CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.53079 of 2014

(Arising out of Order-in-Original No.33/Commr./LKO/ST/2013-14 dated 10/03/2014 passed by Commissioner of Customs, Central Excise & CGST, Lucknow)

Commissioner of Central Excise, Lucknow .....Appellant
(7A, Ashok Marg, Lucknow)

VERSUS

M/s Clean Plast, ...Respondent

(C-1, Chemical Complex, Jahangirabad Road, Barabanki)

<u>APPEARANCE:</u>

Shri Santosh Kumar, Authorised Representative for the Appellant
None for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Final ORDER NO.70224/2023

DATE OF HEARING : 17 November, 2023
DATE OF DECISION : 17 November, 2023

<u>SANJIV SRIVASTAVA:</u>

The present case is directed by revenue against the Order-in-Original No.33/Commr./LKO/ST/2013-14 dated 10/03/2014 passed by Commissioner of Customs, Central Excise & CGST, Lucknow. By the impugned order Commissioner has held as follows:-

<u>ORDER</u>

In view of the above discussion and findings I pass the following order:-

> *"I drop the case proceedings initiated vide show cause notice No.26/Commr/Lko/ST/13-14 dated 28.06.2013 against M/s Clean Plast, C-1, Chemical Complex, Jahangirabad Road, Barabanki (U.P.)."*

2.1 Respondents are engaged in the process of procuring PET Bottles received from M/s Reliance Industries Ltd. and after flaking/washing/grinding the used bottles, the same were return back to M/s Reliance Industries Ltd. for being further use in manufacture of the finished goods by M/s Reliance Industries.

2.2 It was alleged that processes of flaking/grinding of used PET bottles and washing of flakes do not amount to manufacture as defined under Section 2(f) of Central Excise Act and was also not one of the declared product as manufactured under Section 2(f) of the Central Excise Act. Revenue was of the opinion that the process amounting to manufacture and were subjected to nil rate of duty and the finished products were subjected to nil rate of duty as per Notification No.24/2012-CE dated 08.05.2012. Accordingly, the benefit claimed by the respondent in terms of Notification No.08/2005 would not be admissible to them. Accordingly, a show cause notice was issued to the respondent asking them to show cause as to why-

> *"a) Service Tax, Ed. Cess and Secondary & Higher Ed. Cess, total amounting to Rs.52,46,844.00 should not be demanded and recovered from them under Section 73(1) of the Finance Act, 1994 along with interest payable under Section 75 of the Finance Act, 1994; and Late fee under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 should not be demanded and recovered from them; and*
>
> *b) Penalty should not be imposed upon them under the provisions of Section 76 of the Finance Act, 1994.*
>
> *c) Penalty should not be imposed upon them under the provisions of Section 77(1) (a) of the Act for contravention of Section 69 of the Finance Act, 1994."*

2.3 This show cause notice has been adjudicated by the impugned order. Aggrieved revenue has filed this appeal on the following grounds-

> *"**2.1** Notification No. 8/2005-ST dated 01.03.2005 reads as:-*
>
> *"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable*

service of production of goods on behalf of the client referred in sub-clause (v) of clause (19) of section 65 of the said Finance Act, from the whole of service tax leviable thereon under section 66 of the said Finance Act:

*Provided that the said exemption **shall apply only in cases where such goods are produced using raw materials or semi-finished goods supplied by the client and goods so produced are returned back to the said client for use in or in relation to manufacture of any other goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as amended by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), on which appropriate duty of excise is payable.***

Explanation.- For the purposes of this notification,-

(i) the expression "production of goods" means working upon raw materials or semi-

finished goods so as to complete part or whole of production, subject to the condition that such production does not amount to "manufacture" within the meaning of clause (1) of section 2 of the Central Excise Act, 1944 (1 of 1944); (ii) "appropriate duty of excise" shall not include 'Nil' rate of duty or duty of excise wholly exempt."

***2.2** It may be pertinent to mention that availability of Notification No. 8/2005-ST dated 01.03.2005 is subjected to fulfilment of two conditions as contained in the Notification, itself i.e.*

(a) such goods are produced using raw materials or semi-finished goods supplied by the client

(b) goods so produced are returned back to the said client for use in or in relation to manufacture of any other goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as amended by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), on which appropriate duty of excise is payable

***2.3** In the instant case, the party is supplying 'PET Flakes' to the Principal Manufacturer i.e. M/s Reliance Industries Ltd, who are utilising the same for manufacture of 'Polyster Staple Fibre' & 'Tow Polyster' falling under Chapter Heading No. 55 of the First Schedule to the Central Excise Tariff Act, 1985.*

***2.4** Vide Notification No. 24/2012-CE dated 08.05.2012 items falling under Chapter 54 & 55 of First Schedule to the Central Excise Tariff Act, 1985have been notified for 'Nil' rate of duty.*

