Siro Plast Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-13-1995

Reported in : (1995)(77)ELT661TriDel

Appellant : Siro Plast Ltd.

Respondent : Collector of Central Excise

Judgement :

1. This appeal arises from the order-in-appeal dated 28-8-1992 passed by the Collector (Appeals), Bombay. The dispute before the lower authorities was with regard to the product sheet moulding compound and the applicability of the exemption Notification No. 133/86 to this product and to Dough Moulding Compound.

2. The Asstt. Collector classified these products under sub-heading 3907.91 of the Central Excise Tariff, 1985 and granted the benefit of the said notification. Aggrieved by the said order, the revenue appealed to the Collector. The ld. Collector has modified the order of the Asstt. Collector as follows :- (i) held that Sheet Metal Compound is classifiable under sub-heading 3920.39 attracting duty @ 60% by denying the benefit of the Notification No. 133/86.

(ii) Confirmed the classification of Dough Metal Compound under sub-heading 3907.91 and held that this product can be considered for concessional rate of duty at 40% ad valorem under Notification No. 53/88, dated 1-3-1988 vide S. No. 42.

3. The appellants are aggrieved with the order of the ld. Collector.

They contend that both the products DMC and SMC are moulding compounds made from polyester and polystyrene resins with an admixture of lubricants, fillers etc. Those which emerge in a dough form are called DMC and those which are pressed flat are called SMC. It is stated by them that they filed a revised classification list on 26-10-1988 seeking reclassification of their products under sub-heading 3907.09 claiming an effective rate of duty of 20% ad valorem, after taking the benefit of the Notification No. 133/88 as amended. The said classification list was approved provisionally. The department drew samples and sent the same to Dy. Chief Chemist for chemical analysis.

On examining his report dated 23-1-1989, the ld. Asstt. Collector confirmed the classification under sub-heading 3907.91 and denied the benefit of the said notification. On appeal, the Collector (Appeals) remanded the case by his order, dated 27-7-1989. Thereafter, a show cause notice dated 6-10-1989 was issued calling upon them to explain as to why the products should not be classified under sub-heading 3907.91.

After carefully examining the issue, the Assistant Collector confirmed the classification under Heading 3907.91 and also granted the benefit of the Notification No. 133/86 as amended. The audit party by their report had opined that SMC is classifiable under sub-heading 3920.39.

As a result of this report, the Collector filed an application to the Collector (Appeals) under Section 35E(4) of the Act and that is how the impugned order came to be passed.

The appellants submit that DMC and SMC are moulding powder of polyester resins. That moulding compounds and moulding powders are nothing but one and the same and not different products, and thus it is not proper to classify SMC as sheet of plastics under the residuary heading "other" under sub-heading 3920.29. That SMC is a primary bulk form and cannot conceivably be considered to be a moulded sheet. The said product SMC is polyester resin in bulk in the form of a sheet. The Collector (Appeals) having accepted the constituent of both SMC and

DMC to be the same, therefore, cannot classify the products differently. It is further submitted that SMC are moulding powders and this fact has been accepted by Dy. Chief Chemist. They point out that the explanation to the said Notification No. 133/86 as amended clearly includes moulding powders of resins. Moulding powders or compounds invariably include fillers etc. and rarely if ever are resins in their pure form.

The expression "resin" generally covers not only resin but resins with fillers etc. and the expression cannot be restricted to only pure form.

In this context they rely on the ruling rendered in the case of Industrial Plastic Corpn. (P) Ltd. v. CCE, as reported in 1983 (12) E.L.T. 425. They submit that the said products manufactured by other companies are cleared under sub-heading 3907.91. They also rely on HSN Explanatory Note in support of their pleas. Government of India's letter dated 6-10-1982 and instructions dated 7-5-1983 issued to all the Collectors in this regard is also relied. Trade Notice No. 31/87, dated 30-10-1987 and Trade Notice No. 274/87, dated 9-11-1987 is also relied by them.

They submit that DMC is in bulk form and by virtue of Chapter Note 6(b), it is considered as a primary form, as it is made out of polyesterene/ polyester resins. They contend that conversion from one primary form to another primary will amount to manufacture. They submit that SMC has to be classified as DMC, as there is no difference between them and they are covered under S. No. 11 of the table of the Notification No. 53/88, dated 1-3-1988. Thus, they pray that SMC/DMC are classifiable under sub-heading No. 3907.91 of CETA qualifying for the concessional rate of duty at 15% ad valorem and that the benefit of the Notification No. 133/86-C.E., dated 1-3-1986 should be restored.

