

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70456 of 2019

(Arising out of Order-In-Appeal No.GZB/EXCUS/000/APPL-MRT/456/2018-19 dated 16/01/2019 passed by Commissioner (Appeals) CGST & Service Tax, Meerut)

Premier Polyfilm Limited

.....Appellant

(40/1, Site IV, Sahibabad,
Ghaziabad-201010)

VERSUS

Commissioner, CGST, Ghaziabad

....Respondent

(Ghaziabad, U.P.)

APPEARANCE:

Shri Rajesh Chhibber, Advocate for the Appellant

Shri Manish Raj, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70364/2024

DATE OF HEARING : 05.03.2024

DATE OF DECISION : 28.06.2024

SANJIV SRIVASTAVA:

This appeal is directed against order in appeal No GZB/EXCUS/000/APPL-MRT/456/2018-19 dated 16.01.2019 of the Commissioner Central Excise and Service Tax (Appeal) Meerut. By the impugned order following has been held:

"6. I have carefully gone through the facts and records of the case as well as the submissions made by the appellant. I find that the appellant himself has submitted that he was initially clearing his finished goods i.e. PVC flooring/ covering under CETSH No. 39181090, but on insistence of Railways, the said goods were classified under CETSH No. 86079910, and benefit of Notification No. 12/2016-CE dated 01.03 2016 was availed and consequently C. Ex. duty @ 6% adv was paid In this regard, I further find that the appellant has not disputed that the

goods supplied/ sold to Railways were classifiable under CETSH 39181090 and as per S. No. 272A of the Notification No 12/2016-CE dated 01.03.2016, the exemption is available to goods classifiable under Chapter 8607 and not to that of Chapter 3918. Accordingly, the benefit of the concessional rate of duty under the said notification is not admissible and the demand of duty is sustainable

6.1 The appellant has further contended that no penalty under Section 11AC of the Act is imposable, as there was no intent to evade the duty. The appellant in this regard has submitted copy of letter dated 21.04.2017, vide which he had informed the department about the classification of the impugned goods under CETSH 86079910 on the insistence of Railways and payment of Central Excise duty @ 6%. I find that the said letter of the appellant has been made RUD to the SCN issued. I further find that the SCN proposed penalty under Rule 27 of the Central Excise Rules, 2002 (CER) for alleged contravention of the provisions of the CER and proposed imposition of penalty under Section 11AC of the Act, though no allegations had been discussed as to how provisions of Section 11AC of the Act were attracted. I also find that the adjudicating authority has imposed penalty under Rule 25 of the CER read with Section 11AC of the Act, though no proposal for imposition of penalty under Rule 25 of the CER was made in the SCN. Thus, the adjudicating authority has travelled beyond the allegations made in the SCN. Moreover, the issue pertains to the classification of the excisable goods for which the appellant had also informed the department that the goods were meant for the Railways to be used as flooring in the rolling stock and there is nothing to infer that the appellant had changed the classification of the goods with intent to evade payment of duty. As the amount of duty demanded had already been paid before the issue of the show cause notice and the same has been appropriated against the demand confirmed, no penalty is imposable against the appellant.

7. In view of above discussions and findings the impugned order is modified by setting aside the penalty, and the appeal bearing No. 329-CE/APPL-MRT/GZB/2017-18 dated 23.03.2018, filed by M/s Premier Polyfilm Ltd., 40/1, Site-IV, Sahibabad, Ghaziabad, (U.P), against the Order-in-Original No. 06/Assistant Commissioner/ CGST-VII/Ghaziabad/2017-18 dated 31.01.2018 is partially allowed."

2.1 Appellant is registered with the Central Excise department vide Registration No. AAACPO371QXM001, and is engaged in the manufacture of "PVC Laminated Sheets, Vinyl Coated Upholstery Fabrics & Plastics, Articles of plastics and PVC Flooring Covering classifiable under Tariff Head No. 39204900, 59031090,

39239010 and 39181090 respectively of the Central Excise Tariff Act,1985.

2.2 During the scrutiny of party's monthly ER-1 return for the month of March' 2017 (RUD-1), it was noticed that party cleared their finished goods i.e. "PVC Flooring Covering" falling under Tariff Head No. 39181090 to the SMM/CRW/MCS (Ward-03) East Coast Railway, Mancheswar, Bhuwaneswar, Odisha, mentioning these goods as "Parts of Coach Work of Railway Running Stock" classifying them under Tariff Head No. 86079910 and availed benefit of Notification No. 12/2016.C.E dated 01-03-2016 (SI No. 272 A), which was not admissible to them. Central Excise duty @ 6% Adv was paid instead of 12.50 % Adv payable on "PVC Flooring Covering falling under Tariff Head No. 39181090. They debited Rs. 6,60,561/- under protest, against goods supplied to Railway under Tariff Head No. 86079910 under the head "Credit utilized for other payments'

2.3 Appellant informed the jurisdictional officers that, they were classifying the goods in question i.e. "PVC Flooring Covering" under Tariff Head No 39181090, but Indian Railways wanted them to classify the "PVC Flooring Covering" under Tariff Head No. 86079910. Accordingly they have modified the classification and have cleared the goods availing the exemption under Notification No. 12/2016-CE dated 01-03-2016 and paid Central Excise Duty @ 6% Ady. However they decided to pay the differential duty under protest at the time of payment of duty @ 6%.

2.4 A show cause notice dated 29.05.2017 was issued to the appellant asking them to show cause as to why:

- (i) *Central Excise duty short paid i.e. 12.50% (-) 6%=6.50%, amounting to Rs. 6,60,561=00, should not be demanded from them under Section 11 A of the Central 'Excise Act,1944. Since the party has already debited Rs. 6,60,561=00 under the head "Credit utilized for other payments" "Under Protest" in their monthly ER-1 return*

for the month of March`2017, why the same should not be appropriated against the demand of Rs, 6,60,561=00

- (ii) Penalty under Rule 27 of the Central Excise Rules,2002 should not be imposed upon them, for the contravention of above mentioned provisions of Central Excise Rules*
- (iii) Penalty under provisions of Section 11AC of the Central Excise Act, 1944, should not be imposed upon them.*

2.5 Show cause notice was adjudicated by the jurisdictional Assistant Commissioner vide his order dated 31.01.2018 holding as follows:

"ORDER

- (i) I confirm the demand of recovery of central excise duty of Rs.6,60,561/- (Rupees Six Lakh Sixty Thousand Five Hundred Sixty One only), so raised against the said party vide the subject Show Cause Notice No. 07/AC/Div-III/GZB/2017-18 dated 29.05.2017, so bearing C. No. V(I5)Adj/PPL/SCN/22/17/592 dated 30.05.20i7, under the provisions of Section 11A of the Central Excise Act, 1944" and as the said amount of Rs.6,60,561/- (Rupees Six Lakh Sixty Thousand Five Hundred Sixty One only) has already been debited by the said party, as entailed in the said show cause notice, so I order for appropriation of the same against the said confirmed demand of duty:*
- (ii) I impose penalty of Rs.6,60,561/- (Rupees Six Lakh Sixty Thousand Five Hundred Sixty One only) upon the said party under the provisions of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944;*

All the adjudged dues should be paid forthwith

2.6 Aggrieved appellant filed the appeal before the Commissioner (Appeal) which has been disposed of as per the impugned order.

2.7 Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Rajesh Chibber, Advocate for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

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

4.2 Undisputedly the goods in the present case were cleared by the appellant to railways for use in the railway coaches and were meant for the rolling stock of the railway. The classification of the goods was done by the appellant at the instance of Railway under chapter 86079910 by the appellant and the benefit of exemption under the Notification No 12/2016-CE dated 01-03-2016 claimed. Issue whether the goods will be classified under the specific tariff entry of the goods cleared or under chapter 86 has been settled by the Hon'ble Supreme Court in the case of **Westinghouse Saxby Farmer Ltd [2021 (376) E.L.T. 14 (S.C.)]** observing as follows:

"24.As could be seen from the Orders of the Original Authority and the first Appellate Authority, the answer to question No.1 revolves around the description of goods found in Chapters 85 and 86, as well as the Notes in Section XVII and the General Rules for Interpretation of the First Schedule. We have already extracted the description of goods in Chapters 85 and 86. Therefore, let us now take note of the relevant Notes in Section XVII and the relevant Rule of the General Rules for Interpretation of the First Schedule.

25.Section 2 of the Central Excise Tariff Act, 1985 provides that the rates at which duties of excise shall be levied under the Central Excise Act, 1944 are specified in the First Schedule and the Second Schedule. The First Schedule contains a set of Rules known as "General Rules for the Interpretation of this Schedule". These Rules begin with a mandate that the "classification of goods in this Schedule shall be governed by the principles laid thereunder."

26.Rule 1 of these Rules makes it clear that "the titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only and that for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes and provided such headings or Notes do not otherwise require, according to the provisions of the rules that follow".

27.Rule 2 deals with (i) incomplete or unfinished articles; and (ii) mixtures or combinations of material or substance. While Rule 2(a) deals with incomplete or unfinished Articles, Rule 2(b) deals with mixtures or combinations of a material or substance.

28.Rule 3 deals with cases where goods are classifiable under two or more sub-headings. But Rule 3 begins with a reference to Rule 2(b). Therefore, it is necessary to extract Rule 2(b) and Rule 3 together. They read as follows :

xxxx "2.(a)

Any reference in a heading to a material or (b) substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

When by application of rule 2(b) or for any 3. other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows :

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) when goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

29.Interestingly Rule 2(a) speaks about "Article", Rule 2(b) speaks about "material or substance" as well as "goods of a given material or substance" and Rule 3 speaks about "goods".

30.In the case on hand, the claim of the assessee was that the relays manufactured by them were part of the railway

signalling equipment. But all the Authorities were of the unanimous view that this product is referable to goods of a specific description in Chapter sub-heading 8536.90 and that, therefore, General Rule 3(a) will apply.

31.*But in invoking General Rule 3(a), the Authorities have omitted to take note of 2 things. They are : (i) that as laid down by this Court in Commissioner of Central Excise v. Simplex Mills Co. Ltd. [(2005) 3 SCC 51 = 2005 (181) E.L.T. 345 (S.C.)] the General Rules of Interpretation will come into play, as mandated in Rule 1 itself, only when no clear picture emerges from the terms of the Headings and the relevant section or chapter notes; and (ii) that in any case, Rule 3 of the General Rules can be invoked only when a particular goods is classifiable under two or more Headings, either by application of Rule 2(b) or for any other reason. Once the authorities have concluded that by virtue of Note 2(f) of Section XVII, 'relays' manufactured by the appellant are not even classifiable under Chapter Heading 8608, we do not know how the Authorities could fall back upon Rule 3(a) of the General Rules. There is a fundamental fallacy in the reasoning of the Authorities, that Rule 3(a) of the General Rules will apply, especially after they had found that 'relays' are not classifiable under Chapter Heading 8608, on account of Note 2(f) of Section XVII.*

32.*Coming to Section XVII, which precedes Chapter 86, the same contains a few notes, one of which is Note 2, which lists out certain articles to which the expressions "parts" and "parts and accessories" mentioned in Chapter 86 do not apply. Note 2(f) reads as follows :-*

- "(1) xxxx*
- (2) xxx*
- (a) xxxx*
- (b) xxxx*
- (c) xxxx*
- (d) xxxx*
- (e) xxxx*
- (f) electrical machinery or equipment (Chapter 85)".*

33.*Note 2(f) is relied upon by the Revenue, in view of the fact that Chapter Heading 8608 uses the words "parts of the foregoing" after the words "Railway or tramway track fixtures and fittings" etc. Chapter Heading 8608 does not specifically mention "electrical relays". The assessee's contention is that "it is part of the railway signalling safety or traffic control equipment" and that, therefore, Relays manufactured by them would fall under Chapter Heading 8608 due to the usage of the word "parts". It is this*

contention that is sought to be repelled by the Authorities by relying upon Note 2(f) of Section XVII.

34.*Though at first blush, Note 2(f) seems to apply to the case on hand, it may not, upon a deeper scrutiny.*

35.*Note 3 of Section XVII reads as follows :*

"References in Chapters 86 to 88 to "parts" or "accessories" do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those Chapters. A part or accessory which answers to a description in two or more of the headings of those Chapters is to be classified under that heading which corresponds to the principal use of that part or accessory."

36.*What is recognized in Note 3 can be called the "suitability for use test" or 'the user test'. While the exclusion under Note 2(f) may be of goods which are capable of being marketed independently as electrical machinery or equipment, for use otherwise than in or as Railway signalling equipment, those parts which are suitable for use solely or principally with an article in Chapter 86 cannot be taken to a different Chapter as the same would negate the very object of group classification. This is made clear by Note 3.*

37.*It is conceded by the Revenue that the relays manufactured by the appellant are used solely as part of the railway signalling/ traffic control equipment. Therefore, the invocation of Note 2(f) in Section XVII, overlooking the "sole or principal user test" indicated in Note 3, is not justified.*

38.*On the question as to what test would be appropriate in a given case, this court pointed out in A. Nagaraju Bros. v. State of A.P. [1994 Supp (3) SCC 122 = 1994 (72) E.L.T. 801 (S.C.)], as follows :*

".....there is no one single universal test in these matters. The several decided cases drive home this truth quite eloquently. It is for this reason probably that the common parlance test or commercial usage test, as it is called, is treated as the more appropriate test, though not the only one. There may be cases, particularly in the case of new products, where this test may not be appropriate. In such cases, other tests like the test of predominance, either by weight of value or on some other basis may have to be applied. It is indeed not possible, nor desirable, to lay down any hard and fast rules of universal application."

Therefore, the respondents ought not to have overlooked the 'predominant use' or 'sole/principal use' test acknowledged by the General Rules for the Interpretation of the Schedule."

4.3 Thus by the above order Hon'ble Supreme Court has held that end use of the goods should be a determinative factor for deciding the classification of goods. In case of the goods supplied to railway for being used in the rolling stock, the goods get classified as part of the rolling stock under chapter 86. That being so the classification claimed by the appellant at the instance of Railways under 86079910 cannot be faulted with. Accordingly the duty paid by the appellant claiming exemption under Notification No 12/2016-CE dated 01.03.2016 needs to be upheld.

4.4 In the case of **Rail Tech V/s Commissioner of Central Excise, Chandigarh [2000 (120) E.L.T. 393 (Tribunal)]** Tribunal has held as under:-

"9. The bare perusal of Tariff heading 76.10 shows that it covers aluminium structures and parts thereof. The entry "windows and their frames" in the bracketed words, in this Tariff Heading refers only to the parts of the structure. Even the aluminium, plates, rods, profiles, tubes and the like, had been referred to in this Tariff Heading as the ones prepared for use in structures. Similarly, the entry in the sub-heading 7610.10 of this Tariff Heading, regarding doors, windows and their frames and thresholds for doors refers to the ones which are meant for use in the structures as this entry is contained in the sub-heading of the main tariff heading 76.10 of the CETA. The entries in the Tariff heading and sub-heading have not to be read distinctively but collectively and in such a manner that the entry in the main Tariff Heading 76.10 does not become superfluous, redundant or in any manner isolated from its sub-heading entry. Therefore, only those doors, windows and their frames and threshold for doors, would be covered by sub-heading 7610.10 of the CETA which have relevance and use in the structures and not others.

10. In the instant case, admittedly, aluminium doors and windows manufactured by the assesseees have no use or relevance in the structures. These are being manufactured by them on the drawings and specifications provided to

them, by the railways, for their sole use in the railway coaches. These aluminium windows and doors, as not disputed by the counsel before us, are neither marketable in the market nor can be used in any structure. He has rather fairly conceded that these can be solely used in the railway coaches. That being so, it can be safely concluded that these are parts of the railway classifiable under Tariff Heading 86.07(sub-heading 8607.00) of the Tariff. The principle that specific tariff entry has to prevail over the general entry, is not attracted in this case. The view taken in the impugned order dated 15-06-1994 by the Collector (which is the subject matter of the appeal of the assesseees) is legally correct and no fault can be found with the same.

11. *In the light of the discussion made above, the view taken by the Collector(Appeals) in his order dated 30-05-1995(the subject matter of the appeal filed by the Revenue) classifying the products in question under sub-heading 7610.10 of the CETA cannot be subscribed being not legally sound. He had wrongly reversed the order in original of the Assistant Collector dated 9-9-1994 who classified the products under sub-heading 8607.00 of CETA. The Collector (Appeals) had lost sight of the fact that aluminium windows and doors and parts thereof manufactured by the assesseees were not those which were capable of being used as aluminium structures in order to merit classification under Heading 76.10 (sub-heading 7610.10) of the CETA. These goods have no application or utility elsewhere than in the railway coaches. These are being manufactured by the assesseees admittedly, for the railway coaches on the specifications and designs furnished to them, by the Railway. Therefore, these goods are classifiable only under Heading 86.07 (sub-heading 8607.00) of the CETA as parts of railway and not under Heading 76.10(sub-heading 7610.10) of the CETA. The order of the Assistant Collector classifying these goods under sub-heading 8607.00 of the CETA should have been confirmed by the Collector(Appeals) instead of reversing the same. Consequently, the impugned order of the Collector(Appeals) dated 30-01-1995 cannot be allowed to stand and deserves to be quashed. In similar*

circumstances in the case of CCE Bombay v. Fykays Engg. P. Ltd. decided vide Final Order No. 125/2000-B, dated 25-1-2000 [[2000 \(116\) E.L.T. 341](#) (Tri.)], the Larger Bench of the Tribunal while deciding the issue regarding the classification of the mineral insulated thermo couple leads solely and principally meant for the function of pyrometers took the view that the same were to be classified along with the pyrometers and not independently. The analogy of the law laid down in that case by the Larger Bench fully applies to the facts of the present case also.”

4.4 In view of discussion as above we do not find merits in the impugned order to this extent.

5.1 Appeal is allowed.

(Pronounced in open court on 28.06.2024)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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