

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 772 of 2009

(Arising out of OIO-14/VDR-II/COSMO/MKR/COMMR/08-09 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

Cosmo Films Limited

Vermadi Road, Village-Navi Jithardi,
Nr Inox, Off N.H. 9, Taluka-Karjan,
Vadodara, Gujarat-391240.

.....Appellant

VERSUS

C.C.E. & S.T.- Vadodra-ii

1st Floor... Room No.101,
New Central Excise Building,
Vadodara, Gujarat-390023

.....Respondent

APPEARANCE:

Shri J. C. Patel, Advocate for the Appellant

Shri Sameer Chitkara, Additional Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 12329 /2019

DATE OF HEARING: 05.08.2019
DATE OF DECISION: 03.12.2019

RAMESH NAIR

The brief facts of the case are that the appellant are engaged in Manufacture of BOPP Film falling under chapter Sub heading No. 39202020 of the Central Excise Tariff Act. During the course of Manufacture of BOPP Films, Waste/Scrap is generated. Some quantity of such Waste and Scrap is reprocessed and reprocessed granules either used in the Manufacture of BOPP Films such reprocessed granules are exempted under Notification No.67/95-CE dated 16.03.1995. Some quantity of reprocessed granules are exempted under Notification No.6/2002-CE dated 1.3.2002 or 4/2006-CE dated 1.3.2006. In such case on the quantity of waste and scrap used, the appellant is not entitled for Notification No.67/95-CE and required to pay duty as Part of the quantity of scrap also sold as such to the independent customers. The quantity of waste/scrap used in the manufacture of reprocessed granules which are cleared under Notification No.6/2002-CE or 4/2006-CE. The appellant adopted the assessable value which is same assessable value charged in the case of sale of waste and scrap to independent customer. The case of the department is that in the case of captive consumption of waste and scrap for the manufacture of exempted reprocessed granules. The valuation should have been done on Cost Construction Method as per CAS-4 Standard, prepared by Institute of Cost and Works Accountants of India. Accordingly due to value difference demand

of Excise Duty arose and the same was confirmed by the Adjudicating Authority. Therefore, the present appeal is filed.

2. Sh. J.C. Patel, Learned Counsel appearing on behalf of the appellant submits that even though the waste and scrap was captively consumed but part of the same waste and scrap is sold on Principle to Principle basis to the independent customer, price charged to the said customer shall be the assessable value even in case of captive consumption. In this regard he placed reliance on the various following judgments.

- Ispat Industries Ltd v CCE-2007 (209) ELT 185 (LB)
- Vinati Organics Ltd V CCE 2018- TIOL-26-CESTAT-MUM
- Handy Wires Ltd v CCE-2015 (329)ELT 169

3. He further submits that Commissioner has traveled beyond the Show Cause Notice by holding that waste and scrap cleared to an independent buyers was not comparable to the waste and scrap captively consumed. He submits that the Show Cause Notice has in clear terms accepted that the value of captively consumed waste/scrap which was worked out and the price at which such goods were sold to independent buyers. The Show Cause Notice has therefore accepted that waste/scrap which was captively consumed was the same as that sold to independent buyers and there is no allegation in the notice that the waste/scrap sold to independent buyers was not comparable to the waste/scrap captively consumed. It is settled law that Show Cause Notice is the foundation of the departments case and that the Adjudicating Authority cannot travel beyond the Show Cause Notice and make out a case not contained in the Show Cause Notice. He placed reliance on the following judgments.

- C.C.E. V/s. Ballarpur Industries Ltd- 2007 (215) ELT 489 (SC)
- C.C.E. V/s. Gas Authority of India Ltd- 2008(232) ELT 7(SC)
- Commissioner v Reliance Ports and Terminals Ltd.-2016 (334) ELT 630 (Guj.)

4. Without prejudice to his above submission, he further submits that in any event it is totally wrong to adopt the value of granules as the cost of production of waste and scrap. The value of granules is the cost of producing the BOPP films and not the waste and scrap. There can in fact be no cost of production of waste and scrap and CAS-4 does not lay down standards for arriving at the cost of waste and scrap. Therefore, entire duty demand taking the value of virgin granules as the cost of production is incorrect in law and in fact.

