

(2005) 02 SC CK 0059

In the Supreme Court Of India

Case No : Civil Appeal No. 6559 of 1999

D.C.L. Polyester Ltd., Nagpur

APPELLANT

Vs

Collector of Central Excise and Customs, Nagpur

RESPONDENT

Date of Decision : 22-02-2005

Acts Referred:

Central Excise Rules, 1944 — Rule 3, 49, 52A, 9
Central Excises and Salt Act, 1944 — Section 35L

Citation : (2005) 99 ECC 137 : (2005) 181 ELT 190 : (2005) 2 JT 486 : (2005) 3 SCC 455 : (2005) 2 SCR 279

Hon'ble Judges : S. H. Kapadia, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : Jaideep Gupta, Sanjay Grover and Rajesh Kumar, for the Appellant; R. Venkataramani K. Swami, Ashok Panigrahi, P. Parmeswaran and B.K. Prasad, for the Respondent

Final Decision : Dismissed

Judgement

S.H. Kapadia, J.—The issue which arises for determination in this civil appeal filed by the assessee u/s 35L(b) of Central Excise Act 1944 (hereinafter referred to for the sake of brevity as "the 1944 Act") is - whether the product termed by the assessee as "sweeping wastes" is classifiable under chapter heading 39.15 (waste) or whether it is classifiable under chapter heading 39.07 (Primary Form of Plastic) of Central Excise Tariff Act, 1985 (hereinafter referred to for the sake of brevity as "the 1985 Act") as contended by the department.

2. DCL Polyester Ltd. (hereinafter referred to for the sake of brevity as "the assessee") is the manufacturer of partially oriented yarn of polyester and polyester chips by using purified acid and mono ethylene glycol (raw-materials).

3. According to the assessee, manufacture of yarn consisted of different stages; that after the granules emerged from the granulators they were required to be bagged (which was one of the stages in the manufacture); and that in the process of bagging some "chips" fell off and were collected as "sweeping wastes".

4. The short point which arises for determination, therefore, is - whether the spilled chips termed as "sweeping wastes" by the assessee was classifiable as "waste" under chapter heading 39.15, as urged by the assessee.

5. On 1.9.1994, show-cause notice was issued by the department in which it was alleged that polyester chips emerged from the granulators after they were completely produced and, therefore, on account of their spill over, they cannot be treated as a manufacturing waste. According to the show-cause notice, such sweeping/spillage of "chips" did not make them "waste" classifiable under heading 39.15. By the said show-cause notice, the department invoking the extended period of limitation called upon the assessee to pay duty amounting to Rs. 3,98,302.29 for clearance of polyester chips as "wastes" during the period 25.7.1991 to 27.2.1994 without cover of gate passes and in contravention of Rules 9, 49, 52A and 276 of the Central Excise Rules, 1944, with intention to evade payment of duty.

6. In reply, the assessee submitted that during the manufacture of polyester filament yarn, "wastes" of different types were generated; that after granulation, the chips pass through a vibrating screen; that during the screening, the standard chips are collected in the silos, whereas the unusable chips waste is separated; and that standard chips collected in the silos are transferred to the bagging silos from where they are bagged. According to the assessee, "bagging" is a part of manufacturing process and in that process, waste is generated which is unusable. This waste is termed by the assessee as "sweeping wastes" and, therefore, it is classifiable under sub-heading 3915.90.

7. By order dated 14.2.1995, the Collector (hereinafter referred to for the sake of brevity as "the Adjudicating Authority"), after considering the evidence on record came to the conclusion that "polyester chips" got segregated after emerging from the granulators as "chips" and, therefore, such spillage was not classifiable as "waste". According to the Adjudicating Authority, any contamination of the "chips" after their manufacture will not change the nature of the product. In this connection, reliance was placed on the statement of Shri Rastogi, Manager (Polymerization) at M/s DCL Polyester Ltd. and Shri Lilapat, Sr. manager working in M/s DCL Polyester Ltd., Mouda. The Adjudicating Authority further rejected the claim of the assessee for benefit of "nil" rate of duty under the notification No. 14/92-CE dated 1.3.1992 on account of absence of evidence showing utilization of "chips" in the manufacture of polyester staple fibre. The demand in the show-cause notice was consequently confirmed.

8. Aggrieved by the said decision, the assessee carried the matter in appeal to the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to for the sake of brevity as "the tribunal").

