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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 801 OF 2012

[Arising out of Order-in-Appeal No: BC/406/MUM-III/2011-12 dated 30th March 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai - III.]

Asmaco Industries Limited
Road No. 27, Wagle Estate, Thane - 400604 ...***Appellant***

versus

Commissioner of Central Excise
Mumbai – III
CGO Complex, CBD Belapur, Navi Mumbai - 400614
Panaji, Goa ***...Respondent***

APPEARANCE:

Shri Sunil Agarwal, Advocate for the appellant

Shri Sanjay Hasija, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85918 /2022

DATE OF HEARING: 25/04/2022
DATE OF DECISION: 29/09/2022

PER: C J MATHEW

According to Learned Counsel for appellant, the issue in dispute, though dating back to a couple of decades and despite judicial decisions setting aright the erroneous construction on the part of central excise authorities, persists as impugned

order-in-appeal no. BC/406/MUM-III/2011-12 dated 30th March 2012 of Commissioner of Central Excise (Appeals), Mumbai-III resists settled law on classification of the impugned goods compelling re-statement of their consistent submissions once again in this appeal of M/s Asmaco Industries Ltd for rendering justice to them.

2. The appellant is in the business of manufacturing of 'tape' of several varieties and proceedings were initiated against them for having cleared 'masking tape (crepe paper)' without payment of duties of central excise on the claim that these had been merely slit from the 'jumbo rolls' imported on payment of appropriate duties of customs. In show cause notice dated 23rd January 2001, it was alleged that the 'masking tape', liable to duty of 16% corresponding to **sub-heading 4823 90 of the Schedule to Central Excise Tariff Act, 1985** and cleared between January 2000 and October 2000, should be subjected to recovery of ₹ 4,60,512 under section 11A of Central Excise Act, 1944, along with interest under section 11AA of Central Excise Act 1944, besides the assessee being imposed with penalty under rule 173Q/209 of Central Excise Rules, 1944.

3. The original authority, *vide* order dated 29th June 2001, discarded the claim of the assessee for classification of impugned goods against **sub-heading 4811 20 of the Schedule to Central Excise Tariff Act, 1985,** and to be relieved of leviability as the goods had merely been slit without undergoing

any process that was, or amounted to, manufacture, and, relying upon **note 7 of chapter 48 of the Schedule to Central Excise Tariff Act, 1985,** along with the relevant ***Explanatory Notes,*** as well as upon the decisions of the Hon'ble Supreme Court in ***Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works***[1] and in ***Union of India v. Parle Products Pvt Ltd***[2] and circular of Central Board of Excise & Customs (CBEC), concluded that the product emanating after slitting had been manufactured and, therefore, liable to duties under Central Excise Act, 1944.

4. It is noted in the impugned order that the appeal thereon had, by interim order, been retained in suspended animation (or, as traditionally referred to by tax authorities, in "call book") owing to the pendency of like issue before the Tribunal but, in view of the ruling in ***Parth Industries & others v. Commissioner of Customs, Goa***[3] invalidating such orders at the level of Commissioner (Appeals), was taken up for disposal and dismissed.

5. Referring to the decision of the Tribunal in **Asmaco Industries Ltd v. Commissioner of Central Excise, Mumbai**[4], arising from proceedings initiated by show cause

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1. *1991 (55) ELT 444 (SC)*
2. *1994 (74) ELT 492 (SC)*
3. *2012-TIOL-230-CESTAT-MUM*
4. 2003 (162) ELT 256 (Tri-Mumbai)

notice dated 29th February 2000, it is contended by Learned Counsel for the appellant that the unambiguous finding therein

> *'3…… If one were to go the chapter notes of 48.11, the appellants have cleared the goods when it is imported under Chapter Heading 4811.20 which reads as under:*
>
> > *"48.11 - Paper, paperboard, cellulose wadding and webs of cellulose fibres, coated, impregnated, covered, surface-coloured, surface-decorated or printed, in rolls or sheets, other than goods of the kind described in heading No. 48.03, 48.09 or 48.10.*
> >
> > *4811.20 - Gummed or adhesive paper and paperboard*
> >
> > *- Paper and paperboard coated, impregnated or covered with plastic (excluding adhesives)"*
>
> *It is asserted by the appellant that goods have been cleared under this heading. Department once to put the final product that is after slitting the imported material under chapter sub- heading 48.23 which reads as under*
>
> > *"48.23 Other paper, paperboard, cellulose wadding and webs of cellulose fibres, cut to size shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibres."*
>
> *It is nowhere stated in the chapter sub- heading classifying the paper on the basis of the dimension of namely with that the paper. Note 10 (a) of the Chapter 48 mentions that process of slitting or cutting shall amount to manufacture in respect of thermal paper. Here admittedly imported material is not thermal paper. The show cause notice does not state that the product is of thermal paper. In the absence of such a claim in the show cause notice the entire action of Department treating the activity is wrong.'*

accords finality to the issue of excisability of the goods cleared by them as the appeal of Revenue therefrom was dismissed by the Hon'ble Supreme Court. It was pointed out by him that one more episode in the dispute was carried in appeal and the