***2.5** Consequently, the final products i.e. 'Polyster Staple Fibre' & 'Tow Polyster' (i.e. Items of Chapter 55 of the First Schedule to the Central Excise Tariff Act, 1985) being manufactured by the Principal manufacturer, utilizing the impugned 'PET Flakes' produced by the party cannot be construed to have been cleared by M/s Reliance Industries Ltd. upon payment of 'appropriate duty of Excise', as defined in the impugned Notification. As 'Nil' rate of Duty is not 'Appropriate Rate of Duty'.*

***2.6** Accordingly, it is evident that the condition mandated for exemption under Notification No. 8/2005-ST dated 01.03.2005 has not been fulfilled and hence, the party is not eligible to avail benefit thereof from 08.05.2012 onwards i.e. the date on which notification No. 24/2012-CE was issued.*

***2.7** Further, the impugned Notification No. 8/2005-ST dated 01.3.2005 was rescinded vide Notification No. 34/2012-ST dated 20.06.2012 and has further been superseded by Notification No. 25/2012-ST dated 20.06.2012, the effective date being 01.07.2012 & the eligibility of exemption benefit under Notification No. 25/2012-ST dated 20.06.2012 is still subjected to the fulfilment of identical conditions, as were there, in the case of Notification No. 8/2005-ST dated 01.03.2005. However, the Adjudicating Authority has not mentioned such rescinding & supercession in the impugned Order.*

***2.8** Accordingly, the Adjudicating Authority appears to have erred by way of wrongly extending the benefit of exemption Notification No. 8/2005-ST dated 01.03.2005 to the party, while the stipulated condition thereof was not fulfilled from 08.05.2012 onwards and also the impugned Notification No. 8/2005-ST dated 01.03.2005 itself stands rescinded and super ceded by Notification No. 25/2012-ST dated 20.06.2012."*

3.1 The notice for hearing issued to the respondent has been returned undelivered on number of occasions. Accordingly, in terms of Rule 21 of CESTAT Procedure Rules, 1982, reproduced below the appeal has been taken up for consideration after hearing the learned Authorized Representative for the Revenue.

"RULE 21. Hearing of appeals ex parte. — Where on the day fixed for the hearing of the appeal or on any other day to which the hearing is adjourned the appellant appears and the respondent does not appear when the appeal is called on for hearing, the Tribunal may hear and decide the appeal ex parte."

3.2 Learned Authorized Representative for the Revenue reiterates the grounds taken in the appeal memo.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of argument.

4.2 Commissioner in the impugned order has concluded as follows:-

"Summing up, it may be stated that the noticee are engaged in the activity of conversion of was PET bottles into PET Flakes and/ or washing of PET flakes.

It is noticed that if the prosess of conversion of waste bottles into PET flakes is viewed as amounting to manufacture then the noticee are eligible to exemption under serial No 78 of Notification No 4/2006-CE dated 01.03.2006. Alternatively, if this process is not viewed as amounting to manufacture then the noticee are eligible for exemption from Service Tax under Notification No 8/2005-ST dated 01.03.2005.

In view of the above discussion I hold that the processing of waste PET bottles into PET flakes does not amount to *manufacture as the process of crushing, cutting and washing of waste PET Bottles does not result in emergence of a new distinct and identifiable product. Consequently the noticee would be entitled to the benefit of exemption from Service Tax under Notification No 8/2005-ST dated 01.03.2005 and the demand of Rs 52,46,844.00 is liable to be dropped being non sustainable in law."*

4.3 The only ground which is raised by the revenue to counter the findings recorded by the Commissioner in the impugned order is that Polyester staple fiber/polyester Staple yarn was attract nil rate of duty as per exemption Notification No.24/2012-CE dated 08.05.2012. The proviso (2) of the said notification specifically provides that appropriate rate of duty would not include nil rate of duty or duty which is exempted for the purpose of the said notification. The benefit of this Notification No.8/2005 would not be admissible to respondent. As the finished product of M/s Reliance Industries was Polyester staple fiber or polyester staple yarn subjected to nil rate of duty as per Notification No.24/2012. However, we find at no stage of investigation nor even at the filing of this appeal any evidence has been produced by the revenue to show that Reliance was clearing the finished products i.e. Polyester staple fiber or polyester filament yarn by availing the benefit of the notification. In absence of any evidence to this effect, the conclusion drawn in the appeal filed by the revenue cannot be substantiated.

4.4 The period in dispute is from October 2011 to March 2013 and the grounds stated for subjecting to levy the activities undertaken by the respondent to service tax under the category of business auxiliary service and as noted in the appeal filed by revenue are as follows:

"2.2 It was alleged that the process of flaking/ grinding of used pet bottles purchased from local vendors do not amount to manufacture as defined in corresponding Chapter/ Section notes and also in the third schedule to Central Excise tariff Act relating to "Deemed Manufacture" in relation to various specified goods.