9 By impugned judgment and order dated 24.8.1999, the tribunal upheld the order passed by the Adjudicating Authority confirming the demand raised by the department. However, on the point of the benefit claimed by the assessee under

notification No. 14/92-CE dated 1.3.1992, the tribunal remitted the matter to the Commissioner, Central Excise, to decide -whether the assessee has fulfilled all the conditions stipulated in the said notification. Subject to above, the appeal of the assessee was dismissed by the tribunal. Hence, this civil appeal by the assessee.

10. Shri Jaideep Gupta, learned senior advocate on behalf of the assessee submitted that "sweeping wastes" took place during the process of manufacture and it did not emerge at the end of the process; that the activity of feeding raw-material into hoppers is a part of the manufacturing activity and the spillage and rejection of raw-material at that stage resulted in some waste which cannot be classified under sub-heading 3907.60 as "polyethylene terephthalate". He submitted that classification is indicated by the manner in which the goods are known and dealt with in the trade. Learned senior advocate invoked the test of common parlance. He relied upon the statement of buyers who purchased from the assessee the said "chip waste". He submitted that the end-use by the ultimate buyer was not relevant as waste was capable of use. Learned senior advocate also placed reliance on the explanatory notes to Harmonized System of Nomenclature (for short "HSN") under entry 39.15 and submitted that the word "may" in the entry indicates that the illustrations given therein are not exhaustive. It was urged that the "chip waste" was not usable for manufacture of yarn and was not being used as such by the ultimate buyers. It was further submitted that neither the show-cause notice nor the orders passed by the authorities below had invoked chapter note 7 of chapter 39 and in the absence of such invocation, it was not open to the department to rely upon the said chapter note. Alternatively, it was submitted that the chips were made from Purified Terephthalic Acid (PTA) and Mono Ethylene Glycol (MEG) and as such they cannot be classified as "thermoplastic material".

11. On the question of limitation, learned senior advocate for the assessee submitted that in any event the department was not entitled to invoke extended period of limitation as the assessee had filed classification lists for chip waste as also the price list on 20.11.1991 enclosing therewith purchase orders of the buyers of "polyester chips waste". According to the learned counsel, the classification list in fact had declared chip waste as liable to duty @ 40% ad valorem. However, the classification list was rejected by the department vide letter dated 25.11.1991 stating that chip waste stood approved at "nil" rate as per the earlier classification list dated 30.8.1991 filed by the assessee.. In the circumstances, it was urged that the department was not entitled to invoke the extended period of limitation. On the above facts, learned counsel submitted that the assessee had disclosed all the relevant facts in their classification list and the price list; that the classification lists filed in the past were accepted without any investigation, visits or tests being conducted and, therefore, the assessee was of the view that the "chips waste" was classifiable under sub-heading 3915.90. Therefore, it was urged that the assessee was not guilty of wilful suppression as alleged and, therefore, the department was not entitled to invoke the extended

period of limitation.

12. Chapter 39 falls in Section VII of the 1985 Act. Section VII deals with plastics and articles thereof. In this matter, on the issue of classification, we are concerned with chapter headings 39.07 and 39.15, which are quoted herein below:

Heading No. Sub-Heading No. Description of Goods Rate of Duty

1 2 3 4

I. PRIMARY FORMS

30.07

Polyacetals, other polyethers and epoxies resins, In primary forms, polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms.

3907.10 Polyacetals 60%

3907.20 Other polyether 60%

3907.30 epoxies resins 60%

3907.40 Polycarbonates 60%

3907.50 Alkyd resins including maleic resins and fumaric resins 60%

3907.60 Polyethylene terephthalate 60%

3907.70 Diallylphthalate resins 60%

3907.80 Polybutylene terephthalate - other polyesters: 60%

3907.91 Unsaturated 60%

3907.99 Other 60%

II. WASTE, PARINGS AND SCRAP; SEMI-MANUFACTURES; ARTICLES.

39.15

Waste, parings and scrap, of plastics.

3915.10 391520 Of polymers of ethylene Of polymers of styrene 60% 60%

3915.30 Of polymers of vinyl chloride 60%

3915.90 Of other plastics 60% plus Rs. 40 per kilogram

13. We also quote hereinbelow chapter notes 1, 6 and 7 to Chapter 39 which deals with plastics and articles thereof:

"1. Throughout this Schedule, the expression plastics means those materials of heading Nos. 39.01 to 39.14 which are or have been capable, either at the

moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Throughout this Schedule any reference to 'plastics' also includes vulcanized fibre. The expression, however, does not apply to materials regarded as textile materials of Section XI.

6. (a) In heading Nos. 39.01 to 39.14, the expression "primary forms" applies only to the following forms:-

(i) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;

(ii) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.

(b) Notwithstanding anything contained in Note 3 to this Chapter, heading Nos. 39.01 to 39.14 shall also include primary forms obtained from conversion of another primary form, falling under the same heading, and such conversion shall amount to "manufacture".

7. Heading No. 39.15 does not apply to waste, parings and scrap of a single thermoplastic material, transformed into primary forms (heading Nos. 39.01 to 39.14).

14. Since Central Excise Tariff Act 1985 is based on HSN read with explanatory notes thereto, we also quote hereinbelow extracts of chapter notes 1, 6 and 7 from HSN as well as explanatory notes thereto:

"1. Throughout the Nomenclature the expression "plastics" means those materials of heading Nos. 39.01 to 39.14 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Throughout the Nomenclature any reference to "plastics" also includes vulcanized fibre. The expression, however, does not apply to materials regarded as textile materials of Section XI.

6. In heading Nos. 39.01 to 39.14, the expression "primary forms" applies only to the following forms:-

(a) Liquids and pastes including dispersions (emulsions and suspensions) and solutions;

(b) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.

7. Heading No. 39.15 does not apply to waste, parings and scrap of a single thermoplastic material transformed into primary forms (heading Nos. 39.01 to 39.14).

EXPLANATORY NOTES

Plastics:

The expression "plastics" is defined in Note 1 to this Chapter as meaning those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence. Throughout the Nomenclature, the expression "plastics" also includes vulcanized fibre.

The expression, however, does not apply to materials regarded as textile materials of Section

XI. It should be noted that this definition of "plastics" is applicable through the Nomenclature.

The term "polymerization" is used in this definition in a wide sense and denotes any method of forming a polymer, including addition polymerization, rearrangement polymerization (polyaddition) and condensation polymerization (polycondensation).

If material of this Chapter can be softened repeatedly by heat treatment and shaped into articles, e.g., by moulding, and then hardened by cooling, it is termed "thermoplastic". If it can be or has already been transformed into an infusible product by chemical or physical means (e.g., by heat) it is termed "thermosetting".

Plastics have almost unlimited applications but many articles made therefrom are classified elsewhere (see Note 2 to this Chapter).

Primary forms:

Headings 39.01 to 39.14 cover goods in primary forms only. The expression "primary forms" is defined in Note 6 to this Chapter. It applies only to the following forms:

(1) liquids and pastes. These may be the basic polymer which requires "currying" by heat or otherwise to form the finished material, or may be dispersions (emulsions and suspensions) or solutions of the uncured or partly cured materials. In addition to substances necessary for "currying" (such as hardeners (cross-linking agents) or other co-reactants and accelerators), these liquids or pastes may contain other materials such as plasticizers, stabilizers, fillers and colouring matter, chiefly intended to give the finished products special physical properties or other desirable characteristics. The liquids and pastes are used for

casting, extrusion, etc., and also as impregnating materials, surface coatings, bases for varnishes and paints, or as glues, thickeners, flocculants, etc.

When as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere in the Nomenclature, they are excluded from Chapter 39; this is, for example, the case with:

(a) Prepared glues - see exclusion (b) at the end of this General Explanatory Note.

(b) Prepared additives for mineral oils (heading 38.11)

It should also be noted that solutions (other than collodions) consisting of any of the products specified in headings 39.01 to 39.13 in volatile organic solvents, when the weight of the solvent exceed 50% of the weight of the solution, are excluded from this Chapter and fall in heading 32.08. (see Note 2(d) to this Chapter).

Liquid polymers without solvent, clearly identifiable as being intended for use solely as varnishes, (in which the formation of the film depends on heat, atmospheric humidity or oxygen and not on the addition of a hardener), are classified in heading 32.10. When not so identifiable, they fall in this Chapter.

(2) Powder, granules and flakes. In these forms they are employed for moulding, for the manufacture of varnishes, glues, etc. and as thickeners, flocculants, etc. They may consist of the unplasticized materials which become plastic in the moulding and curing process, or of materials to which plasticizers have been added; these materials may incorporate fillers (e.g., wood flour, cellulose, textile fibres, mineral substances, starch) colouring matter or other substances cited in Item

(1) above. Powders may be used, for example, to coat objects by the application of heat with or without static electricity.

(3) Blocks of irregular shape, lumps and similar bulk forms, whether or not containing fillers, colouring matter or other substances cited in Item (1) above. Blocks of regular geometric shape are not primary forms and are covered by the expression "plates, sheets, film, foil and strip" (see Note 10 to this Chapter).

Waste, parings and scrap of a single thermoplastic material transformed into primary forms are classified in headings 39.01 to 39.14 (according to the material) and not in heading 39.15 (see Note 7 to this Chapter)."

15. Scope of an entry in the tariff is a matter of law. However, whether a product comes within an entry is a mixed question of law and fact.

16. In the case of Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, , this Court held that Section 3 levies duty on all excisable goods mentioned in the schedule provided they are produced and manufactured.

Therefore, where the goods are specified in the schedule, they are excisable goods but whether such goods can be subjected to duty would depend on whether they are produced or manufactured by the assessee. The expression "produced or manufactured" has been explained by this Court to mean that the goods so produced must satisfy the test of marketability. Consequently, it is always open to an assessee to prove that even though the goods were excisable goods, they could not be subjected to duty as they were not produced or manufactured by it or if they had been produced or manufactured, they were not marketed or capable of being marketed.

17. Similarly, in the case of Union of India and another Vs. Delhi Cloth and General Mills Co. Ltd. and another, , this Court held that the commodity which is sought to be made liable to duty must be marketable in the condition in which it emerges and not a commodity that may require further processing or packing to be made marketable.

18. In the case of Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd., , this Court held on interpretation of Section 3 that the duty of excise is on the manufacture of goods and for an article to be "goods", they must be known in the market as such or they must be capable of being sold in the market as goods. Actual sale was not necessary. User in the captive consumption was not determinative of that article being capable of being sold in the market or known in the market as goods. Even transient items of articles can be "goods", provided they were known in the market as distinct and separate articles having separate uses during the short life span. Thus, the goods with even unstable character can be marketable, if during the short period, they were capable of being known or sold in the market.

19. In the case of Chemicals and Fibres of India Ltd. Vs. Union of India (UOI), , one of the questions which arose for determination was question of interpretation of tariff items. It was held by the Bombay High Court that the rule that the words should be construed in a popular sense is not applicable in all cases. The said rule is a qualified rule. Where the nature of the product in question is highly technical and scientific in character, the words used in the item will have to be given technical or scientific meaning. The different chemical processes like condensation, polymerization is not capable of being construed in a popular sense. Indeed, it can be construed only in a scientific and technical sense. Incidentally, it may be mentioned that in Chemicals and Fibres India Limited (supra), an affidavit was filed on behalf of the assessee by one Dr. Patel who inter alia stated that polyester chips were capable of being used for manufacture of fibre or yarn by mills other than the assessee in that case. This point is important as it was contended by the assessee that the chips in question were not usable in the manufacture of yam. It was held in the said judgment that plastics and plasticizers were capable of various end-users. However, this observation will not preclude the assessee from leading appropriate evidence on the point of "nil" rate of duty under notification dated 1.3.1992 before the

Commissioner, Central Excise, to which authority, the matter has been remitted as stated above. Lastly, it may be pointed out that in the present case, we are concerned with intricate technical process of manufacture of polyester chips and partially oriented polyester yarn. The authorities below on examination of evidence have concluded that the spillage of chips after emerging from the granulators were goods by themselves and they do not cease to be polyester chips by reason of dust contamination. In the present case, at the stage of spillage, the said "chips" are not waste nor can they be said to be waste owing to the manufacturing process. This finding is pure technical finding and, therefore, no interference is called for in this Civil Appeal.

20. In the case of Collector of Central Excises Vs. Nuchem Industries Pvt. Ltd., , it has been held by this Court that where technical processes are concerned, the findings of the tribunal are, ordinarily, not to be disturbed.

21. In the present case, a categorical finding is recorded by the Adjudicating Authority confirmed by the tribunal, that polyester chip as a complete product emerges from the granulators and during the bagging stage, some of the chips spill over which cannot be termed as a "waste". We see no reason to disturb the said finding which is based on technical processes. It is also important to note that manufacture of partially oriented yarn of polyester consists of various processes. The manufacture of such yarn goes through various stages. Under the 1944 Rules, whenever a stage is reached, the assessee is required to make entry in RG register. It is not in dispute that when chips emerged from the granulators, entries were made in the RG register. This circumstance indicates that the chips were independent products which were required to be bagged and in that they spilled over as "chips". In the entire case, there is no evidence that such "chips" ceased to be "chips". On the contrary, the invoices produced by the assessee show that the said "chips" were bought and sold as polyester chips in the market. Lastly, impurity in the chips is a relevant circumstance for valuation and not for classification, unless the contamination is so heavy that the nature of the product ceases to be polyester chips. In the present case, there is no evidence that alleged unusable chips had ceased to be chips.

22. In the case of O.K. Play (India) Ltd. Vs. Commissioner of Central Excise, Delhi-III, Gurgaon, , this Court has observed that the scheme of Central Excise Tariff is based on HSN and the explanatory notes thereto. Therefore, HSN along with the explanatory notes provide a safe guide for interpretation of an entry. Further, equal importance is required to be given to the Statutory Rules of Interpretation given to the Excise Tariff. Under Rule 3(a), it is provided that the heading which provides a specific description shall be preferred to a heading having general description. In the present case, it may be noted that headings 39.07 and 39.15 both fall in chapter 39 and looking to the product emerging from the granulators, we are satisfied that polyester chips comes within specific description of plastics and articles thereof.

23. Analyzing the provisions of chapter 39 read with notes thereto, it is clear that

chapter 39 is in two parts, namely, primary forms vis-a-vis wastes, parings and scraps. Headings 39.01 to 39.14 refer to plastics in primary forms whereas heading 39.15 refers to wastes, parings and scraps of plastics. Moreover, chapter note 6(a) states that the expression "primary form" in headings 39.01 to 39.14 inter alia applies to blocks of irregular shapes, lumps, powders (including moulding powders), granules, flakes etc. Further, note 6(b) states that heading Nos. 39.01 to 39.14 shall include primary forms obtained from conversion and shall amount to "manufacture". Note 7 states that heading No. 39.15 does not apply to wastes, parings and scrap of thermoplastic material transformed into primary forms (referred to under heading Nos. 39.01 to 39.14), To the same effect is the explanatory note to HSN.

24. In the case of Chemicals and Fibres India Limited (supra), it has been held by the Bombay High Court that polymer chip is a saturated linear polyester. Relying on the Encyclopedia of Polymer Science and Technology, Vol. 11, page 35, it was held that polyester is a high polymer, which is a compound formed by the reaction of molecules and that it was formed by the process of polycondensation. It was further observed that polyesters were known by several trade names, like, polyethylene terephthalate (PET), terylene, deacon etc. In the said judgment it was further held that the distinction between the plastics and resin was arbitrary since synthetic material can be called "resin" as well as "plastic". Synthetic resin was polymer itself whereas plastic was polymer plus additives, such as, filler, colorants, plasticizers. In the circumstances, chapter note 7 to chapter 39 which excludes "waste" of single thermoplastic material from entry 39.15 is applicable to the facts of the present case. In the circumstances, we do not find any infirmity in the judgment and order of the tribunal on the question of classification.

25. Now coming to the question of limitation, it is urged on behalf of the assessee that show-cause notice dated 1.9.1994 invoking the extended period of limitation under the proviso to Section 11A(1) was erroneous as the assessee had filed their classification list and price-list on 20.11.1991 [including the purchase orders of the buyers]; that no inspection, audit or investigation was carried out before approving the classification list and the price-list and, therefore, the department was not entitled to invoke the extended period of limitation.

26. We do not find any merit in these arguments. Firstly, no such arguments were advanced before the tribunal. The only argument advanced before the tribunal was on excisability and nil rate of duty vide notification dated 1.3.1992. Secondly, in the reply to the show-cause notice, the assessee submitted that wastes had emerged at various stages. However, in the classification list, they have not spelt out the various stages at which the so called "wastes" had emerged. In the present case, the department had alleged misdeclaration of polyester chips as wastes. According to the assessee, chips, which spilled over during bagging were unusable and, therefore, "waste". However, no such details

have been mentioned in the classification list particularly when it urged that "wastes" had emerged at different stages of production. In the circumstances, we are not inclined to interfere with the impugned judgment of the tribunal.

27. In the result, civil appeal is dismissed, with no order as to costs.