4. We have heard Shri B.N. Rangwani, ld. Consultant for the appellant and Shri Somesh Arora for the respondent revenue. Shri Rangwani submitted that there was no dispute regarding the classification of DMC under sub-heading 3907.91, but the department had wrongly classified SMC under sub-heading 3920.39, while it should have been also classified under sub-heading 3907.91. Referring to the Explanation in the notification, ld. Consultant submitted that the expression 'resin'

has been defined to mean that 'resin' shall be taken to include moulding powder of such resins also. Although, the constituent of resin was only 40% but the remaining other constituents were fillers and by such additions, the item still continued to remain resin in primary form. Therefore, the classification in respect of SMC cannot be changed and the benefit of the notification also cannot be denied.

5. Shri Somesh Arora, ld. JDR submitted that resin has a restricted meaning and the product had only 40% resin, the report of Dy. Chief Chemist, relied by Id. Collector and his findings are sustainable.

Although Id. Collector had held that they are primary products but has held that they are not polyester resin, and that they are to be considered as products made out of polyester resin. He pointed out that the Board circular relied by the appellant referred only to moulding powder and not to moulding compound.

6. Shri Rangwani countering the arguments submitted that the goods were in primary form only and in this context he relied on a passage extracted from plastic encyclopedia. In support of his plea that sheet in primary form is to be considered as of primary form, he relied on the ruling rendered in the case of Swaroop Fibre Ind. Ltd. v. CCE, 1990 (48) E.L.T. 118. He also relied on the ruling in Super Cassettes Ind.

Ltd. v. Collector of Customs 7. We have carefully considered the submissions made by both the sides and have perused the records and the findings given by the lower authorities. As can be seen from this case, the lower authorities have come to the conclusion that product sheet moulding compound is not a moulding powder as polyester resin while on the other hand the assessee is claiming that both DMC and SMC are moulding powder of polyester resin and they are not two different products. The revenue's contention is not supported by any evidence. Although, it is true that the burden of claiming the benefit under notification has to be discharged by the assessee but the fact remains that there are two Trade Notices referred by the assessee and also ruling relied by them, in the support of their claim. The lower authorities have not accepted the same and they have also not accepted the report of the Dy. Chief Chemist when the appellant's claim on the notification is being rejected, the lower authorities ought to have given the reasons for not accepting the Trade Notices and Govt. of India's opinion on this point. There is no such finding given in this case. Therefore, in the context of the facts and circumstances of the case, it is but proper that the matter is referred back to the lower authorities for de novo consideration giving liberty to the assessee to produce sufficient evidence both technical as well as trade understanding to prove their case that DMC and SMC are moulding powder of polyester resin and they are not two different products. It is also open to the lower authorities to reconsider the case of the appellants by seeking fresh samples of the goods and getting report from the Chief Chemical Examiner. If the department relies on any expert opinion or any technical literature then a copy of which should be furnished to the asses-see to enable them to meet such contentions. The case should be decided after the compliance of principle of natural justice. In the result, the impugned order is set aside and remanded to the lower authorities for de novo consideration.

Sd/- 8. With due respects to Hon'ble Member (J), my views and orders in the matter are as follows :- 9. I observe that the main dispute before us is regarding classification of sheet moulding compound (SMC).

10. The technical literature in the form of extracts from Modern Plastics Encyclopedia as well as the report of the departmental Deputy Chief Chemist shows that the material in question is in the form of sheets (as apparent from its name as well) and there is no doubt or dispute about it.

11. The main point to be considered is whether such sheets could be considered as one of the bulk forms mentioned in Chapter Note 6(a)(ii) and classified under 3907.91 or it was classifiable as sheets under Heading 3920.39.

12. In this connection, I find that the Chapter Note 6(a) and 6(a)(ii) read as follows :- 6(a): "In heading Nos. 39.01 to 39.14, the expression 'primary forms' applies only to the following forms: - (ii) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms." 13. Ld. Counsel has argued that similar bulk forms would include sheets in primary form and has cited an order of the Tribunal in the case of Swarup Fibre Industries 1990 (48) E.L.T. 118. He has also cited a circular of the Board (No. 26/2/94-CX. III,

dated 4-2-1994) reported in 1994 (70) E.L.T. -T31-32 and Hyderabad Collectorate Notice No. 67/94, dated 2-5-1994 1994 (71) E.L.T. - T43.

14. However, I find that on one hand sheets have not been mentioned in Chapter Note 6(a), on the other hand the above citations cited by the Ld. Counsel do not help the cause of the appellants for the following reasons :- (i) The Hyderabad Trade Notice is regarding moulding powders and not about moulding compounds. Admittedly, the appellants' product is not a powder but is a product in the form of sheets.