2.3 In the circumstances, it can be inferred that the processes undertaken by the job worker was not covered under "manufacture" which finds support in case of Crane Betel Nut Powder Works Vs Commissioner of Customs and Central Excise, Tirupathi 2007 (210) ELT 171 (SC) where reliance has been placed on constitutional bench judgment of Apex Court in the case of UOI Vs Delhi Cloth mills reported in (1963) Supp SCR 586.

2.4 The party's service tax liability under Business Auxiliary Services was ascertained on the basis of date wise payments relating to the job charges furnished by the party which was calculated as Rs 52,46,844/- for the period October 2011 to March 2013."

4.5 Section 65 (19) of the Finance Act, 1994 defined Business Auxiliary Service as follows:

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

Explanation. - ……..

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or

> *vendor, public relation services, management or supervision, and*
>
> *includes services as a commission agent,* ***but does not include any activity that amounts to "manufacture" of excisable goods.***
>
> *Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -*
>
> *(a) "Commission Agent" …….*

Respondent has before the Commissioner, contended that the activities undertaken by them amount to "manufacture" and hence he cannot be subject to levy of service tax under this category. Commissioner has after consideration of the submissions rejected the contentions of respondent and has concluded that activities undertaken by the respondent amount to manufacture in terms of Section 2 (f) of the Central Excise Act, 1944. Since Commissioner has concluded against the respondent on the issue of "manufacture" he has held that the activities undertaken by the respondent are liable to Service Tax under the category of Business Auxiliary Services. But he has extended the benefit of exemption as per notification No 8/2005-ST to the respondent. Revenue has in the appeal challenged the impugned order to the extent, that the benefit under notification has been extended to the respondent. The challenge in the revenue appeal is only for the period post 08.05.2012, when the exemption was granted to the Polyester Staple Fibre manufactured out of waste PET bottles was allowed vide Notification No 24/2012.

4.5 The conclusion reached by the Commissioner in the impugned order to the effect that if the processes under taken by the respondent amount to manufacture then they are exempt from payment of duty as per Sl No 78 of Notification No 4/2006-CE finds support from the decision of Chennai Bench in case of Sree Ranga Polymers [2019 (370) E.L.T. 496 (Tri. – Chennai)] holding as follows:

"3.3 Ld. Consultant also submits that even in case the final goods have to be considered as falling within CETH 39.15, it has to be held that no manufacture is involved in conversion of PET Bottles into Flakes. For this purpose, he relies upon the ratio of judgment of the Hon'ble Supreme Court in the case of Crane Betel Nut Powder Works v. CC & CCE, Tirupathi - 2007 (210) E.L.T. 171 (S.C.).

4. Heard both sides and have gone through the facts.

5.1 We find that the main bone of contention in this case concerns the eligibility of the PET flakes, manufactured by the appellants for exemption under Sl. No. 78 of Notification No. 4/2006-C.E., dated 1-3-2006. The said Sl. No. 78 of the notification is reproduced for ready reference :

S. No.	**Chapter or heading or sub-heading or Tariff item of the First Schedule**	**Description of excisable goods**	**Rate**	**Condition No.**
(1)	*(2)*	*(3)*	*(4)*	*(5)*
……	…….	…….	…….	…….
78	*3901 to 3914*	*Plastic materials reprocessed in India out of the scrap or the waste of goods falling within Chapters 39, 54, 55, 56, 59, 64, 84, 85, 86, 87, 90, 91, 92, 93, 94, 95 and 96* *Explanation. - For the removal of doubts, it is hereby clarified that nothing contained in this exemption shall apply to plastic materials reprocessed in a free trade zone, a special economic zone or a hundred per cent export-oriented undertaking and brought to any other place in India*		

5.2 From the facts on record, it emerges that appellant in their reply dated 23-4-2010 to the SCN have informed that waste PET bottles are crushed and washed using mechanical force and converted into "flakes" which are then cleared to other manufacturers, who convert it to powder and cleared to manufacturer of PET bottles; that *the buyer of the product who converts the "flakes" to powder form is not paying Central Excise duty; that the product waste PET bottle flakes and waste PET bottles in powder form are the two stages of conversion of used and waste PET bottles into a new PET bottle for fresh usage; that since flakes are converted into PET bottles, they are inputs for such manufacturers and are classifiable under CETH 3907.60 only.*

5.3 The appellants who were earlier classifying their final product "PET flakes" under CETH 3915.90 have subsequently claimed classification under CETH 3907.60 vide their letter dated 1-12-2009 and also consequential benefit of Notification No. 4/2006-C.E. (Entry 78).