5. He further submits that the Show Cause Notice is dated 1.8.2008 and demand of duty is for the period July 2003 to December 2007. It, therefore covers the period which is beyond the normal period of limitation of 1 year as specified in

Section 11A(1) of the Central Excise Act, 1944 and is therefore barred by time to that extent. Therefore, the period of limitation can have no application to the present case. Since, there was no willful suppression of facts or misstatements. The appellant was filing ER-3 returns and maintaining complete records. A Show Cause Notice is not issued as result of any search, seizure of documents but on observations made in audit from the records maintained by the assessee as stated in the Show Cause Notice. In such circumstances larger period of limitation cannot apply as laid down in the following judgments.

- Hira Cement vs C.C.E. 2017 (4) GSTL 75
- GAC shipping (India) P. Ltd. Vs C.C.E 2017 (49) STR 242

That apart by adopting the price at which waste/scrap was sold to independent buyers, the appellant has acted in a bona fide manner. The view eventually taken by the Larger Bench in Ispat Industries Ltd. is infact in consonance with the course adopted by the appellant. Therefore, there is no question of invoking larger period of limitation.

6. On the other hand Sh. Sameer Chitkara, Learned Additional Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order.

7. We have carefully considered the submissions made by both the sides and perused the record. We find that the issue to be decided is that what should be the valuation of the waste and scrap used captively for Manufacture of exempted reprocessed granules. Whether the valuation should be done in terms of Rule 8 of Central Excise Valuation Rules that is on Cost Construction Method or on the comparable value of waste and scrap sold to independent customer on Principle to Principle basis. We find that the Adjudicating Authority held that the valuation of captively consumed waste and scrap should be on the basis of Cost Construction method mainly for the reason that the waste and scrap sold to independent customer is different from the Waste and Scrap consumed captively. Therefore, the Learned Adjudicating Authority did not accept that the sale price of waste and scrap charged to independent customer should be applied in the case of captive consumption.

8. The Learned Counsel vehemently argued that the nature of the scrap whether it is different for captive consumption and for independent sale was not the subject matter of the Show Cause Notice and therefore, the said issue should not have been taken in the Adjudication Order.

9. We find that in the Show Cause Notice the fact was narrated which is reproduced below.....

"In the present case, the assessee uses waste/scrap generated at intermediate stage for captive

consumption in the manufacture of PP granules which are exempted from payment of duty under Notification No. 6/2002-CE dated 01.03.2002 or 4/2006-CE dated 01.03.2006. It appears that the exemption under notification number 67/95-CE, therefore, is not available to such quantity of waste/scrap captively consumed. The assessee are, therefore, paying duty at applicable rates on such waste/scrap. However, the value of such captively consumed waste/scrap is worked out by them at the price at which such goods are sold by them to independent buyers. Whereas it appears that in the case of captive consumption, the valuation of the goods captively consumed is required to be done in accordance with and as per CAS-4 standard, prepared by the Institute of Cost and Works Accountants of India (ICWAI)."

10. From the plain reading of the above facts narrated in the Show Cause Notice it is accepted that the waste and scrap consumed captively and sold to independent buyers are one and the same. There is no allegation in the Show Cause Notice that the waste and scrap cleared for captive consumption and the one sold to the independent buyers are different.
11. We also find that no investigation was carried out to establish that the waste and scrap sold and captively consumed are different in nature. We also observe that the waste and scrap as generated in the course of manufacture of BOPP film. Therefore, there cannot be different category of waste in one process of Manufacture of BOPP film. The entire Show Cause Notice was issued only on the basis of Rule 8 of Valuation Rules and CBEC Circular dated 30.6.2000, however this dispute has been resolved by the Larger Bench of this tribunal in the case of Ispat Industries Ltd.(supra) according to which even though goods were not sold and used captively, the valuation of such goods shall be on the basis of the Sale Price of such goods sold to the independent buyers. Therefore, after delivering the judgment of Larger Bench the dispute came to the rest. The Adjudicating Authority relied upon the invoices issued for captive consumption and for sale of the goods and the comparative chart was prepared which is reproduced on Page No.13 & 14 of the impugned order. The same is scanned below.

