CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 86475 OF 2021

[Arising out of Order-in-Original No: PLG-GST-COMMR-09to19/20-21 dated 19th February 2021 passed by the Commissioner of Central GST & Central Excise, Palghar.]

Sewa Elastomers
Plot No. 77, B Nanji Industrial Estate, Kharadpada
Silvassa - 396230 … ***Appellant***

versus

Commissioner of CGST & Central Excise
Palghar
Central GST Bhavan, Plot No. C-24, Sector E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

WITH

EXCISE APPEAL NO: 86477 OF 2021

[Arising out of Order-in-Original No: PLG-GST-COMMR-09to19/20-21 dated 19th February 2021 passed by the Commissioner of Central GST & Central Excise, Palghar.]

Sewa Polymers
Plot No. 72/80/85 Achhad Industrial Estate, Talasari
Thane, Maharashtra … ***Appellant***

versus

Commissioner of CGST & Central Excise
Palghar
Central GST Bhavan, Plot No. C-24, Sector E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

WITH

EXCISE APPEAL NO: 86479 OF 2021

[Arising out of Order-in-Original No: PLG-GST-COMMR-09to19/20-21 dated 19th February 2021 passed by the Commissioner of Central GST & Central Excise, Palghar.]

Soham Rubber Products
Survey No. 272/2/1 Lohari Road, Athal, Silvassa … ***Appellant***

versus

Commissioner of CGST & Central Excise
Palghar
Central GST Bhavan, Plot No. C-24, Sector E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

WITH

EXCISE APPEAL NO: 86480 OF 2021

[Arising out of Order-in-Original No: PLG-GST-COMMR-09to19/20-21 dated 19th February 2021 passed by the Commissioner of Central GST & Central Excise, Palghar.]

Rubber Udyog (I) Pvt Ltd
Plot No. 64/65, B Nanji Industrial Estate, Kharadpada
Dadra Nagar Haveli, Silvassa - 396230 … ***Appellant***

versus

Commissioner of CGST & Central Excise
Palghar
Central GST Bhavan, Plot No. C-24, Sector E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

WITH

EXCISE APPEAL NO: 86482 OF 2021

[Arising out of Order-in-Original No: PLG-GST-COMMR-09to19/20-21 dated 19th February 2021 passed by the Commissioner of Central GST & Central Excise, Palghar.]

Surinder Gupta
6th Floor, Marathon Max, Beside Krishna Motors,
Mulund Lunk Road, Mulund (W), Mumbai - 400080 … ***Appellant***

versus

Commissioner of CGST & Central Excise
Palghar ***…Respondent***

Central GST Bhavan, Plot No. C-24, Sector E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051

APPEARANCE:

Shri Gajendra Jain, Advocate and Ms Payal Nahar, Advocate for the appellants

Shri Sunil Kumar Katiyar, Assistant Commissioner (AR) for the respondent

AND

EXCISE APPEAL NO: 86748 OF 2021

[Arising out of Order-in-Original No: PLG-GST-COMMR-09to19/20-21 dated 19th February 2021 passed by the Commissioner of Central GST & Central Excise, Palghar.]

Commissioner of CGST & Central Excise
Palghar
Central GST Bhavan, Plot No. C-24, Sector E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 … ***Appellant***

versus

Konark Rubbers
Plot No. 72/80/85 Achhad Industrial Estate, Talasari
Thane, Maharashtra ***…Respondent***

APPEARANCE:

Shri Sunil Kumar Katiyar, Assistant Commissioner (AR) for the appellant

Shri Gajendra Jain, Advocate and Ms Payal Nahar, Advocate for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85223-85228/2024