Tribunal, in ***Commissioner of Central Excise, Mumbai-III v. Asmaco Industries Ltd [final order[5] disposing off appeal no. E/2827/06-Mum against order-in-appeal no. AT/387-388/M-III/2006 dated 21st June 2006 passed by Commissioner of Central Excise (Appeals), Mumbai-II]***, held that

> *'5. The respondents relied upon decision of the Hon'ble Supreme Court in the case of CCE, New Delhi-I vs. SR Tissues Pvt. Ltd. reported in 2005 (186) ELT)] to submit that the slitting and cutting of tissue paper or aluminium foil does not amount to manufacture. The Hon'ble Supreme Court held as under:-*
>
> > *"26.We accordingly hold that the process of slitting / cutting of jumbo roll of brain tissue paper/aluminium foil into smaller size will not amount to 'manufacture' on first principles as well as under Section 2 (f) of the said Act.*
>
> *The ratio of the above decision is fully applicable on the facts of the present case.'*

6. It was also submitted that failure of yet another demand for a different period, after confirmation of demand in adjudication despite the reliance placed by the noticee on the decision *supra,* before the first appellate authority had been accepted by Revenue. He contends that, even in the face of all these developments, the impugned order rejected their appeal erroneously and inconsistent with law. He drew our attention to the contents of the impugned order to demonstrate that the discarding of binding decisions was the breach that the Hon'ble Supreme Court was compelled to take note of in ***Union of India***

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5. No. *A/358/13/EB/C-II dated 19th March 2013*

v. Kamlakshi Finance Corporation Ltd[6] and the Hon'ble High Court of Gujarat in ***Topland Engines Pvt Ltd v. Union of India***[7] placing emphasis on judicial discipline.

7. Learned Authorised Representative relied on the decision of the Tribunal in ***SR Protus Hygiene P Ltd v. Commissioner of Central Excise, Delhi-II***[8] that, following the decision of the Hon'ble Supreme Court in ***Commissioner of Central Excise, Mumbai-IV v. Fitrite Packers***[9] in which the summation of several decisions on 'manufacture' as also the 'four category tests' culled from ***Servo-Med Industries Pvt Ltd v. Commissioner of Central Excise, Mumbai***[10] was applied to 'GI paper' procured in rolls and printed upon according to design and specification of customer to conclude that 'test of no commercial use without further process' brought this activity within the ambit of manufacture, deduced occurrence of manufacture upon conversion into a form that has use for consumers which the original did not. It would appear that the distinguishment of the decision in ***SR Tissue Pvt Ltd***, relied upon by Learned Counsel before us, was being underlined by Learned Authorized Representative to suggest that we, too, follow suit.

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6. ***1991 (55) ELT 433 (SC)***
7. ***2006 (199) ELT 209 (Guj)***
8. ***2018 (362) ELT 809 (Tri-Del)***
9. ***2015 (324) ELT 625 (SC)***
10. ***2015 (319) ELT 578 (SC)***

8. In the proceedings leading to the impugned order, two aspects have been dealt with – that of classification to fasten rate of duty other than 'nil' and that of 'manufacture' to fasten excisability. Doubtlessly, the first is an exercise that follows from the second to be in accord with section 3 of Central Excise Act, 1944 and we must, necessarily, abide by that sequence. The process, as it appears in the orders of the lower authorities, is the import of 'masking tape (crêpe paper)' in jumbo rolls that are slit and spooled for further sale. The processing under consideration in **Fitrite Packers** and in **SR Protus Hygiene Pvt Ltd**, though commencing with some variety of paper in jumbo rolls, involved conversion – either specific to a customer or to particular end-use – as products that the goods in the form in which they were procured could not be characterized. The goods impugned in this dispute are 'masking tape (crêpe paper)' which, but for its size, remained in the same form and retained all the characteristics of utility as before. The applicability of these decisions, relying upon the last of the 'four category test' to the exclusion of the other three, to the issue before is just the reverse and in favour of the appellant. The earlier decisions of the Tribunal, referred *supra*, in the very same dispute of the same assessee for different periods are emphatic in holding that the process of slitting jumbo rolls does not amount to manufacture within the meaning of section 2(f) of Central Excise Act, 1944. There are no fresh developments that induce us to consider any proposition to the contrary.

9. The order of the original authority lies too far back in time to have had the benefit of subsequent judicial determination; the elapse of time between recourse to jurisdiction of first appellate authority and final determination in the impugned order is replete with orders and decisions arising from the same dispute which Commissioner of Central Excise (Appeals) was certainly not oblivious of. And yet, not only was lack of conformity thereto manifest but, as pointed out by Learned Counsel, the impugned order asserts that

> *'9. With due respect to the higher forum of the appellate authority, I differ from the above observation. Harmonized System of Nomenclature is the mother of all Tariffs of Customs and Excise. These Tariffs derive the strength from the said H.S.N. Whenever, any dispute or any clarification is required it is the mother dictionary which is referred by any authority for classification purposes. Hon'ble CESTAT has decided the issue on the grounds that it is nowhere stated in the chapter sub-heading classifying the paper on the basis of the dimension of it namely with of the paper, without giving due weightage to the H.S.N. It was held by the Hon'ble CEGAT, 2002 (143) E.L.T. 307 (Tri-Del), in the case of Polymer Papers Ltd that Classification - HSN Notes - Central Excise Tariff being patterned on HSN, the HSN Notes are binding, and to prevail over any other interpretation. Further, Hon'ble Supreme Court in the case of Wood Craft Products Ltd (1995 (77) E.L.T. 23 (S.C.)) held that "Classification of goods - HSN Explanatory Notes vis-à-vis ISI Glossary of Terms - When Tariff entry is patterned on HSN - Explanatory Notes to HSN preferable to ISI Glossary in case of a conflict, unless a different intention is indicated in Tariff itself - Section 2 of Central Excise Tariff Act, 1985 - Rule 173B of*

> *Central Excise Rules, 1944. Hence, the Adjudicating Authority has rightly held that the said product is covered under the hearing (sic) 4823.90. Presumably, these case laws were not brought before the Hon'ble CESTAT at the relevant time.'*

which is certainly a matter of concern. We do not wish to elaborate on the inadequate understanding of the place assigned to the Harmonized System (HS) Code even in determination of rate of duty, let alone on the evisceration of process for determining 'manufacture', the incorrect appreciation of the relevant facts in the decision cited and the illogical proposition of chapter notes deeming manufacture any which way.

10. The impartiality, and credibility, of taxation system rests upon certain pillars among which are determination of the rate and value, provisions for recovery and refund, and circumstances in which goods may be interfered with in the realm of quasi-judicial determination subject only to appellate correction and oversight. Implicit in such design is the inevitability of judicial discipline but for which these pillars would stand askew straining both the aesthetics and the foundation of the tax structure. It would appear that the fundamental lessons tend to be ignored or overlooked and the only remedy lies in frequent, and regular, reiteration. That the administrative authority has failed to instill and inculcate such essence in adjudicating authorities could not be more apparent; if it be an aberration, appellate rectification would pass muster but if it be

symptom of a larger malaise, the cost to the system should awaken the Central Board of Indirect Taxes & Customs (CBIC) to the approaching crisis and deal with it appropriately.

11. We can do no better than recommending that, in every office of every adjudicating and appellate authority, the golden principle enunciated succinctly and eloquently, with no room for doubt or repudiation, by the Hon'ble Supreme Court thus

> *'6. … that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the revenue would suffer …. we are not concerned here with the correctness are otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticise this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these offices to give effect to the orders of authorities hired to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellant Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline required that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere*

fact that the order of the appellate authority "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment assessees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. …… The position now, therefore, is that, if any order passed by Assistant Collector or Collector is adverse to the interests of the capital, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly because some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken ….. to keep the interests of the department alive.'

in ***Union of India v. Kamlakshi Finance Corporation Ltd*** be framed and preserved as a constant reminder that, in a society founded on rule of law, departure from the path of judicial discipline is a sure prescription for anarchy. It would be appropriate for the Central Board of Indirect Taxes & Customs

(CBIC) to take note for appropriate remedy lest the structure that is presided over by them propels itself into oblivion.

12. In the meanwhile, as far as this appeal is concerned, the impugned order set aside to resolve the dispute in favour of the appellant.

(Order pronounced in the open court on 29/09/2022)

(JUSTICE DILIP GUPTA)
President

(C J MATHEW)
Member (Technical)

**/as*