Sr.No.	Invoice No. & Date	Description	captive Consumption or for sale	Remark on Inv. If for captive consumption	Qty. (KGS.)	Price / unit Rs.
1	0068 / 16.04.2003	waste - scrap of plastic	Captive	FOR CAPTIVE CONSUMPTION	3000	23
2	0062/14.04.2003	End waste - Transparent	sale to customers	not applicable	990	22
		End waste - White		not applicable	3730	17

3	00625/18.06.2003	waste - scrap of plastic	Captive	waste to RPG for rpg sale to ext customer	3500	21
4	0623/17.06.2003	End waste - Transparent	sale to customers	not applicable	815	18
		End waste - White		not applicable	2130	13
5	1943/27.10.2003	waste - scrap of plastic	Captive	FOR CAPTIVE CONSUMPTION	2000	16.5
6	1878/20.10.2008	End waste	sale to customers	not applicable	1910	19
		End waste		not applicable	2260	15
7	3143/26.02.2004	waste - scrap of plastic	Captive	waste to RPG for rpg sale to ext customer	4000	16.5
8	3072/16.02.2004	End waste - Transparent	sale to customers	not applicable	1040	21
		End waste - White		not applicable	265	8.25
		End waste - White		not applicable	2860	17
9	418/30.5.2004	Waste and Scrap of Plastic	Captive	waste to RPG for rpg sale to ext customer	2700	19.8
10	478/5.6.2004	End waste - White	sale to customers	not applicable	3880	24
11	1867/1.12.2004	waste - scrap of plastic	Captive	waste to RPG for rpg sale to ext customer	2800	41.8
12	1915/8.12.2004	End waste - White	sale to customers	not applicable	2030	29
13	1981/17.12.2004	waste - scrap of plastic	Captive	waste to RPG for rpg sale to ext customer	3600	30.53
14	1984/17.12.2004	End waste - White	sale to customers	not applicable	4920	27.75

12. On going through the above chart we find that there is no specific character of the waste and scrap mentioned in the description, either in case of captive consumption or in the case of waste and scrap sold to independent customer. Therefore, merely on the description which does not give the actual character of the scrap, it cannot be said that the scrap sold to independent customer is different from waste and scrap captively consumed. Therefore, the conclusion of the Adjudicating Authority that both types of clearances are of different waste and scrap is not tenable. We find that the appellant has correctly valued the goods in conformation to the Larger Bench judgment in the case of Ispat Industries Ltd. The relevant order is reproduced below.

“5. We have considered the rival submissions and are of the view that the assessee is correct in contending that provisions of Rule 8 would apply only in a case where its entire production of a particular commodity is captively consumed. This is evident on a plain reading of Rule 8 of the valuation rules, which reads as under

“Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the

cost of production or manufacture of such goods” (emphasis supplied).

If the intention was not to restrict the applicability of Rule 8 to cases where the entire production was being captively consumed, the Rule would have simply stated “where excisable goods are consumed by an assessee himself or on his behalf in the manufacture of other articles” instead of preceding the above expression with the words “where the excisable goods are not sold”. This view is also supported by the judgment of the jurisdictional High Court in the case of Indian Drug Manufacturers Association v. Union of India, wherein the Court held that Rule 8 applies in a situation where goods are not sold but are cleared ‘exclusively’ to be used in consumption or for manufacture of other articles. We also agree with the contention of the assessee that Rule 8 will apply only in two situations, (a) where the goods are consumed by him in the same factory (captive consumption) or (b) where such goods are transferred to another factory for consumption in the manufacture of other articles on behalf of the assessee. In this case, it is not the case of the revenue that the goods were transferred to other units for manufacture of other articles on behalf of the assessee/appellant, i.e. the Dolvi Unit. We agree with the assessee’s contention that the expression ‘assessee’, wherever it appears in the Central Excise Rules, applies to a particular factory, which is why different units belonging to one company are separately registered and separately assessed to duty. Since the assessee in the present case is the Dolvi plant and it is not the revenue’s case that the other three units of the company to whom HR coils were transferred were undertaking further manufacturing operations on behalf of the Dolvi Unit, the provisions of Rule 8 will not apply. We, therefore, hold that Rule 8 is inapplicable in the instant case.