(ii) The Board's order cited above is regarding such moulding compounds which are "in the form of paste or other form of irregular geometrical shape". In the case of appellants the product is in the form of sheets and sheets have regular geometrical shapes.

15. The Tribunal's order in the case of Swarup Fibres (supra), the Tribunal has recognised the fact that it was dealing with a special case of vulcanised fibre sheets. It has itself stated that to be covered by the expression used in 6(a)(ii), the product has to be "a bulk form similar to the forms specified in the note" and that sheet "does not fit into the forms specified in the note" ... "would not be covered by the meaning of the expression primary forms given in the statutory note".

It has also made it clear that it is still applying 3913.30 in the facts and circumstances of that case and the language of the entry 39.13. Hence, this case also does not help the cause of the appellant.

16. The extract from Modern Plastic Encyclopedia which describes the process of manufacture also does not indicate that it is or could be treated as a bulk form. It of course mentions that "SMC is gathered into rolls or layered into containers" and "the shelf life of the matured compound is about 30 days but that by itself is not sufficient to indicate that it could be considered as similar to one of the bulk forms indicated in the Chapter Note 6(a)(ii)".

17. On the contrary Tariff Heading 39.20 explicitly covers "other plates, sheets, film, foil and strip, of plastics, non-cellular, whether lacquered or metallised or

laminated, supported or similarly combined with other materials or not" and thus specifically applies to plastic sheets. Hence, the Ld. Collector's finding on classification is correct.

18. As regards Notification No. 133/86 it is observed that it specifically covers polyester resins and not the products which were the result of mixing or compounding of resin with other materials. In the present case admittedly, the "chopped fibres", usually one inch long are deposited on to the resin paste as it is conveyed on the plastic film. This layer of glass and resin is then covered by another layer of resin on a second carrier film. The sandwich is sent through compaction rollers to ensure uniform distribution and wetting of the glass.

The continuous SMC is covered into rolls or layers into containers and stored until it matures" (Modern Plastics Encyclopedia 1992 page 204).

Such a product is not covered by any of the entries indicated in the notification. Hence, this notification is not applicable.

19. Hence, I confirm the order of the Collector (Appeals) and reject the appeal.

In view of the difference of opinion between Hon'ble Member (J) and the Vice President, the matter is submitted to the Hon'ble President for reference to a third Member on the following point :- 1. Whether in the facts and circumstances of the case, the matter is required to be remanded or the appeal is required to be rejected in view of the observations and findings of the Vice President? Sd/- Sd/- 20. Since there has been difference of opinion between Hon'ble Member 0) and Hon'ble Vice President following point is referred to me.

"Whether in the facts and circumstances of the case the matter is required to be remanded or the appeal is required to be rejected in view of the observation and finding of the Hon'ble Vice President." 21. Heard both sides with reference to the above point of difference.

Both the sides have reiterated the respective stand taken by them before the Bench which originally heard the matter. Shri B.N. Rangwani, learned Advocate appearing for the appellants demonstrated the item in question and emphasised that the item is in primary form although in the shape of sheet but it cannot be used as sheet and continues to be in primary form and accordingly it is to be considered as a bulk form and not sheet. Referring to the technical literature Plastic Films Second Edition by J.H. Briston and Dr. L.L. Katan (George Godwin in association with the Plastics and Rubber Institute), he said that the plastic sheets mentioned in Part II of Chapter 39 of CET are manufactured by seven methods i.e. (i) extrusion of film (ii) calendering (iii) solvent casting (iv) casting of regenerated cellulose film (v) orientation of film (vi) expanded films (vii) plastic net from film and the manufacturing process of these seven methods is given in detail at pages 67 to 86. These plastic sheets can never be manufactured by moulding process and accordingly the sheets which can be moulded are not sheets but only bulk form though it is in the form of sheets. He also referred to Modern Plastic - Encyclopedia 1992 Mid-October Issue and Sheet Moulding Compounds Science and Technology, Edited by Hamid G. Kia (Hanser/Gardner Publications, Inc., Cincinnati) particularly Chapters 1,5 and 12 therein in support of his contention.

He contended that as per Chapter Note 6(a)(ii) of Chapter 39 of CET, the expression primary forms applies to Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms. He said that the item in question is moulding powder in bulk forms and similar bulk forms referred to in the above Chapter Note would include sheets in primary form relying upon the decision of the Tribunal in the case of Swamp Fibre Industries Ltd. v.Collector of Central Excise, reported in 1990 (48) E.L.T. 118 (Tribunal) and Super Cassettes Industries Ltd. v. Collector of Customs - 1992 (58) E.L.T. 105 (Tribunal). He contended that the item in question is not having a regular geometrical shape and the Board's Order No. 26/2/94-CX. III, dated 4-2-1994 is directed at this point wherein it was clarified that the product DMC (Dough Moulding Compound) and SMC (Sheet Moulding Compound) made out of polyester resins, glass fibre, fillers etc. in the form of paste or other form of irregular geometric shape would merit classification under sub-heading 3907.91 of the Tariff.

22. While countering the arguments Shri Sharad Bhansali, learned SDR submitted that the sheets which can be moulded or not is not the criterion to decide the issue

whether they are sheets or in bulk forms.

It is crystal clear that the items are in the form of sheets and accordingly they are specifically covered by Tariff Heading 39.20 and the item is not the powder but only compound in the shape of sheets as the name of the product itself is Sheet Moulding Compound. Similar bulk forms referred to in Chapter Note 6(a)(ii) does not cover sheets and the decision of the Tribunal in the case of Swamp Fibre Indus. Ltd. (supra) is in favour of the Department as can be seen from the observations therein as it was rightly observed by the Hon'ble Vice President. He read some portion of the head note which reads as follows :- "Now, the expression 'primary forms' has been defined in statutory Note 6 to Chapter 39. The relevant portion is : 'Blocks of irregular shapes, lumps, powders (including moulding powders), granules, flakes and similar bulk forms'. The forms specified in the note are evidently of substances in the mass which have no regular shape or form. While lumps, powders, granules and flakes neatly fit into this categorisation, the note takes care to specify blocks of irregular shapes only implying that blocks of regular shape would not be covered by the expression 'primary forms'. Therefore, if any unspecified form is to be held to be covered by the expression, it has to be a bulk form similar to the forms specified in the note.

Sheets, though one of the primary forms in which vulcanised fibre is produced, are possessed of a definite form and shape and does not fit into the forms specified in the note. Since 'sheets' happen to be one of the primary forms, one can take it that it is a bulk form of vulcanised fibre which has to be fabricated for specific end-uses. But it is not similar to the forms specified in the note.

It would, therefore, appear that though sheets constitute a primary form of vulcanised fibre, they would not be covered by the meaning of the expression 'primary forms' as given in the statutory note." 23. He submitted that the important issue to be considered in this case is whether the item continues to be moulding powder of polyester resin or sheets to avail exemption in terms of Notification 133/86 as amended. He said that on the available material the issue can be decided without remanding the matter to the lower authorities. But without giving a finding on this important issue the Hon'ble Member (J) has chosen to remand the matter to decide the issue that too with reference to trade notice and Board's Circular. It is settled position that trade notice and Circular are not binding on the Tribunal. He said that the matter need not be remanded when the matter could be disposed of on the basis of material available on record relying upon the decision of the Supreme Court in the case of M.G. Shahani & Co. (Delhi) Ltd. v. Collector of Central Excise, New Delhi reported in 1994 (73) E.L.T. 3 (S.C.).

24. I have considered the submissions made by both sides with reference to difference of opinion. It is not free from doubt that whether the item continues to be in primary form or not in view of the process of manufacture as given in the Modern Plastic - Encyclopedia 1992. It clearly mentions that SMC is gathered into rolls or layered into containers and that life of the matured compound is about 30 days.

There is some force in the arguments advanced by the appellant's Counsel that DMC and SMC are made out of polyester resins and since SMC is not having a regular geometric shape it would merit classification under sub-heading 3907.91 since DMC was classified under sub-heading 3907.91. He also pointed out that the Board is also of the view as per Circular referred to above that DMC and SMC made out of polyester resin, glass fibre, fillers etc. in the form of paste or other form of irregular geometric shape would merit classification under sub-heading 3907.91 of the Tariff. The issue requires detailed examination and since the third Member's opinion is limited and restricted to the point of difference referred to me, I do not propose to go into further details to decide the issue whether 'similar bulk forms' referred to in Chapter Note 6(a)(ii) would include the item in question to avail exemption in terms of Notification 133/86. In the facts and circumstances I am of the view that it would be appropriate to refer the matter to the lower authorities to decide the issue afresh by giving one more opportunity to the appellants to substantiate their claim. Accordingly I agree with the Hon'ble Member (J) to remand the matter for de novo consideration.

The case file is returned to the original Bench to pass an appropriate order.

In view of the majority of opinion the impugned order is set aside and the matter is remanded to the Assistant Collector for de novo consideration in accordance with law.