DATE OF HEARING: 31/08/2023
DATE OF DECISION: 28/02/2024

PER: C J MATHEW

Before us, on the one hand, are appeals of M/s Sewa Polymers, M/s Rubber Udyog India Pvt Ltd, M/s Sewa Elastomers and M/s Soham Rubber Products and Shri Surinder Gupta upon whom duty liability and/or other detriments have been determined and, on the other, that of Commissioner of Central GST & Central Excise, Palghar, again impugning the same order for having dropped proceedings proposed in notices that were disposed off together. The appellant-assessees were in the business of manufacturing articles of rubber which they claimed to be in conformity with description corresponding to tariff item 4008 1910 and 4008 2110 and chargeable to 'nil' rate of duty therein, and to tariff item 4008 1110 and 4008 1990 of Schedule to Central Excise Tariff Act, 1985 of which the former was entitled to exemption, at serial no. 39, in notification no. 3/2005-CE dated 24th February 2005 and the latter, as the sole dutiable goods, cleared by resort to notification no. 8/2003-CE dated 1st March 2003 which, through threshold and slab exemptions, was intended for incentivizing 'small scale industry (SSI)' units. M/s Konark Rubbers, the respondent-assessee and also in the business of manufacturing articles of rubber, had been clearing goods on payment of duties applicable to tariff item in Schedule to Central Excise Tariff Act, 1985.

2. The culmination in the impugned order that is of grievance to the

assessees is the fastening of duty liability of ₹ 4,57,09,954, comprised - as ₹ 2,64,32,615 of M/s Sewa Polymers for October 2007 to September 2012, as ₹ 74,22,287 of M/s Rubber Udyog India Pvt Ltd for October 2007 to March 2011, as ₹ 1,16,44,354 of M/s Sewa Elastomers for October 2007 to September 2012 and as ₹ 2,10,638 of M/s Soham Rubber Products for October 2007 to March 2011, from the initial notice[1] for recovery of ₹8,40,89,128 from them and from M/s Konark Rubbers, as well as of ₹ 87,14,955, ₹ 1,00,11,524, ₹ 69,17,361, ₹ 54,45,519 and ₹75,81,569 from out of proposal in subsequent notices/statement of demand for recovery of ₹ 97,92,125 for October 2012 to September 2013, ₹ 1,12,48,949 for October 2013 to September 2014, ₹ 77,76,887 for October 2014 to July 2015, ₹ 61,26,208 for August 2015 to September 2016 and ₹ 85,29,265 for April 2016 to June 2017 from M/s Sewa Polymers, along with interest under section 11AA of Central Excise Act, 1944, and penalties imposed on the assessees and individual appellant under rule 25 of Central Excise Rules, 2000. The appeal of Revenue has been prompted by dropping of demand in the first notice for recovery of ₹ 3,44,65,580 from M/s Konark Rubbers as well as that of ₹ 44,32,537 for October 2012 to September 2013, of ₹ 63,95,957 for October 2013 to September 2014, ₹ 58,89,2664 for October 2014 to July 2015, ₹ 43,40,436 for August 2015 to March 2016 and ₹ 43,01,870 for April 2016 to June 2017 from them in

[1] [26th October 2012 and corrigendum of 5th August 2024]

notices/statement of demand pertaining to subsequent periods.

3. The recovery proposed in the first notice, an omnibus one for ₹ 8,40,89,128, including ₹ 3,44,65,580 from M/s Konark Rubbers, was modified to append segregated liability, by corrigendum according to jurisdiction, on each of the other assessees as ₹ 2,80,35,844 from M/s Sewa Polymers, ₹ 83,42,844 from M/s Rubber Udyog India Pvt Ltd, ₹ 1,30,14,806 from M/s Sewa Elastomers and ₹ 2,30,013 from M/s Soham Rubber Products , that came to be adjudicated, together with the subsequent notices as *supra,* in order[2] of Commissioner of Central GST & Central Excise, Palghar was, in relation to assessees other than M/s Konark Rubbers, founded on re- classification with consequent ineligibility for benefit of notification no. 3/2005-CE dated 24th February 2005 availed for one product and 'nil' rate of duty entailed upon the other two products. In all, the proceedings against appellant-assessees, who had also been charged with contriving disaggregation of factories for availing the benefits flowing from notification no. 8/2003-CE dated 1st March 2003 to be neutralized by clubbing, proposed re-classification against tariff item 3921 1900 of Schedule to Central Excise Tariff Act, 1985 rendering them ineligible to 'nil' rate of duty on two of the products, to exemption extended by notification no. 3/2005-CE dated 24th February 2005 availed for one product and

