(1987) 01 CAL CK 0005

In the Calcutta High Court

Case No : Matter No''s. 92 of 1982 and 866/83

National Insulated Cable Co. Ltd. APPELLANT

Vs

Collector of Customs and Others RESPONDENT

Date of Decision : 16-01-1987

Acts Referred:

Customs Act, 1962 — Section 17
Customs Tariff Rules, 1975 — Rule 4

Citation : (1987) 12 ECC 407 : (1987) 28 ELT 248

Hon'ble Judges : Sudhir Ranjan Roy, J

Bench : Single Bench

Advocate : Roy Choudhury, for the Appellant;Mitra, for the Respondent

Judgement

Sudhir Ranjan Roy, J.—The only question which invites this Court''s attention in these two Rules which are taken up for analogous hearing-and disposal is whether Hypalon-40, a chemical compound which is used in the manufacturing of electric cables, is Synthetic Rubber or Synthetic Resin for its proper classification under the appropriate heading of the Customs Tariff Act, 1975 for the purpose of the assessment of Customs duty.

2. The petitioner No. 1 in both the Rules is the National Insulated Cable Company of India Limited. The Company has its factory at Shyam-nagar, 24-Parganas, West Bengal arid its registered office is at Nicco House, Hare Street, Calcutta-1. The petitioner No. 1 is carrying on business of manufacturing various types of electrical cables and wires and for the said purpose has to import amongst other Synthetic Rubber Sold under the trade name of Hypalon-40, which is used for insulating wires and cables. The said Hypalon is manufactured by only one concern in the world viz. DU PONT DE NEMOURS INTERNATIONAL S.A. in the United States of America and are sold by them throughout the world as ''Synthetic Rubber'' and according to the petitioners Hypalon-40 is also known in the market and among commercial people the world over including India, as a variety of Synthetic Rubber.

3. The petitioners imported certain quantities of Hypalon-40, but the Customs authorities insisted that the material so imported, was Synthetic Resin and not Synthetic Rubber as claimed by the petitioners and demanded Customs duty at higher rates under Chapter 39 of the Customs Tariff Act, 1975 instead of assessing the same- as Synthetic Rubber under Chapter 40 of the said Act. The petitioners, however, got the disputed consignments released from the Customs authorities under two different interim orders passed by this Court.

4. In the instant Rules, the petitioners have asked for a declaration that the bags of Hypalon-40 imported by them are assessable as Synthetic Rubber under Item No. 40.01/04 of the customs Tariff Act, 1975 and also for a writ in the nature of Mandamus directing the respondents to assess the said bags of Hypalon-40 as Synthetic Rubber under the said Item.

5. The respondents contested both the matters by filing two different affidavits-in-opposition. According to the respondents, Hypalon-40 is in fact Synthetic Resin and not a form of Synthetic Rubber. The said Hypalon-40, according to the respondents, has been tested in the Customs House Chemical Test Laboratory and it has been found that it is in the form of white irregular lumps; that it is "essentially composed of saturated synthetic organic Polymer and that it does not conform to the definition of "Synthetic Rubber as given in Note 4 of the Notes under Chapter 40 of the First th Schedule to the Customs Tariff Act, 1975. Not only that, in the Tariff Advice No. 17 of 1974 Hypalon has been suggested to be treated as Plastic material and in certain Exemption Notifications issued by the Customs authorities Hypalon has been described as goods falling under Chapter 39. It has been also described as Synthetic Resin in the Compendium of Classification Opinions issued by the Directorate of Statistics and Intelligence (Central Excise and Customs), New Delhi as Synthetic Resin covered by Chapter 39 of the Customs Tariff Act, 1975.

6. Thus, according to the respondents, Hypalon-40 which are the subject-matters of the two Rules should be assessed as Synthetic Resin under Chapter 39 of the Tariff Act and not under Chapter 40 as Synthetic Rubber as claimed by the petitioners.

7. Now, in terms of Section 17 of the Customs Act, 1962, assessment of duty is required to be made after examination and testing of the imported commodity. As a matter of fact, Hypalon-40, as imported by the petitioners in the instant Rules, was tested chemically by the Customs authorities in their own laboratory and the petitioners also got the same tested from the Indian Institute of Technology at Kharagpur.

8. The result of testing of the material by the Customs authorities is as follows:-.

Cus T.O. No. 1 of 82-83 dt. 2.4.82 Sub:- Assessment of Hypalon 40-Reg.

Hypalon is a trade name for a family of elastomers which are chlorosulphonated polyethylene manufactured by T.I. Dupont Co. The percentage of chlorine in this polymers ranges from 29 to 40% and the sulphur content 1 to 1.5%. Generally speaking there were 18 chlorine atoms and 1 sulphur atom for each 100 carbon atoms in the polymer chain which is typical of these products. There are 4 commercial types of Hypalon viz. 20,30,40 and 45. They are stated to be fully saturated and are cured by the reaction of chlorine and sulphonyl chloride groups with poly basic metal oxides. Curing involved the Hydrolysis of the sulphonyl chloride groups to the corresponding sulphonic acid which then reacts with the metal exide. A small amount of water is essential for curing. Since Hypalon is fully saturated it does not satisfy the definition of syn. rubber as laid down at note 4(a) of Chapter 40 of CTA ''75. Hypalon is as such saturated and that instauration results during curing process. For classification of Hypalon the goods as they are is to be taken into consideration. In view of the above, Hypalon cannot be considered for classification and assessment under chapter 40 of CTA''75.

Therefore, Hypalon is appropriately classifiable under Ch. 39 of CTA''75. In this connection attention is also invited to the classification of Hypalon (R.T.M.). (Chlorosulphonated polyethylene) under heading 39.02 in the Compendium of Classification Opinions, published by Directorate of Statistics and Intelligence, New Delhi.

Sd/- N. Rajagopalan Dy. C.C.

9. The result of testing by the Indian Institute of Technology at Kharagpur is as hereunder:-

Rubber Technology Centre Indian Institute of Technology Kharagpur -721 302 Report of Sulfur Vulcanisation of Hypalon-40

In order to study the sulfur vulcanisation of Hypalon-40, the mixes as shown in Table 1, were taken. Mixing was done in a conventional rubber mixing mill (15 cm x 33 cm). Hypalon could be processed like conventional rubbers (natural rubber etc.). Optimum cure time was determined with the help of Monsento rheornetre R-100 nt 150?C. Table II shows the results rheometric studies. Figure 1 shows the rheographs. Out of the 5 mixes studied (A to E), only two mixes (D & E) could be cured. Therefore, details have been reported only for Mixes D & E. It may be noted that Mix D and Mix E contain sulfur vulcanizing system in presence and in absence of metal, oxide (Magnesium Oxide) respectively.

Vulcanisation was done at 150 C at the respective optimum cure times and physical proportion of the vulcanizatoz were performed as per ASTM methods D V12-51T and D 624-54 respectively. Results are summarised in Table III. A comparison of crosslink density has been made from the reciprocal swelling values. 1/Q where QQ in defined as the grams of solvent per gram of hydrocarbon (C.R. Parks and R.J. Brown, rubber Chm. Technical, 49,233(1976). The swelling was done in chloroform for 48 hours at 35 C. The vulcanizates were treated with propase-2 thief (B. Saville and A.A. Wabon, Rubber Chm. Technical.'' 40 100 (1967) in benzone. The vulcanisate (Mix D) form a gelly after treatment and the vulcanisate (Mix E) dissolved completely. It is known that prepase-2-thiol can clear only sulfidic linkage, whom is formed during sulfur valcanization. So dissolution of sulfur cured vulcanizates indicates the formation of only polysulfide linkages

Sd/- D.K.Chatterjee. 10th July, 1986

Table III shows poor tear and tenails strength values of the gum (without filler) vulcanisation. This behaviors is like other synthetic rubbers like styrene-but adiene rubber (SBR).

Vulcanisation (in absence of fillers) could be extended to about four times its original length. It was also found that when extended to twice the original length and then released, within five minutes, the vulcanisation return to its original length.

The results can be summarised as :

1. Hypalon is a polymer (a new synthetic rubber) like EPDM and buty l(IIB) in respect to functionality and like NBR and CR in oil resistance.

2. Hypalon can be vulcanised by sultur system arid thus can be irreversibly transformed into an elastic and non-thermoplastic substance.

Sd/- S.K. De, 1.6.82 for Head. Rubber Technology Centre. Head of the Rubber Technology Centre. Indian Institute of Technology Evaluation done by: Kharagpur-271302 Sd/-S.K. Chakraborty 1.6.82.

In this connection it may be useful to know what the expression ''Synthetic Rubber is to be taken to apply for under Note 4 to Chapter 40 of the Customs Tariff Act, 1975 and it is as follows :-

4. "In this Chapter, the expression "synthetic rubber" is to be taken to apply for :

(a) unsaturated synthetic substances which can be irreversibly transformed into non-thermoplastic substances by vulcanisation with sulphur and which, when so vulcanised as may be (without the addition of any substances such as plasticisers, fillers or reinforcing agents not necessary for the cross-linking) can produce substances which, at a temperature between 18? and 29? will not break on being extended to three times their original length and will return after being extended to twice their original length, within a period of five minutes, to a length not greater than one and a half times their original length."

10. From the report of testing made by the Customs authorities it appears that Hypalan-40 was tested to find out whether it was Synthetic Rubber as claimed by the petitioners and since it was found that it was not so, it was concluded that Hypalon-40 is Synthetic Resin. The report does not show that Hypalon-40 was specifically tested to find out whether it responded to the composition of Synthetic Resin as specified in Chapter 39 of the Customs Tariff Act. It was, accordingly, rightly contended by Mr. Roy Choudhury, the learned Counsel

representing the petitioners, that simply on the basis of the finding that Hypalon-40 was not Synthetic Rubber, it could not automatically be concluded that it was Synthetic Resin, unless the material was specifically tested to find Out whether it was so within the meaning of Chapter 39 of the Customs Tariff Act.

11. Now, before I refer to the report of testing made by the Indian Institute of Technology at Kharagpur on which reliance was placed by the petitioners, it may be observed that according to the report of testing by the Customs authorities Hypalon-40 is a fully saturated substance, whereas Note 4 to Chapter 40 of the Tariff Act shows that Synthetic Rubber is ''unsaturated Synthetic substance.'' Significantly, the report of the IIT appears to be silent on this point. However, Note 4 to Chapter 40 indicates that Synthetic Rubber can be "irreversibly transformed into non-thermoplastic substances by vulcanisation with sulphur". The report of the IIT, as it appears, is based on sulphur vulconisation of Hypalon-40 and on such testing it was found that "Hypalon can be vulcanised by sulphur and thus can be irreversibly transformed into an elastic and non-thermoplastic substance." The report further shows that on valcanization the matter could be extended to about 4 times its original length and that when extended to twice the original length and then released the matter returned to its original length, which specifically correspond with the qualities of ''Syndetic Rubber'' as specified in Note 4 to Chapter 40.

12. Thus, though Hypalon-40 does not correspond to the definition of ''Synthetic Rubber'' as given in Note 4 to Chapter 40 to the extent that it is not an unsaturated substances, it materially and substantially corresponds with the other qualities as specified in Note 4. On testing it was found by the Rubber Technology Centre of the IIT that "Hypalon is a Polymer (a new Synthetic Rubber)....

13. It, therefore, appears that though according to the report of testing by the Customs authorities Hypalon is not Synthetic Rubber, it was not specifically tested to find out whether it was Synthetic Resin covered by Chapter 39 of the Tariff Act. The report concludes that Hypalon is Synthetic Resin since it is not Synthetic Rubber. Since a substance which is not Synthetic Rubber cannot automatically be Synthetic Resin unless found to be so, the report of testing made by the Customs authorities cannot be said to be reliable to this extent and from the said report it cannot be safely concluded that Hypalon is Synthetic Resin.

14. On the other hand, the report of the IIT, on which reliance was placed by the petitioners, at least shows that Hypalon 40 on testing, responded to some of the basic qualities of Synthetic Rubber as given in Note 4 to Chapter 40 of the Customs Tariff Act, 1975, though it is not an unsaturated substance as it should be under the said note.

15. The above being the position, none of the two testing reports as referred to above, can be said to be conclusive regarding the actual character and composition of Hypalon, namely, whether it is Synthetic Rubber or Synthetic

Resin.

16. Since situations like this are likely to occur in some cases, the Rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 provides a remedy and Rule 4 of such Rules provide that "goods not falling within any Heading of the Schedule shall be classified under the Heading appropriate to the goods to which they are most akin."

17. Now, since in the instant Rules Hypalon 40 as already seen, was not specifically tested to find out whether it was Synthetic Resin within the meaning of Chapter 39 of the Tariff Act and since the testing carried out by the IIT, Kharagpur shows that Hypalon 40 is ''most akin'' to Synthetic Rubber, it would be fair and proper, in my view, to place it under the Heading of Synthetic Rubber under Chapter 40 of the Tariff Act. Incidentally, the manufacturers of the product are also describing it as Synthetic Rubber. It is true that the report of testing made by the Customs authorities show that Hypalon 40 is not Synthetic Rubber, but there is nothing to indicate that specific testings were carried out for the purpose, as was done by the IIT, which is a highly qualified and competent body.

18. Since Section 17 of the Customs Act, 1962 requires that assessment of duty should be made after testing of the goods, it is, in my view, immaterial whether in the Compendium of Classification Opinions as relied upon by the respondents, Hypalon-40 has been described as Synthetic Resin falling under Chapter 39 of the Tariff Act. This is because, the exact nature of the ''chemical commodity could be determined only by proper scientific testing and it can never rest on mere opinion of any authority howsoever high it may be.

19. In The Collector of Customs, Madras Vs. K. Ganga Setty, , it was held by the Supreme Court that if there were two constructions which an entry could reasonably bear, and one of them which was in favour of the revenue was adopted, the writ Court has no Jurisdiction to interfere merely because the other. interpretation favourable to the subject appeals to the court as the better one to adopt.

20. But here the case is different. The question which this Court was called upon to decide in the instant Rules was whether Hypalon-40 is Synthetic Rubber or Synthetic Resin and since the report of testing by the Customs authorities falls short of the requirement the other report, which is more scientific and more reliable, has been accepted since Hypalon 40 is most akin to Synthetic Rubber though it does not fulfil all the requirements of Note 4 to Chapter 40 of the Tariff Act.

20. Mr. Mitra, the learned Counsel representing the respondents, in this connection drew my attention to some decisions of the Appellate Tribunals where the Tribunals have taken the view that Hypalon-40 is Synthetic Resin and not Synthetic Rubber. But I am afraid, the views so taken by the Appellate Tribunals, are not binding on this Court.

22. Mr. Mitra also referred to an unreported decision of this Court in the Indian Cable Company Ltd. and Anr. v. the Collector of Customs and Ors., being Matter No. 1702 of 1981, where a learned a single Judge of this Court relying upon the testing report of the Customs authorities has held that Hypalon-40 is Synthetic Resin and not Synthetic Rubber. But since the view which I have taken rests on somewhat a different footing. I do not think that the said decision actually binds me. Moreover, it is not a pure question of law but law based mainly on facts and in my judgment, I am not debarred from taking a different view on factual issues.

23. It appears, that the petitioners in the instant Rules before coming up to this Court did not exhaust their remedies as provided by the Customs Act, 1962, namely, appeal before the Collector of Customs (Appeals) and thereafter appeal to the Appellate Tribunal and also the other remedies. It was, accordingly, contended by Mr. Mitra, the learned Counsel representing the respondents, that the instant writ applications are not maintainable since they were filed without exhausting the alternative remedies. This contention of Mr. Mitra cannot be accepted in view of the decision of the Supreme court in L. Hirday Narain Vs. Income Tax Officer, Bareilly, to the effect that where the High Court entertains a writ petition and gives hearing on merits, the petition cannot thereafter be rejected on the ground that the statutory remedy was not availed of. That being so, the writ petitions cannot be rejected at this stage on the ground that the alternative remedies as provided by the Customs Act, 1962 were not exhausted by the petitioners before coming to this Court. Mr. Mitra further contended that since no demand justice notice was given by the petitioners to the respondents before filing the writ petition, the writ petitions should be held to be not maintainable in view of the Rules framed by this Court. But since it appears, that the Customs authorities from the very beginning were rigid in their view that Hypalon-40 is not Synthetic Rubber, no reasonable purpose would possibly have been served by giving formal demand Justice notices and that being so, the writ petitions cannot be held to be bad on that ground.

24. The writ petitions, accordingly, succeed.

25. The Rules issued be made absolute and the respondents be directed by the issue of writs in the nature of Mandamus to assess the subject consignments of Hypalon-40 imported by the petitioners in both the cases from Du Pout as Synthetic Rubber under Item No. 40.01/04 of the Customs Tariff Act, 1975 and as Synthetic Resin under Chapter 39 of that Act.

26. In case excess duty has been charged from the petitioners on the footing that that Hypalon-40 is Synthetic Resin coming under Chapter 39 of the Customs Tariff Act, the excess duty so charged should be refunded to the petitioners within 45 days from the date of this order. Any security furnished for such excess duty should not be enforced. The bank guarantees furnished by the petitioners in this connection be also discharged.

27. This order will govern both the Rules which are being disposed of analogously.

28.There will be no order for costs.

29. Verbal prayer for stay of operation of this order is considered and rejected.