6. *We also note that in the present case the application of Rule 4 is being disputed by the Revenue not on the ground that the said rule is inapplicable to the present case but on the ground that a more specific provision in Rule 8 is available to enable determination of the assessable value. As discussed above, the provisions of Rule 8, in our view, are not applicable to the present case and therefore the value determined by the assessee under Rule 4 deserves acceptance.*

7. *We also agree with the submission of the assessee that even if both the rules, i.e. Rule 4 and Rule 8, were applicable, it would only be logical to read and apply the various rules in the Central Excise Valuation Rules in a sequential manner. Though the Central Excise Valuation Rules, 2000 do not specifically prescribe such sequential application of various rules, the same, in our view, is the only reasonable way to read these rules. Any other interpretation would only lead to confusion and chaos. Since the applicability of Rule 4 is not really in dispute, there was no need to look further and regardless of the applicability or otherwise of Rule 8, the assessable value should have been determined in terms of Rule 4 of the Valuation Rules.*

8. *The conclusion that we are drawing in the present case would lead to determination of a value which, in our view, will not only be reasonable but also consistent*

with the provisions of Section 4 of the Central Excise Act. We would, at this stage, draw support from the judgment of the Supreme Court in the assessee's own case, as reported in [2006 \(202\) E.L.T. 561](#), wherein the Court applied "The Gunapradhan Principle" in interpreting the Customs Valuation Rules. We have kept in mind the following observations of the Court in coming to our above conclusion :

"26. In our opinion if there are two possible interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make the rule ultra vires the Act.

27.....

36. In our opinion, the Gunapradhan principle is fully applicable to the interpretation of Rule 9(2). Rule 9(2) is subservient to Section 14. We must, therefore, interpret it in such a way as to make it in accordance with the main object that is contained in Section 14 of the Customs Act. It may be that in isolation Rule 9(2) conveys some other meaning, but when it is read along with Section 14 of the Act, it must be given a meaning which is in accordance with the object of Section 14. The object of Section 14 is 'primary' whereas the conditions in Rule 9 (2) are the 'accessories'. The 'accessory' must, therefore, serve the 'primary'."

9. In view of what we have observed above, we answer the reference in the following terms :

(a) the provisions of Rule 8 of the Valuation Rules will not apply in a case where some part of the production is cleared to independent buyers;

(b) the provisions of Rule 4 are in any case to be preferred over the provisions of Rule 8 not only for the reason that they occur first in the sequential order of the Valuation Rules but also for the reason that in a case where both the rules are applicable, the application of Rule 4 will lead to a determination of a value which will be more consistent and in accordance with the parent statutory provisions of Section 4 of the Central Excise Act, 1944.

10. The papers are now returned to the referral Bench for passing orders on the appeal."

13. From the above decision of the Larger Bench of this tribunal, the same is clearly applicable in the facts of the present case. Therefore, on merit itself the demand is not sustainable. We also examined the aspect of limitation, we find that the fact of sale of waste and scrap and captive consumption for further manufacture of reprocessed granules and use thereof in the manufacture of BOPP films was in the knowledge of the department as the appellant was otherwise discharging the duty and the issue is of neat question of law that what should be the valuation in case of captive consumption. Subsequently, since the issue was contentious on the dispute of valuation in case of captive consumption the same was resolved by the Larger Bench of this tribunal in the case of Ispat Industries Ltd (supra). Therefore, it cannot be said that the appellant had any intention to evade payment of Excise

Duty. Accordingly, the extended period of demand was also not invocable. Therefore, demand for the extended period is not maintainable on the ground of time barred also.

14. As per our above discussion, the impugned order is set aside, appeal is allowed.

(Pronounced in the open court on 03.12.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul