

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE**

Appeal(s) Involved:

E/596/2007-DB

*[Arising out of Order-in-Original No. 04/2007 dated 17/05/2007
passed by the Commissioner of Central Excise & Customs, Cochin.]*

**M/s. PALA MARKETING CO-
OPERATIVE SOCIETY LTD.**

No.4214, Cherpumkal
Pala.
Kerala

Appellant(s)

Versus

**The Commissioner of central
Excise & Customs**

C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN – 682 018.
KERALA

Respondent(s)

Appearance:

**Mr. Kuriyan Thomas, Advocate
MENON & PAI**

P.B. NO.1911
IS PRESS ROAD,
COCHIN – 682 018.
KERALA

For the Appellant

Mrs. Kavitha Podwal, AR

For the Respondent

Date of Hearing: 17/07/2018

Date of Decision: 24/07/2018

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No: 20990 / 2018

Per : P. ANJANI KUMAR

The appellants are a society registered under Kerala Co-operative Societies Act, 1969. They have got two units. In one of the units, they manufacture Low Density Poly Ethylene (LDPE) sheets and strips falling under Chapter Heading 3920 10 12 and Latex Collection Cups falling under Chapter Heading 3926 90 99 of Central Excise Tariff Act. In the other unit, they cleaned the scrap rubber to get crumb rubber. The Central Excise department has issued a show-cause notice dated 9.1.2007 to the appellants covering the period 2003-04 to 2006-07 demanding a total duty of Rs.68,52,988/- and also proposing to impose penalties under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002. Vide Order-in-Original No.4/2007 dated 17.5.2007, the Commissioner (A) has confirmed the demand and appropriated an amount of Rs.13,54,109/- already paid by them towards the duty confirmed and has imposed equal penalty under Section 11AC of Central Excise Act, 1944. The main allegation of the Department was that the conversion of scrap rubber into crumb rubber amounted to manufacture. Aggrieved by the above order, the appellants have filed this appeal.

2. The appellants submitted that the learned Commissioner erred in finding that the process of cleaning of scrap rubber to crumb rubber is a process of manufacture and consequently, crumb rubber is an excisable product for the purpose of Notification No.8/2003 dated 1.3.2003. The appellants have produced a certificate from the Rubber Board which clearly stated that there is no process of manufacture involved in the said conversion. The appellants further submitted that the crumb rubber cleared by them is not to be treated as excisable goods for the purpose of Notification No.8/2003. The appellants also submitted that in case CESTAT opines that the findings of the Order-in-Original are correct, the differential duty payable by them would only be Rs.6,34,810/- as they have already paid Rs.13,54,109/- through cash and Rs.48,64,069/- by way of CENVAT credit which the Commissioner held to be proper.

3. The learned counsel for the appellants submitted that the processing of natural scrap rubber to form crumb rubber does not amount to manufacture. The raw material used is rubber tree laces, cup lumps, which are collected from the trees as a post-harvest practice. The scrap collected is cleaned by soaking or crushing the lumps, and then followed by hammer milling,

drying bale pressing and packing. They have submitted that the issue has been clearly settled by Mumbai Bench of the Tribunal in case of ***CCE vs. Gujarat Reclaim & Rubber Ltd.: 2006 (195) ELT 44 (Tri.-Mum.)*** wherein it was held that crumb rubber powder obtained by crushing smaller pieces of rubber cuttings having similar properties and characteristics as input waste – Mere changing of physical form does not amounts to manufacture – Crumb rubber powder not dutiable. Similar opinion was given by Delhi Bench of the Tribunal in the case of ***Elgi Rubber Products Ltd. vs. CCE: 2002 (145) ELT 112 (Tri.-Del.)*** and ***Munch Food Products Ltd. vs. CCE: 1999 (114) ELT 521 (Tri.)***. He has also submitted that in the case of ***Indian Organic Chemicals Ltd. vs. Collector of Customs and Excise: 1996 (88) ELT 644 (SC)*** held that physical and chemical characteristics of original input waste and the resultant wastes are the same, resultant waste cannot be said to have been manufactured.

3.1 He has further submitted that it is the burden of the department to prove that the processes amounted to manufacture. The appellants by way of certificate given by the Rubber Board clearly proved that the production of crumb rubber

does not amount to manufacture. They have relied upon the following case laws:

- ***CCE s. Markfed Vanaspati & Allied Indus: 2003 (153) ELT 491 (SC)***
- ***Sandur Manganese vs. CCE: 2004 (168) ELT 75***
- ***CCE vs. United Phosphorous: 2000 (117) ELT 529 (SC)***
- ***In re Gujarat Narmada Valley: 2005 (184) ELT 128 (SC-FB)***
- ***CCE vs. Jagajit Industries: 2002 (141) ELT 306 (SC)***

3.2 They further submitted that certificate given by the Rubber Board being in the nature of expert evidence needs to be followed in the absence of contrary evidence produced by the department. They have relied upon the following case laws:

- ***CCE vs. International Tobacco Co. Ltd.: 2008 (231) ELT 207 (SC)***
- ***Security Paper Mills vs. CCE: 2017 (345) ELT 661 (Tri.-Del.)***
- ***Pearl Enterprises vs. CC: 2006 (203) ELT 71 (Tri.-Kol.)***
- ***Venture Impex Pvt. Ltd. vs. CC: 2016 (338) ELT 759 (Tri.-Del.)***
- ***CCE vs. Hydrokrimp AC (P) Ltd.: 2000 (123) ELT 1085 (Tri.)***

3.3 The learned counsel concluded by submitting that the appellants were under the *bona fide* belief that the activity of processing of scrap rubber to form crumb rubber does not amount to manufacture. Therefore, it could not be said that there was any deliberate intention on the part of the appellant to refrain from paying duty with the intention to evade payment of

duty. Therefore, the period of limitation and penalty under Section 11AC of Central Excise Act cannot be maintained.

4. The learned Departmental Representative reiterating the findings in the Order-in-Original and submitted that the Commissioner has considered all the submissions of the appellants and has given a categorical finding to that effect. The Commissioner has held that:

“The definition of ‘manufacture’ as given under Section 2(f) of the Central Excise Act, 1944 reads as:

“manufacture includes any process (i) incidental or ancillary to the completion of a manufactured product”.

In the Central Excise purview, manufacture involves some process either simple or complicated and the product at the end of the process should be new and commercially different. As per the society’s own version, the process of conversion of scrap rubber into crumb rubber involves cleaning, blending, reduction of size, drying and packing (for transport and marketing). The clarification issued by the Rubber Board, vide their letter ref No.CM/3/2007 dated 6.2.2007, also gives the same processes as being involved in the conversion of scrap rubber into crumb rubber. In my opinion, the above processes come within the ambit of manufacture as per the definition of given supra. The scrap of rubber, as it is collected from the

rubber estates are not being used by the manufacturers of articles of rubber. The scrap contains a lot of impurities, which are eliminated during the process of conversion into crumb rubber. Also the scrap, in different forms like shell scrap, tree laces and cup lumps, lose their individual identity during the process and get transformed into crumb rubber. Crumb rubber is the technically specified natural rubber i.e., ISNR 20 and ISNR 10, which is admittedly a value added product, which is purchased by the manufactures of Rubber articles. It is not correct to say that the crumb rubber is same as the scrap in different forms, as obtained from the rubber estates. In fact, crumb rubber, is *prima facie*, distinguishable from the various forms of scrap. Crumb rubber is a commercially known product which is bought and sold in the national as well as international markets. The appellants are exporting ISNR 20/ISNR 10. This evidences the commercial identity and marketability of the product. The contention that is neither a finished product or manufactured article, as it remains a raw material in one of its primary forms is not correct. If a product, obtained as a result of subjecting of some materials to some process, is commercially a different product which is bought and sold in the trade, it can be taken as manufactured product irrespective of that product remaining as a raw material.”

The learned departmental representative has submitted that the order of the Commissioner does not

require to be modified as it was given after considering the submissions of the appellants.

5. Heard both sides and perused the records. The appellants have relied upon the ratio of the judgment of the Tribunal rendered in the case of **Gujarat Reclaim and Rubber Products Ltd.** (supra) and has mentioned that Supreme Court in the case of **CCE s. Markfed Vanaspati & Allied Indus** (supra) has held that the burden to prove that there is manufacture is on the Revenue and merely because an item falls in the tariff entry, manufacture must not be deemed. We also find that Hon'ble Tribunal in **Elgi Rubber Products Ltd.** (supra) has held that the activity of manufacturing powder form by crushing the old rubber is neither commercial nor chemically a new product. We find that though the process discussed in these cases is not of manufacture of crumb rubber from scrap rubber, the issue discussed is very much similar. If conversion of old rubber into crumb rubber powder does not amount to manufacture, a process of manufacturing crumb rubber from scrap rubber should not be an act of manufacture. Moreover, in the appellant's case, they are drawing the scrap rubber from rubber tree laces and cup lumps which are collected from the tree as a post-harvest practice. The

activity undertaken by the appellants is more in the nature of segregation of different types of rubber produced naturally and to convert it into crumb rubber. The processes undertaken is more primitive than the activity discussed in ***Gujarat Reclaim and Rubber Products Ltd.*** cited supra, therefore by no stretch of imagination the appellant's activity cannot be treated as amounting to manufacture. The learned departmental representative has tried to argue on the basis of entries in the Central Excise Tariff Act. However, as discussed above, the burden to prove that there is manufacture is not discharged by the department beyond reasonable doubt. We find that whereas the appellants have produced the certificate issued by the Rubber Board but the department has not produced any evidence to negate the certificate thus issued. The certificate states categorically that the process undertaken by the appellants in fact helps the basic properties of natural rubber to be retained fully in the processed form of crumb rubber. It is also seen from the certificate that Kerala Government had exempted the item from payment of tax on the purchase or sale on this kind of rubber. Understandably, this cannot be the criteria to decide the excisability of the product under Central Excise Act, 1944. However, it will throw a light on the way to approach such an

issue as held by the Supreme Court and the Tribunal as discussed above. The process of converting scrap rubber to crumb rubber powder does not amount to manufacture. The process in dispute in the impugned order being similar should also be held not to amounting to manufacture. Moreover, as contended by the appellants, the department has not produced any certificate or opinion by an expert in the field to counter the contentions of the appellant. The learned Commissioner has merely attempted to lift one or two sentences from the certificate issued by the Rubber Board saying that the certificate supports the department's claim that the conversion of scrap rubber to crumb rubber involves same processes. As held by the Supreme Court as well as the Tribunal, a mere involvement of mere process or processes or by showing an entry in the Central Excise Tariff Act, the process shall not be deemed to be an act of manufacture. It is not the case of the department that there is a specific Chapter or Section Note to this effect. In view of the above, we find force in the contentions of the appellants and hold that conversion of scrap rubber into rubber powder does not amount to manufacture as the department's basic contention on the manufacture itself does not flows water other arguments.

5.1 Regarding the applicability of inclusion of the value of such clearances for the purposes of Notification No.8/2003 and imposition of penalty under Section 11AC of the Central Excise Act, 1944, etc., we find that no deliberation on the issue is warranted.

6. In view of the above, we allow the appeal of the appellant with consequential relief, if any.

(Order was pronounced in Open Court on **24/07/2018.**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

rv