5.4 The two contending Tariff headings are reproduced as under :

Heading No.	***Sub-Heading No.***	***Description of Goods***
1	*2*	*3*
PRIMARY FORMS		
39.07	***Polyacetals, other polyethers and epoxide resins, in primary forms, polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms***	
	3907.10	*Pollyacetals*
	3907.20	*Other polyether*
	3907.30	*Epoxide resins*
	3907.40	*Polycarbonates*
	3907.50	*Alkyd resins*
	3907.60	*Polyethylene terephthalate*
	3907.70	*Diallylphthalate resins including moleic resins and fumeric resins*
	3907.80	*Polybutylene terephthalate - other polyesters :*
	3907.91	*Unsaturated*
	3907.99	*Other*
II. WASTE, PARINGS AND SCRAP; SEMI-MANUFACTUTRES ARTICLES		
39.15	***Waste, parings and scrap, of plastics.***	

	3915.10	*Of polymers of ethylene*
	3915.20	*Of polymers of styrene*
	3915.30	*Of polymers of vinyl chloride*
	3915.90	***Of other plastics***
	3915.90 42	***- Of Pet Flakes***

5.5 We thus find that the important requirement for goods to be classified in Heading 39.07 is that they should be "primary forms" of plastics. What are primary forms is amplified in Chapter Note 6, which 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."

5.6 It is thus evident that primary forms for the purpose of Chapter 39 are constituent goods which are "primary" in form and meant to be converted by further polymerisation or chemical synthesis into other materials of Headings 3901 to 3914. This interpretation is reinforced by Chapter Note 3 which clarifies as under :

"3. Headings 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 1,013 millibars when a reduced pressure distillation method is used (Headings 3901 to 3902);
(b) resins, not highly polymerised, of the coumarone-indene type (Heading 3911);

(c) other synthetic polymers with an average of at least 5 monomer units;

(d) silicons (Heading 3910)

(e) resols (Heading 3909) of other prepolymers.

5.7 Discernably, the appellants are not doing any chemical synthesis or polymerization processes on the PET bottles used by them as raw material. On the other hand, the process involves only putting the used PET bottles into a crusher which makes them small pieces and subjecting the resultant goods to washing and packing after which they are cleared from the factory. Though the appellant has argued that they are manufacturing "flakes", in our view, what is being manufactured is only "parings" of PET bottles. True, these "parings" eventually get converted into new PET bottles, however that will not make the final product of the appellant eligible for classification as "primary form of plastic". The "flakes" which are included as "primary form" in Note 6 of Chapter 39 will surely have to be a 'primary grade material". This is certainly not the case here.

5.8 In the first place, even as per the respondent's own admission the buyer of their products only convert them into primary form namely, powder form and hence not paying Central Excise duty.

5.9 Secondly, while Chapter Note 7 does clarify that Heading 3915 does not apply to inter alia "parings" of a single thermoplastic material, that is only applicable for such material which has been transformed into primary form (Headings 3901 to 3914). This being so, only when the "parings" manufactured by the respondents are converted into "primary forms" such goods will then go out of CETH 3915.

5.10 Further, respondent has all along not only been importing the "PET Bottle Waste" under classification 3915

90 42, but also exporting the 'PET Flakes Clear, washed' under the same classification 3915 90 42.

5.11 In view of the discussions herein above, we therefore find ourselves in agreement with the following conclusion of the original authority :

"The issue to be decided is whether the Parings of PET Bottles commonly known in trade as 'PET Flakes clear' manufactured by the M/s. SRP is classifiable under CETSH 3915.9042 or under 3907.60 as stated vide their letter dated 1-12-2009. The materials manufactured by the M/s. SRP by cleaning and crushing of used pet bottles are only parings of post-consumer PET Bottles. As per assessee's own reply, pet flakes manufactured by them is further processed and converted into powder form by other companies before used by the recycling companies to manufacture pet bottles & pet fibers in comparison, PET or Poly Ethylene Terephthalate in primary form is a thermoplastic polymer resin of the polyester family. Depending on its processing and thermal history, Poly Ethylene Terephthalate may exist both as an amorphous [transparent) and as a semi-crystalline material. The semi-crystalline material might appear transparent [particle size < 500 mm) or opaque and white [particle size up to a few microns) depending on its crystal structure and particle size. PET is produced by the step-growth polymerization of ethylene glycol and telephthalic acid. But the M/s. SRP is not doing any polymerization process. The materials manufactured by the M/s. SRP are only parings of post-consumer PET Bottles. Just because it is used as input in recycling companies, of course after several mechanical processes, the same cannot be equated with PET in primary form. As per Chapter Notes No. 3 to Chapter 39 under Section VII of Central Excise Tariff clearly stated that -

Headings 39.01 to 39.11, apply only to goods of a kind produced by chemical synthesis.

As per point No. 1 of the General Rules for the interpretation of the schedule "for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter notes."

The Tariff Heading 3915 applies to Waste, parings and scrap of plastics; the sub-headings 3915 90 42 applies to Waste, parings and scrap of pet bottles; The word 'of' in sub-heading has to be given its due importance. The cleaned and crushed pet bottles cannot be considered as PET [Poly Ethylene Terephthalate) in primary form and can be considered only as parings and scrap of pet bottles. Hence, I intend to conclude that the materials manufactured by M/s. SRP by cleaning and crushing of used pet bottles is rightly classifiable under Tariff Heading 3915 90 42."

Thus we find that tribunal has held that the processes under taken by the respondent do amount to manufacture and leads to emergence of the finished goods which are exempted from payment of Central Excise duty as per Notification no 4/2006-CE. In view of the specific decision holding that the finished goods of the respondent are exempt from payment of duty, in our view the issue of manufacture is settled in favour of the respondent and the activities undertaken by the appellant cannot be classified under the taxable category of Business Auxiliary Service. Revenue in its appeal has not challenged this conclusion arrived by the Commissioner in the impugned order. In our view the appeal filed by the revenue can be dismissed on this account itself.

4.4 Before we proceed to examine the issue in respect of applicability of exemption Notification No 8/2005-ST or Sl No 30 of Notification No 25/2012-ST, entire history of exemption provided by the Notification 17/2012-CE dated 01.03.2012 as amended by Notification No 24/2012-CE dated 08.05.2012 needs to be taken note of In case of G P L Polyfils [2005 (183) ELT 27 (T)] this Tribunal has on the issue of excisability of Polyester Fibre obtained from the waste pet bottle observed as follows:

> ***"4.****Chapter 54 of the Tariff, relates to man-made Filaments and its Chapter note I defines man-made fibres, as under :-*
>
> *"Throughout the First Schedule, the term man-made fibres" means staple fibres and filaments of organic polymers produced by manufacturing processes, either :*
>
> *(a) By polymerization of organic monomers, such as polyamides, polyesters, polyurethanes or polyvinyl derivatives; or*
>
> *(b) By chemical transformation of natural organic polymers (for example, cellulose, casein, proteins or algae), such as viscose rayon, cellulose acetate, cupro or alginates."*
>
> *It remains undisputed that none of these processes, had been undertaken by the assessee in respect of their fibre so as to bring the same within the ambit of this Chapter 54 or even Chapter 55 which are part of the First Schedule. The learned Commissioner (Appeals) has, in our view, rightly dropped the duty demand against the assessees on this ground.*
>
> ***5.****The learned SDR has however, contended that the definition given in Chapter Note 1 to Chapter 54, should not be taken as exhaustive but only explanatory and that the fibre manufactured by the assessee, falls within the definition of "goods" and as, such is excisable and liable to duty. But we are unable to subscribe to the contention of the learned SDR. The Chapter Note 1, reproduced above, sets out the definition of man-made fibres for the purpose of bringing the same within the ambit of the First Schedule of the CETA. It gives an exhaustive and self-contained/self-defined, definition of the man-made fibres.*

Nothing can be subtracted or added to this definition and for bringing the "man-made fibres" within the scope of the First Schedule of the CETA, the processes detailed in this Chapter note, must be undertaken by an assessee. Therefore, even if it is taken for sake of arguments that the fibres manufactured by the assessees in the case in hand falls within the definition of 'goods' but being not covered under the First Schedule as observed above, they cannot be saddled with the duty liability. The view taken by the learned Commissioner (Appeals) after having regard to the Chapter Note 1 of Chapter 54, for excluding the fibres manufactured by the assessees from Chapters 54/55 of the Tariff, in our view, is perfectly valid and no fault can be found with it. Therefore, the impugned order passed by him is upheld."

4.5 Subsequently Board vide Circular Number 929/19/2010-CX dated 29.06.2010 issued a 37B Order Clarifying as follows:

2. It has been brought to the notice of the Board that divergent practices are being adopted in respect of classification of the "Polyester Staple Fibre" manufactured out of PET scrap and waste bottles. Whereas in some jurisdictions the said product has been classified under the Chapter 39 as article of plastic, in other jurisdictions the same has been classified under Chapter Heading 55032000.

3 The matter has been examined. Polyester is "Long-chain polymers chemically composed of at least 85 percent by weight ofan ester and a dihydric alcohol and a terephthalic acid." Federal Trade Commission defines Polyester Fibre: Amanufactured fibre in which the fibre forming substance is any long-chain synthetic polymer composed of at least 85% byweight of an ester of a substituted aromatic carboxylic acid, including but not restricted to substituted terephthalic units, p(-R-O-CO- C 6 H 4 -CO-O-) x and parasubstituted hydroxy-benzoate units, p(-R-O-CO-C 6 H 4 -O-) x .

4. Normally PSF is manufactured by using main inputs like PTA & MEG. The name "polyester" refers to the linkage of several monomers (esters) within the fiber. Esters are formed when alcohol reacts with a carboxylic acid. The monomer ester then is polymerized under suitable conditions to obtain polyester.

5. The most common polyester for polyester staple fibre purposes is poly (ethylene terephthalate), or simply PET. This is also the polymer used for many soft drink bottles and it is becoming increasingly common to recycle them after use by re-melting the PET and extruding it as fibre. To manufacture Polyester staple fibre, used PET bottles are taken as inputs. They are crushed and converted into PET flakes. These PET flakes are then charged to extruders where they are melted and molten polymer is passed through spinnerets to obtain TOW. The tow is drawn and then cut into different lengths to obtain PSF.

6. As per Chapter Note 1 to Chapter 54,

1. Throughout this Schedule, the term "man-made fibres" means staple fibres and filaments of organic polymers produced by manufacturing processes, either:

(a) by polymerisation of organic monomers to produce polymers such as polyamides, polyesters polyolefins or polyurethanes, or by chemical modification of polymers produced by this process [for example, poly (vinyl alcohol)prepared by the hydrolysis of poly (vinyl acetate)]; or

(b) by dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such as cuprammonium rayon (cupro) or viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates.

The terms "synthetic" and "artificial", used in relation to fibres, mean: synthetic: fibres as defined at (a); artificial: fibres as defined at (b). Strip and the like of heading 5404 or 5405 are not considered to be man-made fibres.

The terms "man-made", "synthetic" and "artificial" shall have the same meanings when used in relation to "textile materials" .

7. Thus manmade fibre can be obtained either starting from monomers or from polymers itself. The process of manufacture is not determinative of the classification of the manufactured product. What is essential for determining the classification is the nature of the end product and the market understanding of the said end product. In the present case there appears to be no dispute with regard to the nature and commercial understanding of the product viz Polyester Staple Fibre.

8. As per technical literature uses of Polyester Fibre are as follows

Apparel: Every form of clothing

Home Furnishings: Carpets, curtains, draperies, sheets and pillow cases, wall coverings, and upholstery

Other Uses: hoses, power belting, ropes and nets, thread, tire cord, auto upholstery, sails, floppy disk liners, and fibre fill for various products including pillows and furniture

9. From the above facts it is quite evident that the product under consideration is nothing but a textile material and hence will be classified as textile material under Section XI and not as article of plastic in Chapter 39.

10. Tribunal decision in case of GPL Polyfils Ltd [2005 (183) ELT 27 (T)] would be relevant to the particular facts as in the said case and hence cannot have binding precedents in other matters.

11. To ensure uniformity in the manner of classification of the Polyester Staple Fibre obtained from PET scrap and waste bottles it is clarified that this product is correctly classifiable under heading 55032000.

4.6 Para 10 of the above Circular was struck down by the Hon'ble Delhi High Court in case of Shiva Taxfabs Limited [2011 (24) S.T.R. 525 (Del.)] holding as follows:

"13. *Paragraph 10 of the circular cannot be sustained. Paragraph 10 of the circular states that the decision of the Tribunal in GPL Polyfils Ltd. (supra) would be relevant to the facts of that particular case and is not a binding precedent in other matters. It stipulates that even if the facts and the process are identical, other assessees cannot rely upon the decision in GPL Polyfils Ltd. (supra) before the Revenue authorities. In the written submissions and during the course of the argument, the Revenue took a forthright and categorical stand that the said decision is incorrect and per incuriam. Intention of the Revenue in paragraph 10 of the circular is apparent, Revenue authorities should not follow the decision of the CESTAT in GPL Polyfils Ltd. (supra). Paragraph 10 of the said circular is accordingly struck down.*

16. However, one difficulty remains as pointed out by the counsel for the petitioners. It is stated that the hands of the authorities are bound and tied because of the impugned circular. It is submitted that the entire adjudication process would be a formality. It is further submitted that even if paragraph 10 of the circular is struck down, the damage and harm has been caused. There is merit in the contention of the petitioners in this regard. The situation, we think, can be redeemed by giving two directions. Firstly, the Revenue authorities will examine the contentions raised by the petitioners without being influenced or treating the circular as binding. The Revenue/adjudicatory authorities will independently apply their mind and take into consideration the decision of the

Tribunal in GPL Polyfils Ltd. (supra). They will also examine whether the said decision is applicable or state if they feel that there are good grounds and reasons (i.e. just cause) why the said decision should not be applied and questioned in appeal etc. The circular will be read as a guideline and not a binding mandate. Secondly, the petitioners can be protected by ensuring that in case the authorities hold that the decision in GPL Polyfils Ltd. (supra) is not to be applied even if facts are similar, then the demands should not be recovered by adopting coercive measures till stay applications are decided by the CESTAT. This direction is necessary, as a piquant situation has been created by the Revenue. Equities have to be balanced. The earlier decision of the CESTAT in GPL Polyfils Ltd. (supra) should be given due regard if the petitioners are able to show that the same applies, unless the same is set aside. [See judgment dated 6th July, 2011 in Civil Appeal No. 5166/2003 titled M/s. Gammon India Ltd. v. Commissioner of Customs, Mumbai [2011 (269) E.L.T. 289 (S.C.)]. Of course the stay of demand will be subject to the order of the CESTAT. The petitioners if denied stay by the CESTAT and aggrieved will be entitled to challenge the order of the CESTAT in accordance with law.

19. *Accordingly, the aforesaid writ petition is disposed of recording as under :*

(a) The first question is decided in terms of paragraph 8 above.

(b) Paragraph 10 of the impugned circular is struck down;

(c) The Assessing Officer and the authorities under the Act shall independently apply their mind and consider the judgment of Tribunal in GPL Polyfills Ltd. (supra) and keep in mind the observations and ratio of Supreme Court in C.K. Gangadharan & Anr. (supra). The Assessing Officer/authorities will not be bound by the impugned circular. The

circular can be referred for guidance but not as a binding mandate.

(d) In case of an adverse decision, the demand will not be enforced by adopting coercive method till the stay application is decided by CESTAT."

4.7 To set all the issues at rest in respect of the classification of Polyester Staple Fibre obtained from the waste PET Bottles, by Section 142 of Finance Act, 2012, Chapter Note 1 A was introduced in the Chapter 54 of the First Schedule to Central Excise Tariff Act, 1985 with effect from the date of 37 B order. The text of Section 142 ibid is reproduced below:

"142. Amendment of Chapter Notes to Chapter 54 or First Schedule. *- (1) In the First Schedule to the Central Excise Tariff Act, in Chapter 54, after Note 1, the following Note shall be inserted and shall be deemed to have been inserted with effect from the 29th day of June, 2010, namely: -*

"1A. Notwithstanding anything contained in Note 1, man-made fibre such as polyester staple fibre and polyester filament yam manufactured from plastic and plastic waste including waste polyethylene terephthalate bottles shall be classified as textile material under Chapter 54 or Chapter 55, as the case may be.".

(2) Any action taken or anything done or purported to have been taken or done for recovery of duty of excise at any time during the period commencing on and from the 29th day of June, 2010 and ending with the date on which the Finance Bill, 2012 receives the assent of the President (hereafter in this section referred to as the "specified period"), shall be deemed to be, and always to have been, for all purposes, as validly and effectively taken or done as if the amendment made by sub-section (1) had been in force at all material times and, accordingly, notwithstanding any judgment, decree or order of any court, tribunal or other authority -

(a) all duties of excise levied, assessed or collected during the specified period on such goods shall be deemed to be and always to have been, as validly levied, assessed or collected as if the amendment made by sub-section (1) had been in force at all material times;

(b) recovery shall be made of all the duties which have not been paid, but would have been paid had the amendments made by sub-section (1) been in force, within a period of thirty days from the date on which the Finance Bill, 2012 receives the assent of the President and in the event of non-payment of such duties of excise within the said period, interest at the rate of twenty-four per cent, per annum on the amount of such duties in addition to the amount of duties to be recovered, shall be payable from the date immediately after the expiry of the said period of thirty days till the date of its payment;

(c) while computing the amount of duty to be recovered under clause (b), the assessee shall be entitled to take into account the CENVAT credit of duty paid on inputs, input services and capital goods, if any, under the CENVAT Credit Rules, 2004 which has not been availed by him for reason of such goods being treated as non-excisable or exempted goods.

Explanation. - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this section not come into force."

4.8 Simultaneously vide Notification No 24/2012-CE dated 08.05.2012 Notification No 17/2012-CE dated 01.03.2012 was amended granting exemption to the Polyester Staple Fibre etc obtained from waste pet bottles.

4.9 By Section 110 of Finance Act, 2014 exemption to polyester staple fibre etc., manufactured out of the waste PET Bottles was given with retrospective effect for the period from

29.06.2010 to 17.03.2012. The said section is reproduced below:

> ***"110. Amendment of notification number GSR 95(E), dated 1st March 2006 issued under Section 5A of Central Excise Act.*** *- (1) The notification of the Government of India in the Ministry of Finance (Department of Revenue) number GSR 95(E), dated the 1st March, 2006 (hereinafter referred to as the first notification) which was superseded vide number GSR 163(E), dated the 17th March 2012 (herein referred to as the second notification), issued under sub-section (1) of Section 5A of the Central Excise Act, shall, in so far as it relates to the first notification, stand amended and shall be deemed to have been amended retrospectively, in the manner as specified in column (2) of the Fifth Schedule, on and from -*

<table>
<tr><th>Notification No. and date</th><th colspan="5">Amendment</th><th>Period of effect of amendment</th></tr>
<tr><td>(1)</td><td colspan="5">(2)</td><td>(3)</td></tr>
<tr><td rowspan="4">G.S.R 95(E), dated the 1st March, 2006 (5/2006-Central Excise, dated the 1st March 2006)</td><td colspan="5">(1) In the said notification, in the Table, after serial number 2B and the entries relating thereto, the following serial number and entries shall be inserted and shall be deemed to have been inserted with effect from the date and up to the period specified in column (3), namely :-</td><td rowspan="4">29th June, 2010 to 16th March, 2012 (both days inclusive)</td></tr>
<tr><td>(1)</td><td>(2)</td><td>(3)</td><td>(4)</td><td>(5)</td></tr>
<tr><td rowspan="2">"2C</td><td rowspan="2">54 or 55</td><td>(1) Polyester staple fibre or polyester filament yarn manufactured from plastic scrap or plastic waste including waste polyethylene terephthalate bottles.</td><td>Nil</td><td>-</td></tr>
<tr><td>(2) Tow manufactured and captively consumed within the factory of its production for the manufacture of goods specified in entry (1)</td><td>Nil</td><td>-</td></tr>
</table>

4.10 In case of Capitol Fibres P. Ltd [2017 (346) E.L.T. 495 (Tri. - Mumbai)] tribunal followed the decision in case of G P L Polyfils and held as follows:

> ***12.*** *It is also an admitted fact that the final product manufactured by the appellant is not obtained by the process mentioned in Chapter Note 1 to Chapter 54 of Central Excise Tariff Act, 1985. Therefore, we have no hesitation to follow the decision of GPL Polyfils Ltd. (supra) to hold that the finished goods manufactured by the appellant does not fall under Chapter 54 or 55 of the Central Excise Tariff Act, 1985. In these circumstances, we hold that for the period 1-11-2009 to 28-6-2010 as proposed by the ld. AR, the demands are not sustainable.*

4.11 Thus it is seen that Polyester staple fibre or polyester filament yarn manufactured from plastic scrap or plastic waste including waste polyethylene terephthalate bottles was throughout exempted from payment of duty or attracted nil rate of duty. There could not have been any reason for limiting the applicability of Notification No 8/2005-ST dated 01.03.2005 from the 08.05.2012 the date of Notification No 24/2012-CE amending notification No 17/2012-CE dated 01.03.2012. Revenue has in its appeal restricted the demand of service tax from 08.05.2012. Further in its circular dated 29.06.2010, Board has in para 8 clarified multifarious uses of Polyester Staple Fibre etc. No evidence has been produced by the revenue in the appeal or at any stage of the proceedings to show that the finished goods of the M/s Reliance Industries Limited were cleared under exemption Commissioner has in para 23 of the impugned order observed as follows:

> *"23. The Noticee have submitted that if their activity is not treated as manufacture of goods the same would be liable for exemption from Service Tax under Notification No 8/2005-ST dated 01.03.2005 as the PET flakes which are processed by them out of the waste PET bottles supplied by RIL and that the PET flakes are returned by them to RIL (principal) for mbeing used in the manufacture of Polyester*

Staple on which appropriate excise duty is being paid after clearance by the RIL. Further the range Officer, Superintendent Central Excise Range-I, Barabanki in his reported dated 16.07.2013 as inetralia informed that if the activity of job work is considered as service, the same is also exempted from payment of service tax under Notification No 8/2005-ST dated 01.03.2005 and 25/2012-ST dated 20.06.2012."

4.13 The exemption contained in the notification No 8/2005-ST which was rescinded by the Notification No 34/2012-ST extended by the entry at Sl No 30 of the Notification No 25/2012-ST. The entries made in the two notifications are in respect of the same activities. The contention of revenue in appeal with regards to non admissibility of the exemption under these notifications is supported by any evidence, to show that M/s Reliance Industries Limited was clearing the Polyester Staple Fibre by availing the exemption under the Notifications referred in the appeal. In fact it is not even shown that M/s Reliance was clearing Polyester Staple Fibre or was clearing the product referred in para 8 of the board circular of 2010 on payment of appropriate duty.

5.1 We do not find any merits in the appeal filed by the revenue. Appeal is dismissed.

(Dictated and pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp