

**Collector of C. Excise Vs. Vijay Flexible Containers (P)**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** May-04-1995

**Reported in :** (1995)LC119Tri(Delhi)

**Appellant :** Collector of C. Excise

**Respondent :** Vijay Flexible Containers (P)

**Judgement :**

1. The above 3 appeals involve common issues and are hence heard together and disposed of by this common order.

2. E/2449/86-C - The respondents herein are manufacturers of goods falling under TI 17 and TI 68 of the Schedule to the erstwhile Central Excise Tariff. They manufacture "printed shells" and "printed H.L.

Blanks". They filed classification lists dated 9-3-1982 and 23-4-1982 respectively classifying these products under TI-68 and claiming benefit of exemption in terms of Notification 104/82, dated 28-2-1982.

The Assistant Collector classified both the products under TI 17(4) as printed boxes (slide type of boxes and printed boxes in flattened /unassembled condition and denied the benefit of exemption under Notification 66/82, dated 28-2-1982. The assessee preferred an appeal to the Collector (Appeals) contending that the printed shells are not known in common parlance as boxes or cartons and, therefore, cannot be classified under TI 17(4), but are classifiable under TI 68 and

as their products are of printing industry, benefit of exemption under Notification 104/82 is to be extended thereto. Their alternative claim was that even if the products were classifiable under TI 17(4), they would still be exempt from payment of duty under Notification 66/82 as they were not printed cartons or printed boxes falling within the Proviso to the said Notification. The lower appellate authority vide his order dated 26-6-1986 set aside the order of the Assistant Collector and upheld the claim of the assesseees to classification of both the items under TI 68. This has given rise to the above appeal by the Revenue.

2.1 E/2865/88-C - Pursuant to the order-in-appeal dated 26-6-1988 of the Collector (Appeals), Bombay, the assesseees filed a refund claim for Rs. 55,78,298.39 on 20-10-1986 in respect of Central Excise duty which they had paid under protest during the period from 5-3-1983 to 28-2-1986 and also filed a supplementary refund claim for Rs. 24,427.87 for the same period on 15-2-1986. By his order dated 19-10-1987, the Assistant Collector held that the assessee was entitled to refund only to the extent of difference between the rate of duty paid under TI 17(4) i.e. 15% ad valorem plus 5% Special Excise Duty and the rate of duty payable under TI 68 which worked out to Rs. 17,98,516.05. He further deducted an amount of Rs. 1,71,017.34 on the ground that the assessee was admittedly not going to pass on the benefit of refund to the customers and sanctioned the remaining amount of Rs. 16,27,498.74.

Both the Department and the assesseees preferred appeals against the order of the Assistant Collector and by order dated 20-6-1988 the Collector (Appeals), Bombay held as under : "The Assistant Collector, in his impugned order has held that the Collector of Central Excise (Appeals), Bombay has in his order-in-appeal classified the appellants' products viz. shells and blanks under TI 68 without speaking anything about the admissibility of the exemption under Notification No. 104/82 which exempts the products as products of printing industry. In his order-in appeal the Collector of Central Excise (Appeals) has only held that the products in question are classifiable under TI 68 in the dispute between the two items viz. 17 and 68. The Collector of Central Excise (Appeals) had not taken any decision on the Notification No. 104/82 in his order. However, the Assistant Collector should have examined the issue of eligibility of the subject products under Notification No.

104/82 in the light of the Collector (Appeals') order on the basis that the products are under TI 68. The Assistant Collector has not done this but has erroneously assumed that the Collector (Appeals) has denied the benefit of the said Notification to the appellants' products. The Assistant Collector's order is, therefore, set aside. He should re-examine this issue and come to his finding about the applicability of the Notification No. 104/82 and redecide.

Regarding the unjust enrichment question, the Assistant Collector has not denied the entire amount of refund. The amount recovered by the appellants as excise duty from the customers is not the correct amount of duty payable but the same is a part of profit to them.

Therefore, treating the said amount as a part of the assessable value and deducting duty calculated on this added value from the amount of refund claimed is correct under Section 4(4)(d)(ii) of the Central Excise Act. In this respect, I also further rely on the Appellate Tribunal's decision in the case of (i) M/s. Hubli Chemical Works Ltd. v. Collector of Central Excise, Madras 1984 (18) E.L.T. 488 and (ii) Ajanta Paper & General Products Ltd. v. Collector of Central Excise 2.2 Against this order the Department has preferred E/2865/88-C on the ground that the classification of the items is based upon an order of the Government of India which related to pre-1982 description of T.1.17 which did not contain any entry regarding boxes and cartons and packing containers, and while after 1982 budget which enlarged the description of T.I. 17, the assessee's products were classifiable under Item 17(4) upto 28-2-1983 and thereafter i.e. from 1-3-1983 to 28-2-1986 under TI 17(3). The prayer in the above appeal is for remand of the matter to the Assistant Collector with directions to keep the refund issue pending till the Appeal No. E/2449/86 filed by the Department against the order of the Collector (Appeals) dated 26-6-1986 on classification is disposed of by the Tribunal.

2.3 E/3644/88-C - This appeal has been filed by the assesseees against the order of the Collector (Appeals) dated 20-6-1988 rejecting part of the refund claim on the ground that the assesseees had not passed on the benefit of refund to their customers. The appellants also reiterated their claim to the benefit of exemption under Notification 104/82 which was applicable to products of printing industry as

their products are of printing industry.

3. The learned SDR Shri Sharad Bhansali contends that printed shells should be classified under TI 17(4) as they are in the nature of printed boxes (slide type of boxes) and that the benefit of Notification No. 66/82 is not available thereto. His alternative plea was that, in the event of the Tribunal holding that shells are not goods under TI 17(4) following the decisions of the Hon'ble Delhi High Court in the case of Zupiter Printing and Anr. v. Union of India reported in 1991 (34) E.C.R. 7 and of the Madras High Court in the case of Asia Tobacco Company reported in 1992 (58) E.L.T. 418 (Mad.), shells should be held to be classifiable under TI 68 and the benefit of Notification No. 104/82 is not available to them as they are not products of Printing Industry but of the Packaging Industry, as held by Hon'ble Supreme Court in the case of Rollatainers Limited v. Union of India 4. Regarding the other item in dispute namely H.L. Blanks, the learned DR contends that these are classifiable under TI 17(4) as cartons or boxes as they are only cartons in flattened or unassembled form and they are not eligible to the benefit of Notification No. 66/82 which excludes cartons and boxes from its scope. In reply, the learned Counsel Shri M.A. Rangaswamy, for the assessee draws our attention to the judgment of the Tribunal in the case of India Tobacco Company Ltd. v. Collector of Central Excise, Madras reported in 1994 (71) E.L.T. 547 wherein the non-dutiability of outer shells was conceded by the learned DR in that case on the basis of the Delhi High Court decision in the case of Zupiter Printery and wherein the Tribunal has held that the reasoning which led the High Court of Madras (in the case of Asia Tobacco Co.) to rule against the dutiability of outer shells and inner slides, applies equally to the hinge lids cut out and inner frames. He therefore, submits that the two items in dispute in these appeals are not 'goods' within the meaning of the Central Excises & Salt Act, 1944.

In the alternative, he prays that, in the event of this Bench taking a different view from that expressed in the case of TTC (supra), the matter may be referred to a larger Bench.

5. We have carefully considered the rival submissions and perused the case laws cited by both the sides.

5.1 We find that in the case of *Zupiter Printery v. Union of India*, the assesseees were aggrieved by the classification of outer shells of the cigarette packets as boxes/container under TI 17(4). The Court held that a cigarette packet consists of two boxes - one described as 'outer shell' and the other as a slide which is inserted into the shell to complete the packet. In para 15 of its judgment, the Delhi High Court has held that 'in a broad sense, the outer shell is neither a receptacle nor can contain an article by itself. This outer shell can also not be a container in a narrower sense because any articles placed in outer shell are not covered or enclosed nor they can be transported as such; nor the outer shell can be called an enclosure, which can be used for transportation of the cigarettes.'" Considering the expression 'containers' in the context in which it is used, the said expression has to be construed to mean packing containers which are analogous to boxes and cartons i.e. an enclosed receptacle which can be used for storage and transportation of articles. The shell i.e. the product of the petitioner is open from both the sides. In the absence of the slide, this shell by itself will not be in a position to hold the cigarettes. The broad description of the shell does not fit in the expression of boxes or container. "The question for consideration before the High Court was whether the outer shell manufactured by the petitioner which has no lid and is open from both the sides can hold and keep cigarettes and the question was answered in the negative. The Court further held that "box" has a definite meaning as understood in common parlance and therefore, the mere outer shell by itself cannot be put in that category and hence it was held that shells of cigarette packets were not excisable under Entry 17(4) of the First Schedule as introduced by the Finance Act, 1982.

5.2 In the case of *Asia Tobacco Co 1992 (58) E.L.T. 418 (Mad.)*, the issue for consideration before the Madras High Court was whether cigarette packets covered under TI 17 of the First Schedule liable for duty and whether the same are exempt from duty in view of Notification No. 66/82, dated 28-2-1982. The Court considered the process of packing of cigarettes and found that the packet is complete only after cigarettes have been put into it and thus the packet of cigarettes is complete at a stage when cigarettes are also in it. The Court held that it is not only the packet which is assembled but a packet of cigarettes containing cigarettes therein and thus if this assembly is to be treated as a manufacture, the

manufacture is not of a packet but of a cigarette packet containing cigarettes and thus a cigarette packet cannot be subjected to duty twice over. In the second case of Asia Tobacco Co. 1993 (66) E.L.T. 55 the Madras High Court held that the cigarette packet and outer shell and inner slides are not excisable under sub-heading 4818.13 of the Central Excise Tariff Act, 1985 and reiterated the earlier finding that cigarette packet cannot be subjected to duty twice over and even otherwise, the outer shells and inner slides cannot be subjected to any separate assessment.

6. The issue before the Tribunal in the case of India Tobacco Company v. Collector of Customs, Madras reported in 1994 (71) E.L.T. 547 was whether the printed board articles described as follows - are printed cartons which include within their scope valid and flattened containers of paper and paper board within the description of TI 17(4) as it stood before 1-3-1986 read with Notification No.66/82-C.E., dated 28-2-1982. The Tribunal held that outer shells were not dutiable, upon the basis of the concession made by the learned DR and upon the basis of the judgment of the Delhi High Court (supra).

However, we regret that we have not been able to persuade ourselves to follow the same reasoning in view of the discussion in the previous paragraphs regarding the nature of the controversy before the Delhi and Madras High Courts, and noting that the question of excisability of outer shells and hinge lid blanks was not an issue for decision before the High Courts. The High Courts were not called upon to determine whether the two items fall for classification under any other entry in the Schedule to the erstwhile Central Excise Tariff while in this case, we are called upon to decide classification of the two items either under TI 17(4) or under TI 68.

7. According to us, the outer shells are printed paper boards cut to particular size and shape and they are parts of cigarette packets and are marketable and the assessee herein do not dispute that the shells manufactured by them are sold to cigarette manufacturers hence they are excisable. As regards H.L. Blanks, we see force in the contention of the learned DR that these are classifiable under TI 17(4) as cartons or boxes in flattened/unassembled form.

8. In the light of this discussion, we regret that we are unable to persuade ourselves to follow the order of the Tribunal in the case of India Tobacco Co. v C.C.E., Madras reported in 1994 (71) E.L.T. 547. We therefore, place these papers before the Hon'ble President for reference to a Larger Bench to resolve the issue.

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