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[2] [order-in-original no. PLG-GST-COMMR-09to19/20-21 dated 19th February 2021]

ineligible to exclusion from levy in exemption intended for 'small scale industry (SSI) units. Insofar as M/s Konark Rubber was concerned, the goods cleared by them at rate of duty prescribed for goods conforming to description corresponding to tariff item 4008 1110 of Schedule to Central Excise Tariff Act, 1985 was sought to be re-classified against tariff item 4008 1190 of Schedule to Central Excise Tariff Act, 1985.

4. Insofar as the classification dispute is concerned, the impugned order has relied upon composition of goods, inferred from deployment of inputs conducive not as much to elasticity, a characteristic of rubber, as to form moulding which is an attribute of plastics, and reports of tests conducted on representative samples by Deputy Chief Chemist, Vadodara which, apparently, that were accepted by responsible officials of the appellant-assessee. Learned Counsel for appellant contended that the test carried out on samples was inappropriate and their acquiescence with the 'morphology' tests had been misconstrued as concurrence with the whole even as samples tested at their initiative at private laboratories were in their favour. The adjudicating authority was disinclined to accept the authenticity of samples for acceding to claim of the appellant-assessee.

5. According to Learned Counsel, the substitution of classification was erroneous inasmuch as the test required by note 4 in chapter 40 of Schedule to Central Excise Tariff Act, 1985 had not been undertaken.

It was further alleged that the test report lacked validity owing to admission, in cross-examination of the chemical examiner, that testing or analysis for lack of conformity with declaration had not been undertaken. It was further pointed out that, on an earlier occasion, proceedings for shifting classification from sub-heading 4008 11 to sub-heading 3921 19 of Schedule to Central Excise Tariff Act, 1985 had, upon remand by the Tribunal for carrying out the test appropriate to referred note in chapter 40 of Schedule to Central Excise Tariff Act, 1985, been dropped by the adjudicating authority thus validating re-classification only upon such outcome.

6. According to Learned Authorized Representative, the statements recorded during the investigation had made it abundantly clear that the test reports relied upon in the adjudication order were beyond reproach. The technical characteristics of the manufactured goods was, according to him, sufficient to discard the classification of the impugned goods as articles of rubber.

7. We take up the issue of classification as it is contingent upon resolution thereto that the discarding of claim for exemption available to 'small scale industry (SSI) will become relevant. At the outset, we may, gainfully, lay particular emphasis on the rigours of classification, within the framework of General Rules for Interpretation of the Schedule appended to Central Excise Tariff Act, 1985 and judicial

determination, which forecloses admission in statements from having anything but peripheral influence on the exercise. Such disputes are resolved in accordance with the statutory rules and,

> *'3. It is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No. 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.'*

as held by the Hon'ble Supreme Court in Hindustan in *Hindustan Ferodo Ltd v. Commissioner of Central Excise, Bombay [(1997) 2 SC 677]* and

> *'28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue……'*

in *HPL Chemicals v. Commissioner of Central Excise, Chandigarh [2006 (197) ELT 324 (SC)]*.

8. The impugned order is claimed to be sustainable on the finding that

'27.16 Regarding the manufacture and clearances of goods by other entities, i.e. M/s Sewa Polymer, M/s Rubber Udyog, M/s Sewa Elastomers and M/s Soham Rubber Products which they have classified as Microcellular rubber sheets under C.S.H. 4008.11.10 claiming exemption under notification No. 3/2005 CE and under 4008.21.10 tariff rate for which is Nil, I find that noticees' contention is that samples were drawn in wrong manner and not according to the note 4(a) to chapter 40 and that samples were drawn of finished products and as such, test -reports on samples drawn from other factories/entities did not reflect the true picture of the product/sample to be rubber. In test report for sample No. 11 to 15 drawn from the factory premises of M/s Sewa Polymer, sample No. 21 to 23 drawn from the factory premises of M/s Rubber Udyog and sample No. 24 to 26 drawn from the factory premises of M/s Sewa Elastomers, except sampled no. 11, ail other samples were found to be made from polyethylene which does not have unsaturation and can not be vulcanised with sulphur and hence, it is other than rubber, it is contended by the noticees that show cause notice is based on these test reports only to classify their products under chapter 39 apart from contending the manner of drawing of samples. Regarding this contention of the noticees, I would like to refer to the various formulations recorded by Shri Pawan Kumar Agarwal and Shri Vijay Agarwal as per the. directions of Shri Surinder K. Gupta in 11 note books seized from the residential premises of Shri Pawan Kumar Agarwal (note book marked as A/1 to A/7) and Shri Surinder K. Gupta (note book marked as 14, A/32, A/34 and A/41). It is admitted by Shri Surinder Gupta that formulations mentioned in those note books are used by them in all their manufacturing units. Table B as shown in para 27.8 is prepared based on entries contained in these note books and based on the ingredients used in the formulations, the same is divided into three categories i.e. Rubber, LDPE and

combination of rubber and LDPE. Perusal of this table would reveal that formulations contained in note book marked as A/32, A/34 and A/41 do not contain rubber as ingredient Notebook marked as A/34 contains formulations of LDPE only, whereas formulations contained in note book marked as A/32 and A/41 contains formulations of LDPE only as well as combination of LDPE and Rubber. In column 4, figures in bracket denote ratio of quantity of rubber and LDPE in the formulations. From this table, it is evident that 103 formulations are of LDPE only and use of rubber is not made at all. However, as stated earlier, in all the sales invoices issued by these entities, description of goods is mentioned as Microcellular rubber sheet only though rubber is not used in these formulations. Here it is pertinent to mention that during recording of his statement dated 06.06.2012, Shri Pawan Kumar Agarwal had categorically answered in reply to question No.7 that "since other than M/s. Konark Rubber, our major ingredient is LDPE/Plastic, vulcanization with sulphur cannot be done. However we are using Sulphur as Vulcaniser in M/s. Konark Rubber……'

We find extensive discussions on the classification claimed by the assessees which is not in accord with prescription *supra* in terms of which comparison between adopted and proposed classification is warranted only upon discharge of onus as laid down in judgement of the Hon'ble Supreme Court. In the absence of any exposition of description corresponding to the proposed classification, it is well nigh impossible to approve the manner in which the adjudicating authority has proceeded.

9. We are particularly concerned that the original authority appeared to be impressed, in the main, by the alleged conformity of the product with attributes that do not attach to ‘rubber’ to conclude that those are plastic. Such simplistic perception is contrary to the first rule of interpretation. The proposed heading comprises plates, sheets, film, foil and strip of ‘cellular’ and ‘non-cellular’ plastic within the former of which lies those made of ‘polymers’, whether of styrene or vinyl chloride, of polyurethanes, which could be flexible or otherwise, of re-generated and of other plastics that was found to be most apt. The expression ‘plastic’ has been defined thus

> *‘1. Throughout this Schedule, the expression "plastics" means those materials of headings 3901 to 3914 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) 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 vulcanised fibre. The expression, however, does not apply to materials regarded as textile materials of Section XL’*

in note 1 with specific exclusion, *inter alia*, of

> *‘(l) synthetic rubber, as defined for the purpose of Chapter 40, or articles thereof;’*

in note 2 of chapter 39 of Schedule to Central Excise Tariff Act, 1985.

In view of the proposed classification, no other note of chapter 39 except

> *'10. In headings 3920 and 3921, the expression "plates, sheets, film, foil and strip" applies only to plates, sheets, film foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or other wise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use),*

is germane to resolution of this dispute.

10. To fit within heading 3921 of Schedule to Central Excise Tariff Act, 1985, the impugned goods would have to be generated from materials that are enumerated in heading 3901 to heading 3914 of Schedule to Central Excise Tariff Act, 1985 and, by resort to the impugned tariff item, the adjudicating authority has eliminated 'styrene', 'vinyl chloride' impliedly. On the other hand, it is not in dispute that the impugned order avowedly accepts that the principal ingredients are 'rubber' and 'low density polyethylene (LDPE) in varying proportions and that the ascertainment of content has been made only at the conclusion of production. The placement of the goods covered by 'plastics' and 'rubber', with added matrix of 'synthetic rubber' in the latter renders the distinction between the two categories to be literally 'touch and go' save when the distinguishment is available in the schedule itself. We find no reference in the adjudication order to

the Explanatory Notes to the Harmonized System of Nomenclature (HSN) that may have been gainfully adverted to in the light of the technical contentions and test reports furnished by the noticees.

11. Though there is elaborate discussion on the purported evidence, such as formulation found in private records, admission in statements that these reflected reality and samples sent for testing, the key to the findings are the reports of tests from Deputy Chief Chemist, Vadodara on the composition of the 'end product' as being polyethylene. This, along with the conclusion that the product is 'not rubber', led to the re-classification insofar as the appellant-assessees are concerned. While the presence of 'polyethylene' does fulfill the requirements of note 1 in chapter 39 of Schedule to Central Excise Tariff Act, 1985 and has not been controverted, there is abundantly less certainty on the conclusion in the test report of 'no rubber' especially when concatenated with the findings in the impugned order that 'rubber' was consumed in the production process. Surely, Law of Conservation Mass cannot be so wrong as to destroy the 'rubber' or to convert it to 'plastic' at the end of manufacturing process. It is also clear that the report has not asserted the test of 'rubber' – restoration to original form after induced elongation – having been undertaken on the sample. In the face of test reports from private laboratories, which have been discarded only for lack of procedural acceptability, the credibility assigned by the adjudicating authority to the reports of Deputy Chief Chemist,

Vadodara does not resonate with us.

12. We take note that, on previous occasion, the Tribunal, in similar circumstances, had directed visit and observation of manufacturing process coupled with testing of samples. Inevitably, that should be undertaken in relation to the impugned goods as it needs to be ascertained, from fact and from rules of interpretation of tariff schedule, if the products, comprising of 'rubber' and 'low density polypropylene (LDPE)' find fitment with proposed description or claimed description. The grounds of appeal preferred in the challenge mounted by Revenue to the impugned order confirms the need for re-determination. On the outcome of fresh determination also rests the appropriateness of penalty imposed on the individual-appellant. For those purposes, the impugned order is set aside and notice restored to the original authority for fresh decision on claim of appellant-assessees after test and our observations *supra*.

13. Turning to the appeal of Revenue, arising from the dropping of proceedings against M/s Konark Rubber, it is noticed that the primary contention relates to failure in ascertaining the goods to be 'micro-cellular' and reliance placed on unofficial test reports. In the grounds of appeal, it has been asserted that

> *'17. The Adjudicating Authority has erred while deciding the classification of the product without obtaining the fresh test reports/opinion from Government approved laboratory like*

Central Revenues Control Laboratory, New Delhi, as per standards practice followed by the department when classification of any product is in dispute and/or any confusion arises due to different and contradictory reports forthcoming from some Government laboratory as well as private testing laboratories. Such findings by the Adjudicating Authority by relying on the test reports and technical views from agencies like Indian Rubber Manufacturer's Research Association, M/s. Jay Polymer Corporation, and private consultants, without obtaining valid report from competent Government approved agencies like CRCL, New Delhi are not acceptable and not legal and correct.'

and the compelling imperative consequent upon contradictory reports cannot be ignored. For the central excise authorities to assume anti-podal positions is neither becoming nor legally proper. In such circumstances, and as we are inclined to remand the matter insofar as appellant-assessee is concerned, the appropriate disposal of this appeal of Revenue too is re-determination of the dispute by the original authority.

14. For the above reasons, we set aside the impugned order and allow the appeals by way of remand.

(Order pronounced in the open court on 28/02/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*