

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 01

Excise Appeal No. 12951 of 2014

[Arising Out Of OIA-VAP-EXCUS-000-APP-61-63-14-15 Dated- 12/05/2014 Passed By
Commissioner of Central Excise, Customs and Service Tax-VAPI]

Pms Exports Pvt Ltd

100% Eou, Unit-ii, Plot No. 210a,
Gidc, Umbergaon, VALSAD,
GUJARAT

.....Appellant

VERSUS

C.C.E. & S.T.-Vapi

4th Floor...Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road, Vapi
Vapi, Gujarat-396191

.....Respondent

WITH

Excise Appeal No. 12952 of 2014

[Arising Out Of OIA-VAP-EXCUS-000-APP-61-63-14-15 Dated- 12/05/2014 Passed By
Commissioner of Central Excise, Customs and Service Tax-VAPI]

Kalpesh Kantilal Khut

Account Cum Authorised Signatory Of M/S, Pms Exports Pvt Ltd,
100% Eou Unit-Ii, Plot No. 210aa, Gidc, Umbergaon,
VALSAD, GUJARAT

.....Appellant

VERSUS

C.C.E. & S.T.-Vapi

4th Floor...Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road, Vapi
Vapi, Gujarat-396191

.....Respondent

AND

Excise Appeal No. 12983 of 2014

[Arising Out Of OIA-VAP-EXCUS-000-APP-61-63-14-15 Dated- 12/05/2014 Passed By
Commissioner of Central Excise, Customs and Service Tax-VAPI]

Pms Exports Pvt Ltd

100% Eou, Unit-i, Shed No. A -1/244/18,
Gidc, Umbergaon, VALSAD, GUJARAT

.....Appellant

VERSUS

C.C.E. & S.T.-Vapi

4th Floor...Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road, Vapi
Vapi, Gujarat-396191

.....Respondent

APPEARANCE:

Shri. Ankur Upadhyay, Advocate for the Appellant

Shri. Anoop Kumar Mudvel, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA**

FINAL ORDER NO. 10920-10922 /2024

DATE OF HEARING: 25.01.2024

DATE OF DECISION: 24.04.2024

RAJU

These appeals are filed by M/s. PMS Pvt. Ltd a 100% EOU, M/s. PMS Export Pvt. Unit a 100% EOU (II) and Shri. Kalpesh Kantilal Khutt, Accountant cum Authorized Signatory of Second appellant.

2. Learned Counsel for the appellant pointed out that appellant- 1 and appellant-2 were engaged in import of Duty Free Inputs and were also clearing the manufactured product in DTA in accordance with para 6.8 (H) of Foreign Trade Policy 2009-2014 on payment of duty under Section 3 of Central Excise Act, 1944 at full rate under the provision of Notification No. 23/2003-CE dated 01.03.2003. It was noticed that the appellant had manufactured and clearance recycled agglomerated plastic declaring classifiable under Chapter sub-heading 39159029 during the year-2007-2008, 2008-2009, 2009-2010, 2010-2011 and 2011-2012 (up to September-2011) on payment of Central Excise Duty calculated according to provisions prescribed under Notification No. 23/2003-CE dated 01.03.2003. It was noticed that while calculating aggregate duty both these appellant

had taken basic Customs Duty at the rate of 5% ad valorem in terms of Notification No.. 21/2002-Cus., dated 01.03.2002 as amended vide Notification No. 11/2006 dated 01.03.2006. According to the said notification, the exemption of duty was available to the product of Chapter Heading 3901 to 3904 (Serial No. 477 to 480 of notification). Revenue was of the opinion that the goods manufactured by both these appellants, i.e. recycled agglomerated plastic and plastic grinding, were classifiable under Heading 39159029 and therefore the concessional rate of 5% under Notification No. 21/2002-Cus., dated 01.03.2022 was not available to the appellant. The revenue was of the opinion that the goods of Chapter sub heading 39159029 attract Basic Customs Duty at the rate of 7.5% ad valorem. Consequently, while calculating aggregate duty, the appellants short paid Central Excise Duty leviable on the clearances to the tune of Rs. 63,82,438/-. The liability against Unit-1 was Rs. 2,05,581/- and against Unit-2 was Rs. 61,76,857/-. Penalties under Section 11AC were also imposed in respect of the first show cause notice issue invoking extended period of limitation. Penalty of Rs. 4 Lakhs was imposed under Rule 25(1) of Central Excise Rules in respect of three show cause notices issued subsequent to the first show cause notice. Penalty of Rs. 6,38,243/- was imposed on third appellant by the original adjudicating authority but the same was reduced to Rs. 3,20,000/- by first appellate authority.

2.1 Learned Counsel pointed out that due to mistake on account of their executives the product "agglomerate plastic granules" were classified under Tariff Heading 39159029 till September-2011. However, the said mistake

was corrected and goods were classified under 39019090 after September-2011. Only after this change was made that the first show cause notice dated 19.06.2012 was issued by the revenue. Learned counsel pointed out that earlier during 2007-2008 and 2008-2009, the Central Excise Revenue Audit had identified short payment of Education Cess and SHE Cess on the said goods. The said differential Cess was paid by the appellant. He pointed out that the duty payments of the said transactions were examined by the Central Excise Revenue Audit at the material time well before the issue of show cause notice. Thus revenue was aware of the classification and rate of duty structure adopted by appellants.

2.2 Learned Counsel stated that the process of making agglomerated Plastic out of waste and scrap imported by them involved a processing. He argued that these granules are undisputedly the primary form of polymer of ethylene in uneven sizes and same cannot be called plastic waste and scrap. He argued that the said goods were classifiable under 39019094 of Central Excise Tariff Act, being plastic in primary form in terms of Chapter Note-6 of Chapter 39

2.3 Learned Counsel further stated that That they had imported duty free plastic waste & scrap falling under CETSH 39159029. As per Public Notice No. 392(PN)92-97 dated 01.01.1997, the import of these goods is subject to actual user condition only and would be permitted only to actual users who had the required facility for recycling such waste/scrap. Therefore, for others import of plastic waste/scrap is prohibited fro clearance as such. After recycling, it gets transformed into primary form of plastic agglomerat (re-

processed granules), which is being manufactured by the two appellants. The said goods cannot be classified under same heading as that of raw material i.e. plastic waste/scrap under heading 39159029. Learned Counsel pointed out that the appellant had imported plastic waste and scrap subject to actual user condition. Para 3 of the Public Notice No. 392 (PN) 92-97 dated 01.01.1997 clarifies that the parameters prescribed therein would apply *Mutatis Mutandis* in case of import of plastic waste and scrape by 100% EOU's.

2.4 Learned Counsel further argued that the learned Commissioner (Appeals) erred in holding that the heading 3901 applies only to goods produced by chemical synthesis. Learned Counsel pointed out that the contention of Commissioner (Appeals) is not acceptable for the reason that the Chapter Note-3 applies only to sub category (a to e) prescribed in said Chapter Note-3 to Chapter 39. He argued that the said Chapter Note is not applicable to agglomerated Plastic as it does not fall in any category (a to e) specified in said chapter 3 to chapter 39. He argued that the said chapter in terms of Chapter Note 6 and 7 to Chapter 39, the said goods are classifiable under Chapter Heading 3901 to 3914.

2.5 Further, he pointed out that the argument of revenue that even if the goods are in primary form in terms of Chapter Note 6 to Chapter Note 39 still the goods can be classified in heading 3901 to 3904, only if they are produced by the process of chemical synthesis as required under note 3 of Chapter 39 Central Excise Tarrif Act. He pointed out that though samples were drawn by the superintendent of Central Excise Customs and Service

Tax Range-I on 23.01.2012 no test results were informed to the appellant. The test report was not relied upon in the impugned proceedings and was not even supplied to the appellants.

3. The appellant obtained the test report under RTI. The test report of T A Sreenivasan, Chemical Examiner Grade-I dated 07.03.2012 reads as under:

"The sample is in the form of off white small size lumps along with some pieces of irregular shapes and sizes (primary form). It is composed of single thermoplastic, polyethylene having specific gravity below 0.74, size 2 mm to 20 mm".

3.1 Another test report of shri. T A Sreenivasan, Chemical Examiner. The Second report with eligible dates reads as follows:

"The sample is in form of white colour size and shape (preliminary forms). It is composed of thermoplastic polyethylene having specific gravity below 0.6, size 1 mm to 15 mm".

3.2 Another report of the Chemical Examiner dated 09.03.2012 reads as follow:

"The sample is in form of pink coloured lumps and irregular size and shape (primary form) Composed of single thermoplastic polyethylene (pigment) size 2 mm to 20 mm".

3.3 Another report dated 07.03.2004 reads as follow:

"The sample is in form of gray colour small lumps, irregular size in shape (primary form). It is composed of single thermoplastic polyethylene (pigmented) size 2 mm to 15 mm".

4. Learned Counsel pointed out that from the above report , it can be seen that even chemical examiner has stated that the goods are in primary form and composed of single thermoplastic namely polyethylene.

5. Learned AR relies on the impugned order.

6. We have considered the rival submissions. We find that the issue before us is if the product imported by the appellant can be considered goods classifiable as polymers of ethylene in primary form under heading 3901 or the same have to be classified as waste, paring and scrap of plastic falling under heading 39159029. It is noticed that while samples were drawn but the reports obtained from chemical examiner have not been relied in the current proceedings. The appellant has obtained the aforesaid test reports by under RTI. The learned counsel for the appellant has relied on the test reports which are reproduced above, to assert that the goods consist of single thermoplastic material and the chemical examiner grade-I has categorically that the goods are in primary form. Note 6 and 7 of the Chapter 39 reads as under:

"6. In headings 3901 to 3914, 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 39.15 does not apply to waste, parings and scrap of a single thermoplastic material, transformed into primary forms (headings 39.01 to 39.14)."

From the above notes, it is apparent that the chapter heading 3915 does not apply to waste, parings and scrap of a single thermoplastic material transform into primary form and for such material the appropriate heading is 3901 to 3914. A perusal note would indicate that the terms primary form applies to lumps, powder and granules. The chemical examiners report clearly holds that the goods are single thermoplastic material and are in form of lumps, powder granules etc. The chemical examiner further holds that the goods are in primary form. In these circumstances, the attempts to sustained classification of goods under heading 3915 cannot be upheld. In terms of Notes 6 and 7 and in terms of the chemical examiner report, it is apparent that the goods are not classifiable under heading 3915 being of single thermoplastic material in primary form.

7. The revenue in the proceedings has greatly relied on Chapter Note 3 of Chapter 39 which reads as follows:

"3. 3901 to 3911 apply only to goods of a kind produced by chemical synthesis, falling in the following categories:

(a) Liquid synthetic polyolefins of which less than 60% by volume distils at 300 °C, after conversion to 101.3 kPa when a reduced-pressure distillation method is used (3901 and 3902);

(b) Resins, not highly polymerised, of the coumarone-indene type (3911); (c) Other synthetic polymers with an average of at least 5 monomer units;

(d) Silicones (3910.00.00); (e) Resols (3909) and other prepolymers."

This prescribes that only goods produced by chemical synthesis would fall under Note 3901 to 3914.

It is seen that the Chapter Note 3 is apparently in conflict with Chapter Notes 6 and 7 examined above. However, it is noticed that the said conflict has been resolved in the General Notes to Chapter 39 in the HSN which reads as follows:-

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 "curing" 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 "curing" (such as hardeners (cross-linking agents) or other co-reactants and accelerators), these liquids or pastes may contain other materials such as plasticisers, stabilisers, 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 exceeds 50 % of the weight of the solution, are **excluded** from this Chapter and fall in **heading 32.08** (see Note 2 (e) 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.

Polymers in primary forms further formulated with additives, which make the products suitable for their expressed use as mastics, are to be classified in heading 32.14.

- (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 unplasticised materials which become plastic in the moulding and curing process, or of materials to which plasticisers 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).

It is the apparent from the above that if single thermoplastic material is transform into primary form from waste scrap, it would remain classifiable under heading 3901 to 3914. Thus, it is apparent from the explanatory note of HSN that the impugned goods cannot be classified under heading 3915 and have to be classified under heading 3901 to 3014 depending on the material. In the instant case, the Chemical Examiner Reports have clearly indicated that the material is polyethylene and it is in primary form.

8. In this instance case, the goods being polyethylene are classifiable under heading 3901. In this background, we do not find any merit in the impugned order and the same is set aside and appeals are allowed.

(Pronounced in the open on 24.04.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi