

inarco Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-06-1996

Reported in : (1997)(90)ELT104TriDel

Appellant : inarco Ltd.

Respondent : Collector of Central Excise

Judgement :

1. In both these appeals, common question of facts and law is involved, hence they are taken up together for disposal as per law.

2. The assessee in Appeal No. 2724/92-C has challenged the Order-in-Appeal, dated 14-1-1992 passed by the Collector of Appeals, Trichy. By this order, the Collector (Appeals) has held that the products Aprons and Cots do not possess the qualities or functions of pipes or tubes and hence they do not qualify for classification as claimed by the assessee under chapter subheading 4009.99 as Tubes and Pipes of unhardened vulcanised rubber. The learned Collector has, therefore, held the product as having been convert from Pipes and Tubes as the resulting products which are used in-textile spinning machinery as "components", therefore, they qualify for classification under Heading 8448.00. The assessee had pressed for accepting the ratio of the Bombay High Court's judgment rendered in the case of M/s. Precision Rubber Ltd. v. CCE as reported in 1990 (49) E.L.T. 170. Ld. Collector has rejected the said contention on the ground that the decision was with reference to the erstwhile tariff and considering inter alia the eligibility of exemption of the products under erstwhile Tariff Item 16A(2) read with Notification

No. 197/67, and therefore has held that the ratio does not appear to have relevance to the present case.

3. The Revenue has also come up in Appeal No. E/920/91-C against the order, dated 17-9-1990 passed by the Collector (Appeals), Bombay. The Collector (Appeals) in this case has accepted the appellant's contention that their products are correctly classifiable under chapter sub-heading 4009.99 following the ratio of the Bombay High Court. The Revenue in this particular appeal has challenged the said classification arrived at by the Collector (Appeals) and have pleaded for classifying the said products under sub-heading 4016.99 of the CET. Therefore, before us in this appeal, the competing entries for consideration under sub-heading 4009.99 attracting duty at 'NIL' rate and sub-heading 4617.99 attracting duty for 15% adv. The Revenue in this appeal has given the process of manufacture of Cots and Aprons, which is as follows : "The Cots and Aprons are made out of Synthetic Nitrite Rubber Compounds. The compound is made with synthetic rubbers, fillers, plasticisers, curving ingredients, etc.;, in the mixing machine. The mixed batches are then taken for extrusion or calendering operations. The cot tube is a single layer construction and is made by extrusion process. The Apron tube is of 3 layer construction, the outer tube is an extruded jacket, while inner tube is made by calendering and knife jointing process. A special cord is impregnated in between the outer and inner tubes. Cots and Aprons tubes are then taken for vulcanisation (curving) in a steam heater autoclave. Vulcanised tubes are processed further with chemical treatment, buffed (surface grinding) and cut to specifications and sizes as per the requirement of the Customers. Bevelling/Spiral grooving of Cots is one after cutting the tubes. They are then inspected and packed." It is also stated that the Cots and Aprons manufactured by them are designed according to technical patent process and conform to the ISI Specifications (Cots IS 7175-1974, Aprons IS 4892-1968). The revenue has stated that Aprons and Cots are not tubes and pipes of rubber in the sense that in the penultimate stages of its manufacture, it is cut into specified lengths and a further operation called bevelling/spiral grooving/buffing is carried out before it is put into use in the machinery. Therefore, it is stated by the revenue that this amounts to manufacture of a distinct product, with an entirely different commodity having distinct name, character and use. Therefore, it is stated that

Aprons and Cots, being articles of unhardened vulcanised rubber and component parts of textile machinery are aptly classifiable under Heading 40.16 of the CET. It is further stated that as per Sub-section I(a) of Section XVI "other articles of a kind used in machinery or mechanical or electrical appliances or for other technical uses, of unhardened vulcanised rubber" are covered under Heading No. 40.16 and that they are not further sub-classifiable under sub-heading No.4016.99. The goods attracting duty @ 15% Adv. as they are not covered by the description of goods against the rest of the sub-classifications of Heading 40.09. It is also stated that the products Cots and Aprons have a specific trade name and connotation other than 'tubings' and 'pipings' of vulcanised unhardened rubber. They are known in the trade and commercial parlance as "parts and accessories of textile machinery". As they conform to the ISI Specifications and that they have a very special type of use for the textile industry, the classification has, therefore, to be only under sub-heading 4016.99.

4. In the assessee's appeal, the lower authorities had classified the goods under sub-heading 8448.00 which is challenged before us, and the assessee is claiming the classification under 4009.99 nil rate of duty. The revenue filed a cross objection 369/94, by which they have given up the classification under sub-heading 8448.00 and have prayed for classifying the product under 4016.99. This cross objection have been dismissed by us by a separate order in the open Court, however, we have granted liberty to the revenue to plead their case for classifying the product under sub-heading 4016.99, notwithstanding the fact that the lower authorities had confirmed the classification under subheading 8448.00

5. (i) The reasons assigned by the Id. Collector (Appeals) for rejecting the classification under Tariff Heading 8448 in E. 369 /94-C as prayed for by the assessee, are, that rubber pipes and tubes are components of textile machinery and that they do not perform the functions of conveying fluids and hence they cannot be considered as rubber tubes and pipes, as its essential function to convey gases and fluids is not performed by the product in question. The Id. Collector (Appeals) has held that the Hon'ble Bombay High Court's judgment was with reference to erstwhile Tariff Item 16A(2) and consequent to the change in the tariff, only items which are other than those which are designed for use in laboratories and having functions of conveying, air, gases or liquids, are classified under Heading 4009.99; and they

should have rubber compound weight of more than 25%. The Id. Collector (Appeals) has held that pipe is long hollow cylinder with the primary function of conducting or conveying gases or fluids. Tube is a hollow elongated cylindrical body used to convey fluids and mechanically nearly or precisely the same as a pipe but its use is primarily associated with particular items and devices. Thus, the Id. Collector has held that Aprons and Cots which do not possess the qualities or functions of pipes or tubes do not qualify for classification under 4009.99 as "Tubes and Pipes of unhardened vulcanised rubber", as they are converted into Aprons and Cots, the resulting products which are used in textile spinning machinery as components qualify for classification under Heading 8448.00.

(ii) The Collector in order-in-original in the appeal challenged by the Revenue has held the product to be classifiable under Heading 8448.00 by accepting the judgment of the Hon'ble Bombay High Court in the case of M/s. Precision Rubber Industries. He has also taken into consideration that the same products manufactured by other assesseees has been classified under Tariff Item 8448.00 by the same Collectorate.

(iii) When the case came up for arguments before us, the Revenue has given up the classification of the products under sub-heading 4016.99 and has agitated for classification under sub-heading 8448.00, which the assessee has contested for the sub-heading 4009.99.

6. The assessee in this case has submitted that there is no significant difference between the old Tariff Item 16A(3) and the present Heading 40.09. It is their plea that the Notification 197/67, dated 29-8-1967 exempted certain goods falling under Item 16A(3) viz. "Piping and Tubing designed for use as component parts of medical or surgical instruments or machinery articles". It is stated that S. Nos. 2 & 3 of this Notification applied to "Piping and Tubing designed for use in laboratories or designed to be, or converted in the factory of its production into component parts of machinery articles respectively".

The item in question falls within S. No. 3 of the said notification.

After the amendment of the tariff, the items were considered to be falling under sub-heading 4009.99, the tariff rate itself was Nil and as the notification was also in existence, the Government realised about the tariff having Nil rate of duty and therefore, they issued an amending Notification No. 31/90 omitting S. Nos. 2 & 3 in Notification No. 197/67. Therefore, it became clear that the item being unhardened vulcanised rubber continued to be treated as piping and tubing designed to be, or converted in the factory of its production into component parts of machinery articles and that they fell within the said heading noted supra. It is also submitted that after the introduction of tariff Notification No. 197/67 amended by Notification 78/86, dated 10-2-1986, the only amendment being the substitution of the words "falling under sub-item (3) of Item No. 16A of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944)" by the words "falling under Chapter 40 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)". Therefore, it is submitted that even after the coming into force of the new Tariff, pipes and tubes to which processes have been done to render them suitable for use as parts and components, were regarded by the Government of India as Pippings and Tubings. In this context, the assessee is also relying on the Explanatory Notes to the HSN that pipes and tubes cut to length fall under 4009, (page 591).

Therefore, it is submitted that a Notification-being a part of statute, relying on the citation "1988 (38) E.L.T. 741". It follows that on the principles of harmonious construction, the Tariff Item must be read alongwith the notification. It is also submitted that this consistent and longstanding legislative history and / or executive interpretation has to be accepted and the same is binding on the department. In this context, the ruling of the Hon'ble Supreme Court as rendered in the case of Deshbandhu Gupta & Co. and Ors. v. Delhi Stock Exchange Association Ltd. as reported in AIR 1979 S.C. 1049 is relied alongwith Ruling rendered in the case of Collector of Central Excise v. Parle Exports (P) Ltd. as reported in 1988 (38) E.L.T. 741 and in the case of State of Tamil Nadu v. Mahi Traders 266. Therefore, it is submitted that it cannot be contended that by reason of cutting, bevelling (in 2% of cases) which rendered pippings and tubings becoming usable as parts and components of machinery ceased to be pippings and tubings, by virtue of such cutting and bevelling. It is also submitted that Notification No. 197/67, both before and after 1-3-1986, shows a clear legislative intent to

exempt from duty pipes and tubes made into parts and components. It is submitted that this clear intent would be wholly frustrated and the Notification rendered largely nugatory if it is held that pipes and tubes which have become known as machinery parts have ceased to be pipes and tubes and therefore, such an interpretation as placed by the Id. Collector (Appeals) is not a correct interpretation. It is also submitted that the ratio of the Bombay High Court rendered in the case of Precision Rubber Ind. is binding on the Tribunal and there is no reason to differ for the same, in the context of there being no material difference in the language of Tariff Item 16A and Heading 40.09. Therefore, they submit that the earlier decision rendered in their own case of the Tribunal in Inarco Ltd. v. CCE Order No. 167/84D, dated 23-3-1984 is no longer pending after the ruling rendered by the Hon'ble Bombay High Court. It is also submitted that the Tribunal judgment in Inarco Ltd. is contrary to the judgment of the Hon'ble Supreme Court as rendered in the case of Bharat Forge as reported in 1990 (45) E.L.T. 525, where the Hon'ble Supreme Court has held that pipes and tubes cut into size were classified under Tariff Item 26AA and not under Tariff Item 68, even if they were known in the market as a distinct commodity. It is also submitted that the Tribunal judgment in Inarco Ltd. is also inconsistent with the order of the Tribunal rendered in the case of CCE 1989 (39) E.L.T. 681, wherein it has been held that Heading 4009 applied to pipes and tubes cut into smaller sizes and subjected to processes such as skiving and swagging, processes similar to bevelling, (Skiving means "shaving the surface", swagging "to bend or shape". In that view of the matter, they submit that notwithstanding the judgment rendered by the Tribunal in the case of Inarco Ltd. (supra). The ruling of the Hon'ble Bombay High Court with reference to the pleadings made by them has to be accepted.

7. We have heard Shri Atul Setalvad, Id. Sr. Advocate for the appellant and Shri Sharad Bhansali, Id. SDR for the Revenue. Id. Sr. Advocate Shri Atul Setalvad very persuasively put forth the points of the assessee as noted supra and heavily relied on the ratios of the judgment noted as above. On the other hand, Shri Sharad Bhansali submitted that the Hon'ble Bombay High Court's judgment should not be relied as the scope of Tariff Entry 16A and 4009 are different. He submitted that the use of word 'hose' has enlarged the tariff entry and gives meaning to pipes and tubes. As the items in question are not "hose" after they have been cut and

made into component, they no longer remain piping and tubing and hence their classification under Heading 4009 is very inappropriate. He submitted that the Bombay High Court has not examined the scope of Section Note and Tariff Notes and therefore, the application of these notes would materially alter the classification of the item from 16A to 8443.00. He submitted that the Notification did not refer to sub-headings and as the amending notification had deleted S.No. 3 from Notification 197 of 67-C.E. It followed that the present notification did not cover to such items as in the present case. He submitted that the Hon'ble Supreme Court's judgment rendered in the case of Bharat Forge is also not relevant as in that case the Hon'ble Supreme Court has held that 'T' shape and 'V' shape continued to be pipe, while in the present case, the item is no longer a pipe or a tube, and it had become a component for use as parts of textile machinery. He relied on the ruling rendered by the Tribunal in the case of CCE v. Kohinoor Rubber Mills as reported in 1993 (67) E.L.T. 816.

8. Ld. Sr. Counsel countering the arguments submitted that the ruling of Kohinoor Rubber Mills is clearly distinguishable and did not apply to the present case but on the other hand, there were observations in the judgment which helps the party. Ld. Sr. Advocate specifically relied on para 18 of the Hon'ble Supreme Court judgment wherein it has been held that the items continued to be piping after processes as it does not change the character of the piping. He also relied on the ruling rendered by the Tribunal in the case of Track Parts Corporation v. Collector of Customs as reported in 1992 (57) E.L.T. 98, wherein it has been specifically held that merely because the hose pipes were cut to specific sizes and subjected to further processes and fitted with fittings and it does not change the essential character and it continued to remain as hose within the Heading 40.09.

9. We have carefully considered the submissions made by both the sides and perused the records. The question that falls for our consideration is as to whether the products "Aprons and Cots" which have been cut to specific sizes and certain processes carried out to make them as specific components for use in the textile machinery would be excluded from the sub-heading 4009.99 and be included under Chapter Heading 8448.00 as "Parts and accessories suitable for use, solely or principally with the machines of this heading or of Heading No. 84.44, 84.45,

84.46 or 84.47 (for example, spindles and spindle flyers, card, clothing, combs, extruding nipples, shuttles, healds and heald-frames, hosiery needle)". In this regard, the revenue is also relying on the Chapter Note 2 of Section XVI which pertains to the classification of parts. We also notice that Note 1A of Section XVI states that this section does not cover articles of a kind used in a machinery or mechanical or electrical appliances or for other technical uses, unhardened vulcanised rubber (40.16). As per this note, articles of unhardened vulcanised rubber for other technical uses fall within the Heading No. 40.16 and are excluded from Chapter 84. However, the Revenue has given up the classification under the Heading 40.16 and we are not required to dwell upon this note, in view of the revenue contending for classification under Heading 84.48. It is, now well settled that before we go to the later heading as in the present case Chapter 84, it is necessary for us to eliminate Chapter 40 for the purpose of classification. The Rule 3(a) of Rules for Interpretation of the Schedule of the Tariff Act also clearly lays down that when classification under two or more headings are possible in that case, the headings which provides the most specific description shall be preferred to heading providing the more general description. Therefore, it follows that we have to first eliminate the Chapter Heading 40 before going to Chapter 84 in the present case. It has been the case of the assessee that pipes and tubes cut to similar sizes and subjected to processes of bevelling, do not cease to be pipes and tubes. In this context, they have relied on the principle of '*contemporanea expositio*' in as much as they have drawn the analogy that the intention of the Government as expressed in the notification which has got statutory effect, should be taken into consideration while interpreting the heading for the purpose of classification. In this regard the rulings of the Hon'ble Supreme Court has been cited before us. It has been strongly argued before us that the question has already been settled by the Hon'ble Bombay High Court in the case of Precision Rubber Ind. and therefore, the question of classification gets settled thereby and that the change of tariff would not make any difference, in as much as the Hon'ble Bombay High Court has clearly held that merely because the item has been converted into a component from pipes and tubes, it does not cease to be pipes and tubes, by virtue of such cutting and bevelling processes. In order to buttress the arguments, the Id. Sr. Advocate has also relied on the ruling of Hon'ble

Supreme Court rendered in the case of Bharat Forge & Press Ind. Ltd., Tract Parts Corpn., Parle Exports Pvt. Ltd. 10. On a careful consideration of the pleas made by the assessee and the revenue, we have to uphold the contentions of the assessee. The reason being that the Bombay High Court in the case of Precision Rubber Ind. at Para 18 of the judgment has held that what has resulted in the manufacturing process, continued to have the character of the tubing as contemplated by the relevant entry.

"Tubes, pipes and hoses of vulcanised rubber other than hardened rubber, with or without their fittings, for example joints, elbows, flanges." The tariff entry although are not identically worded but the fact remains that both the tariff items deals with pipes and tubes of unhardened and vulcanised rubber. There is no dispute that the item is unvulcanised hardened rubber. The only dispute is as to whether the item continues to be pipes and tubes despites processes having been carried out as stated.

As can be noted from Para 18 of the Bombay High Court judgment in respect of the same products, the finding is that despite such manufacturing process the product continues to have the character of the tubing as contemplated by the relevant entries. The change in the tariff has not brought about any change in the goods. The goods remain the same. When the tariff entries reads identical and the goods being the same, the findings given by the Hon'ble Bombay High Court would clearly apply to the facts of the present case. Although the Hon'ble Tribunal in the case of Inarco Ltd., Bombay v. CCE, Bombay - 1987 (31) E.L.T. 469 had taken a different view but the Hon'ble Bombay High Court has noticed and discussed about this Tribunal judgment in Para 11 of its judgment and has not accepted the said ratio of the Tribunal's judgment. It follows that the judgment of the Tribunal does not have any more applicability as rightly pointed out by Id. Sr. Advocate.

The ratio of ruling rendered in the case of Bharat Forge also has relevance in the present case, as Hon'ble Supreme Court has held that pipe fittings such as elbows, bends, reducers continued to be classified under Tariff Item 26AA(iv) of the erstwhile Central Excise Tariff as 'Pipes and tubes' and that mere change in

length, size and shape is immaterial.

11. The Id. Sr. Advocate has pressed the argument that the tariff entry has to be understood in the way as understood by the Government, legislature and authorities implementing the statutes. In the Notification 197/67, exemption was extended to "Pipes and Tubing" on the understanding that pipes and tubes fall under Chapter 40. This argument has a strong force as Hon'ble Supreme Court in the case of Parle Exports Ltd. has been held that: "It is a settled principle of interpretation that Courts in construing a statute of Notification will give such weight to the interpretation put up on it at the time of enactment or issue and since by those who have to construe, execute and apply the said enactments." A similar view had earlier been expressed by the Hon'ble Supreme Court in the case of Desh Bandhu Gupta & Co. (supra) wherein it has been held that principle of 'contemporanea expositio' would apply in a case where documents issued by Government almost simultaneously with issuance of the Notification explaining the manner in which transactions stated in the Notification were intended to be closed, and therefore, it has been held that the documents can be looked into for finding out the true intention of the Government in issuing the Notification. In this regard, Hon'ble Supreme Court has also relied on Maxwell's Interpretation of Statute (12th Edn. P. 268) and Crawford on Statutory Construction (1940 Edn. Pp. 393-395 Para 219).

In the case of Track Parts Corpn., the Tribunal has held that hose assembly made of vulcanised rubber other than hard rubber with end fittings are classifiable under sub-heading 4009.50 of the Customs Tariff Act, 1975. A similar argument as raised by the Id. SDR had been raised in that case but the Tribunal rejected the same. This ruling has got a clear applicability to the facts of the present case. The Id. SDR relied on the ruling rendered in the case of Kohinoor Rubber Mill. This ruling is not applicable to the facts of the present case and is clearly distinguishable. As in Para 28 of the said ruling at page 827, the Tribunal after a detailed examination of the matter, has come to the conclusion that the subject goods are not pipes and tubes at all and therefore in that context held that the question of applicability of Chapter 40 did not arise. In this particular case, the facts are different and therefore, the ratio is not applicable.

12. In that event of the matter for the reasons stated and applying the ratio of the Hon'ble Bombay High Court rendered in the case of M/s.

Precision Rubber Ind. (supra), the assessee's appeal is allowed and the revenue appeal is rejected.

13. With due respects to Hon'ble Member (J) my views and orders are as follows :-

14. I find that the articles in question namely Cots and Aprons made of Synthetic Rubber Compounds are admittedly parts of textile machinery.

Since parts of textile machinery are covered by Chapter 84 ex facie.

Therefore, unless it could be shown that they were excludable from this chapter by virtue of some provision therein and (includible in Chapter 40 by some provision therein), they would have to be classified in the former in the normal course.

15. It has been argued before us that by virtue of Section Note 1(a) of Section XVI articles of unhardened rubber used in machinery stand excluded from Chapter 84; And they get covered by Chapter 40 as they are not hit by Note 2 of that chapter. The learned Counsel has stressed that Note 2 of Chapter 40 excludes only "Mechanical or electrical appliances or parts thereof of Section XVI (including electrical goods of all kinds), of hard rubbers" whereas the articles in question are made of vulcanised but unhardened rubber.

16. However, in my opinion, this does not reveal full or complete picture as would be evident from that follows : 17. First and foremost Section Note 1 (a) of Section XVI excludes articles of only specified headings. In respect of articles of a kind used in machinery or mechanical appliances it excludes only those articles of unhardened vulcanised rubber which fall under Heading No.40.16 (as evident from specific mention of this heading) and not others. In the present matter it is nobody's case at this stage, that the articles in question attract 40.16. In other words, they are not hit by the exclusion Clause 1(a).

18. Secondly, Section XVI (and Chapter 84 thereof) distinguishes between machinery and mechanical appliances; And Section Note 5 shows that the "Machines" is the genus of which machinery and mechanical appliances have

been treated as species and the articles in question are admittedly component parts of machinery.

19. Further the fact is that Chapter Note 2 of Chapter 40 excludes only parts of mechanical appliances made of hard rubber.

20. Hence, in view of the specific entry for textile machinery parts in Chapter 84 under Heading 8448.00 which covers "parts and accessories suitable for use solely or principally with machines of this heading or of Heading Nos. 84.44, 84.45, 84.46 and 84.47", the Chapter Note 2(d) of Chapter 40 can only be interpreted to mean that parts of mechanical or electrical appliances made of unhardened rubber could be considered under that chapter, provided of course, they could be shown to be covered by a more specific entry under that chapter.

'Cots' and 'Aprons' may be tubular but have acquired the characteristics of component parts of textile machinery whereas Heading 40.09 covers only tubes, pipes and hoses as commonly understood and does not include specialised articles of the type in question which are very different and distinguishable from tubes, pipes and hoses.

21. In fact, it is interesting to note that assessee had themselves been good enough to accept initially that the correct classification was under 8448.00 as mentioned in their appeal memo but when they came across the judgment of the Bombay High Court cited by them they thought of requesting for a change in classification to 4009.99. This order has been mentioned and discussed before us but I find that this judgment is not at all relevant or applicable. It was passed with reference to the old Tariff. There has been a sea change since then. In the new Tariff, a whole lot of new headings quite different in extent and scope have been provided for. The Hon'ble Bombay High Court had no occasion to go through the section notes and chapter notes and/or to apply the principles of interpretation which are an integral part of this tariff and they had no occasion to interpret the two competitive entries in question. The same applies to the notifications or Board's Circular, issued with reference to the old tariff and Heading 16A thereof. Hence neither the Bombay High Court judgment nor the notification under the old tariff or the advice or clarification issued by the Board with reference to the old

tariff and Heading 16A thereof were of any help to the assesseees.

22. I may also mention that the doctrine of contemporaneous exposition advocated by the learned Counsel also does not help the assesseees. The Notification No. 197/67 was issued under the old tariff. It was amended by Notification No. 78/86 on 10-2-1986 and even this amending notification had to be further amended as according to the Id. Counsel, it apparently contained a mistake which was rectified by a subsequent Notification No. 31/90, dated 20-3-1990. To my mind it appears that the notification apparently was required to be amended as it was realised that even after the amending Notification No. 78/86 it did not conform to and was not in consonance with the new tariff but, irrespective of the reasons for the amendment, the fact remains that the notification as it stood during the relevant period did not cover pipings and tubings which had been converted into component parts of machinery.

23. The Id. DR's arguments on the other hand have a lot of force. And if anything, it is the ratio of the Tribunal's order in the case of appellants themselves as reported in 1987 (31) E.L.T. 469 (T), to the extent of its finding on facts, which is still valid. The relevant portion reads as follows: "we have thus not an iota of doubt in our mind that these products known as 'Aprons' and 'Cots' are finished manufactured products, wholly distinct from tubings and pipings from which they are made." 24. It may be mentioned that this part of the finding was concurred with by the Bombay High Court and the Tribunal's order was modified only on the legal aspect of classification and appropriate heading.

25. The present Heading 40.09 also covers merely tubes, pipes and hoses and not specialised articles which were different and distinguishable from them, and designed for use as parts of machinery. Since they are admittedly parts of textile machinery, therefore, in the absence of any chapter note or section note excluding them from Chapter 84, they would fall under this chapter and would be classifiable under Heading 8448.00 which is specific for parts of textile machinery.

26. Further, in my opinion, when it is a question of deciding as to which of the two competing entries is more appropriate, we have to keep the principles of interpretation in view and decide in favour of one which is more specific and in

case the two appears to be almost equally appropriate it is the later one which has to be preferred.

27. In my opinion, since 40.09 covers only pipes and tubes and not articles made thereof for specialised use (except those specifically mentioned therein) whereas 8448.00 specifically covers parts of textile machinery and the items in question were admittedly parts of textile machinery, they were classifiable under the later heading.

28. I, therefore, accept the department's contentions and reject the assessee's appeal.

In view of 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: Whether the items in question are required to be classified under Heading 40.09 or 8448.00.

29. The facts involved in this difference of opinion matter have been set out in detail in the order proposed by the Honourable Judicial Member. I have carefully perused both the orders as also the various decisions referred to therein. I have also considered the submission made before me by the learned Senior Counsel, Shri Atul Setalvad who argued the case of M/s. Inarco, appellants in the first appeal who happen to be the respondents in the other appeal which has been filed by the department. No arguments were advanced on behalf of the department as the Departmental Representative who was to argue the case did not make his appearance until the hearing was over. No written submission has also been filed. As has come out in the orders proposed by my learned Brothers. Inarco wants the classification of the goods, cots and aprons to be under Tariff Heading 40.09 as Tubes and Pipes of vulcanised rubber other than hardened rubber. The impugned order in the first appeal was for classification of the said goods under Heading 84.48 as machinery parts. The latter view found favour with the learned Vice President. He has accordingly proposed dismissal of Inarco's appeal. The learned Judicial Member had, however, upheld the appellants' plea for classification of the goods under Heading 40.09, going by the Bombay High Court judgment in Precision Rubber Industries v. Collector of Central Excise [1990 (49) E.L.T. 170]

wherein it was held that cots and aprons were classifiable as Piping and Tubing of unhardened rubber under Tariff Item 16A as the Tariff stood at that time and not under Item 68 as applied by the department. In coming to the said decision, the High Court overruled a Tribunal decision reported in 1987 (31) E.L.T. 469 in the case of Inarco themselves classifying the same products under Tariff Item 68 of the Tariff then in force, treating the goods as component parts of textile machinery, wholly distinct from tubing and piping from which they are made. While the learned Member (Judicial) had gone by the said High Court judgment, the learned Vice President has held that judgment was rendered under the old Tariff and hence not applicable to the present problem as there has been a sea change because of the new Tariff with new Tariff Headings with different wording and chapter notes and section notes.

30. The Bombay High Court judgment in Precision Rubber Industries considered the classification of cots and aprons as between the Tariff descriptions Piping and Tubing of unhardened Vulcanised Rubber falling under Tariff Item 16A (3) on the one hand and "All other goods not elsewhere specified----". In that context, it was held that the description Piping and Tubing covered cots and aprons. The following observations of the High Court even while holding that these fell under the Tariff Item 16A (3) as Piping and Tubing are relevant in the present context.

"Para 13. For the reasons stated in the foregoing paragraphs we hold that Aprons and Cots manufactured by the Petitioners are components of textile, machinery and that they do not perform the function of conveying air, gas or fluids. These articles are the result of conversion of piping and tubing into smaller units known as aprons and cots which, as already stated, are the components of textile machinery. They, therefore, fall within the description of the articles exempted by Notification No. 197/67, dated 29-8-1967. These goods are, therefore, not excisable." 31. In the Paragraph 8 of the judgment, it had been observed that aprons and cots are admittedly parts, cut from piping and tubings and that it was common ground between the two sides that before the introduction of Tariff Item 68 aprons and cots were considered as pipings and tubings attracting Item 16A. It was then observed that the authorities had examined the use of aprons and cots and that is why the character of aprons and cots as components of textile

machinery was never in dispute. The show cause notice mentioned "it is observed that synthetic rubber aprons and cots are essentially textile machinery component parts. They are also distinctly known as such and are marketed as textile machinery components".

32. While adjudicating the case, the Collector took note of the ISI Specification for Synthetic Rubber Aprons for drafting system. The Collector held that as the standard was drafted by the Committee named as the "Textile Mill Accessories Committee", the aprons are accessories. "Drafting systems" are defined as the "part of spinning machinery". The Court observed that they were of the opinion that the publication of the ISI though authoritative does not suggest that aprons are not "components". The Collector had relied upon the ISI specifications and concluded that aprons and cots are accessories. The High Court held that the said publications do not suggest that aprons and cots are accessories. The function performed by them is of gripping the fabric and the aprons and cots are accepted as components of machinery. The finding of the High Court that the items in question are component parts of textile machinery and not mere accessories thereof as had been held by the departmental authorities in that case (Precision Rubber) as well as in the earlier Inarco case would support the finding reached by the learned Vice President in Para 27 of his order that sub heading 8448.00 which specifically covers parts of textile machinery would apply to the goods in question which are admittedly parts of textile machinery. The alternative Heading 40.07 would apply to tubes and pipes which are known as such and not as other identifiable items known by separate names. If a person wants to buy aprons and cots he has to ask for them by such names. He will not get them by asking for tubes and pipes. The argument developed in Para 21 of the order of the learned Vice President for holding that the Bombay High Court judgment in the Precision Rubber case is not applicable to the present cases is agreed to by me. The reasons set out in that order are valid.

33. It was contended on behalf of Inarco that the Supreme Court judgment in Bharat Forge & Press Industries -1990 (45) E.L.T. 525 would support the stand that aprons and cots are classifiable under Heading 40.09 as tubes and pipes. In the Bharat Forge case, pipe fittings like elbows, bends and reducers were treated

as Pipes and Tubes and not under residuary Item 68 of the Tariff. The Supreme Court was not dealing with the question whether such pipe fitting were classifiable under a more specific Tariff description than Pipes and Tubes. Hence the classification of cots and aprons under 8448 as parts of Textile machinery which they are, would not be governed by the Bharat Forge judgment. The HSN notes under the Heading 40.09 of HSN also do not support the case of Inarco that cots and aprons are only tubes and pipes. The relevant notes provide that Tubes, Pipes and Hoses remain classified under Heading 40.09 even if presented with fittings (for example, joints, elbows, flanges) provided that they retain the essential character of piping or tubing. Another note is. that the said Heading viz. 50.09 also covered tubing of vulcanised rubber, whether or not cut to length, but not cut to a length less than the greatest cross sectional measurement. The effect of these notes is only that the classification Tubes and Pipes will cover such articles which retain such essential character of piping and tubing. That is not the case with cots and aprons which are distinct articles being component parts of textile machinery. Hence, on merits, I agree with the view expressed by the learned Vice President.

34. An argument has been advanced that the department had given up their stand in favour of classification under that Heading, namely, 84.48 as the ground taken in their cross objection on Inarco's appeal was that the goods should be classified under Heading 4016.99. This cross objection was dismissed as barred by limitation. It was indicated by the Bench that it will be open to the department to take up that position during the hearing of the appeal. The Departmental Representative did not pursue that line during his argument but agitated for classification under Heading 8448.00 vide Paragraph 5(iii) of learned Judicial Member's order. Since this question was thus argued before the Bench, the decision upholding that classification cannot be said to be beyond the issue agitated in the appeal. A Privy Council decision reported in AIR 1923 PC 189 and the Supreme Court decision in *Tenner (India) Limited v. Collector of Central Excise, Madurai* -1995 (77) E.L.T. 8 were cited by the learned Senior Counsel in support of the plea that it was not open to the department to raise a ground in appeal proceedings which had been given up by them earlier. In other words since classification under Heading 84.48 had been abandoned by the department as they have sought classification of cots and aprons under Heading 40.16, the

former classification cannot be claimed now. I have examined this contention in the light of the decisions cited. I find that in AIR 1923 Privy Council 189, the appellant had elected to abandon certain issues stated by the trial Judge and never called any evidence in support of them and a formal order was made upon his petition disposing them all in that way. It was noted by their Lordships while disposing of the appeals that it was by the deliberate act himself that he closed the door to any investigation of the issues when they held that the additional issues could not be gone into at the appeal stage. In the other case 1995 (77) E.L.T. 8 which related to a Central Excise classification matter, the show cause notice proposed classification of the goods in question under a particular heading which was challenged in Writ Petition. The Department gave up the claim for such classification before the High-Court. It was held by the Supreme Court while disposing of the appeals that it was not open to the excise authorities to claim classification of the goods under the same Heading in subsequent proceedings. It was held in another case that a new classification was not claimable by the department at the Appellate stage. It was observed that the excise authorities at all times sought to assess belting under Tariff entries 3920.11 or 3920.12 and never under 59.08. It was held that it was in permissible for the Excise authorities to urge for the first time before that court that the belting must be classified under Tariff Heading 59.08. I am of the view that the present question before me is distinguishable on facts.

The contention of the department during the hearing of the appeal that cots and aprons are classifiable under Heading 84.48 is not a new claim made at the appeal stage only. The goods had in fact been classified under the heading earlier in the proceedings agitated in both the appeals. Thus in Inarco's appeal, both the Assistant Collector and Collector (Appeals) went by 84.48. In the other appeal also, which is by the department, while the Collector (Appeals) in passing the impugned order held in favour of 40.09, the earlier order of the Assistant Collector held the product to be under 84.48. Thus reverting to this classification in the arguments during the hearing of the appeals is not presentation of a new ground not at all raised earlier.

The decision in *Tenner India* (Supreme Court) related to a case where a classification originally decided by the department was given up by them when it was challenged by the other side. The learned Counsel for the authorities on instructions stated that a revised show cause notice would be issued and further action on the earlier show cause notice had become unnecessary. The statement was recorded by the High Court and the Writ Petition was dismissed as unnecessary. In view of this position it was held that it was not open to the department to revert to the original classification which they had given up at the Writ Petition stage. This decision was taken in the facts and circumstances of this case where, on the department giving up their original stand, the court decided the matter. After this the department could not revive their original stand. It would be a case of estoppel. In the second appeal relating to the same parties, the authorities at all times sought to assess the belting under Tariff entries 3920.11 or 3920.12 and never under 59.08. It was held that it was impermissible for the Excise authorities to urge for first time in the appeal before them (Supreme Court) that the classification would be under 59.08. Thus the facts in both the appeals of *Tenner (India) Limited* are distinguishable from the present appeals. In the present case no decision was taken by any authority on the basis of the department's not pursuing the question of classification under 84.48. Such an approach was only a temporary phase and no decision was taken on such a position which has been sought to be reversed by department reverting to that classification.

35. The Privy Council decision relates to a case where the appellant had given up certain grounds and got a decision from the lower court.

As upon his conduct in giving up certain issues no evidence was called in their support and by his deliberate act, the appellant had closed the door to any [investigation] of such issues, it was held by the Privy Council that the additional issues could not be gone into at that stage. Such is not the case here, as already observed by me as no decision was taken by the authorities in view of the department not raising the question of classification under Tariff Item 84.48 for cots and aprons in their appeal. In fact the classification claimed in the department's Appeal 40.16 was at variance with their earlier stand and it was just as well that this was given up at the argument stage when the Departmental

Representative fell back on the old faithful 84.48.

This classification has been found to be acceptable by the learned Vice President with which I am in agreement.

36. Thus the decision of the learned Vice President on the classification question having been agreed to by me, the appeal papers may be returned to the regular Bench for passing appropriate orders on both the appeals.

In terms of the majority order, the assessee's appeal is rejected and Revenue's appeal is allowed.

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