August 1984 are quashed and set aside. Accordingly this petition is allowed. Rule made absolute with no order as to costs.

15. In Special Civil Application No. 7247 of 1988 the petitioners have challenged the show cause notice dated 28th August 1986 and consequential orders passed by the Assistant Collector of Central Excise, Vadodara whereby it is held that the petitioners' product plastic top/cap is not a component of dry battery cell but the said product is suitable for use solely and principally with the battery cell. The aforesaid order is confirmed in appeal by the Collector, Central Excise, by order dated 2nd February 1989 which is produced at Annexure-D to the petition, on the same grounds. As we have arrived at the conclusion that the petitioners' product cannot be said to battery cell, or primary battery and also cannot be considered to

be 'machine' as contended by the learned counsel for the respondents, the aforesaid orders are required to be quashed and set aside. Accordingly this petition is allowed and the impugned orders at Annexure- C and D are quashed and set aside. Rule made absolute with no order as to costs.

16. In Special Civil Application No. 533/91, the petitioners have challenged the show cause Notice dated 18/21-12-1990 issued by the Collector, Central Excise & Customs, Baroda, under Section 11A(1) of the Central Excises and Salt Act, 1944 read with Rule 9(2) of the Central Excise Rules, 1944. It has been pointed out that in so set of circumstances the proviso to Section 11A(1) would be applicable to the present case. Since 1984 all throughout the petitioners are contending and pointing out to the concerned authority that the petitioners' product is not covered firstly under T.I. 42 and thereafter under the Tariff Heading 85.06. For this purpose the petitioners had filed Special Civil Application No. 5318/84 and thereafter Special Civil Application No. 404/87 which was disposed of on 1st August 1988. The order passed by this Court reads as under :

'Mrs. Mehta, the learned Senior Standing Counsel for the Central Government, states that the authorities will give a show cause notice and thereafter decide whether the plastic tops manufactured by the petitioner company constitute parts of dry cell or battery falling within Tariff Item 8506 read with Section Note 2(d) of Section XVI of the Schedule to the [Central Excise Tariff Act, 1985](#). She states that after the show cause notice is given to the petitioner Company the petitioners will be given an opportunity of being heard and thereafter the decision will be taken on merits. In view of this statement made by Mrs. Mehta, Mr. Trivedi seeks leave to withdraw this petition without prejudice to his right to contend that the said section note is ultra vires the provisions of the Act, if need be. Mrs. Mehta states that no coercive steps will be taken in the meantime except raising a demand within the period of limitation.

In view of the above, the petition is rejected as withdrawn. Notice discharged.'

In spite of the aforesaid order no show cause notice was issued by the respondents upto December 1990. Therefore, it will be difficult to say that the petitioner company by recourse to suppression of facts and mis-statements,

misdeclared plastic battery tops as industrial components under Tariff Item 68 and wrongly claimed the benefit of the exemption notification and after 1st March 1986 by describing the said product as industrial component i.e. articles of plastics covered under sub-heading 3926.90/3923.90 instead of paying excise duties under sub-heading 85.06. Apart from the fact that there is no justification for issuing a show cause notice for the period more than six months by resorting to Section 11A of the Act, as we have arrived at the conclusion that the plastic tops cannot be classified under sub-heading 85.06, the aforesaid show cause notice would not survive. Hence this petition is allowed. Rule made absolute with no order as to costs.

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