CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALSOUTH ZONAL BENCH CHENNAI

Appeal No.E/132/2010

[Arising out of Order-in-Appeal No.99/2009 to 106/2009 (M-II) dt. 18.12.2009 passed by Commissioner of Central Excise (Appeals), Chennai]

Commissioner of Central Excise,
Chennai — Appellant

Versus

Roofit Industries Ltd. — Respondent

Appearance :

Shri S. Govindarajan, AC (AR)
For the Appellant

Shri G.Natarajan, Advocate
For the Respondent

CORAM :

Hon'ble Ms.Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing :23.04.2018
Date of Pronouncement :05.06.2018

FINAL ORDER No. 41718 / 2018

Per Bench

The issue that comes up for decision in this appeal concerns the classification of various products meant for construction industry, namely, Ready Mix (Dry Mix) manufactured by the respondents under the brand name "Roofit mix". Respondents assessee were classifying the goods under Chapter Heading 2505.00 of the First Schedule to the

Central Excise Act, 1985 (CETA). This was not agreed to by the department resulting in issue of SCN dt. 10.03.2008 for the period July 2005 to January 2008 issued to the appellant, inter alia proposing reclassification of the goods under CETH 32149010, demand of consequential differential duty amount of Rs.42,71,429/- with interest thereon, confiscation of goods which were cleared without payment of duty and imposition of penalties on the appellants and their Directors / Employees under various provisions of law. Yet another SCN dt. 19.01.2009 was issued with similar proposals, for the period February 2008 to March 2008, inter alia, demanding Rs.1,00,376/- with interest thereon and imposition of penalties. These SCNs were adjudicated vide adjudication orders dt. 10.02.2009 and 16.07.2009 respectively, upholding the proposals made in the respective SCNs. Affected noticees preferred appeals to the Commissioner (Appeals), who vide a combined order dt.18.12.2009 (impugned order), set aside the orders dt.10.02.2009 and 16.07.2009 of the original authority.Aggrieved, department is in appeal.

2. On 23.01.2018, when the matter came up for hearing Revenue represented by Ld. A.R Shri S. Govindarajan, reiterated the grounds of appeal. He further submits that Chapter Heading 2505 under which the assessee classified the product before 1.3.2005, covers only natural sands whereas dry mix process of the impugned product involves addition of portland cement, white cement and lime stone powder in various proportions. Hence it is not a case of only natural sands but

one of mixture of sand with combined materials like port land cement, white cement and lime stone powder. After introduction of 8 digit nomenclature w.e.f. 1.3.2005, corresponding Chapter heading 2520 covers only Gypsum, Anhydrite and Plasters consisting of calcined gypsum and calcium sulphate. Hence after 1.3.2005 also, the drymix manufactured by assessee is outside the purview of CETH 2520. Ld. AR submits that the correct classification of dry mix should be under CETH 3214.90. He relies upon the Tribunal decision in *Roofil Industries Vs CC Kandla* - 2007 (219) ELT 422 (Tri.-Mumbai) involving import of similar products by the assessee through Kandla Port, where the classification has been held as CTH 3214.90 .

3. On the other hand, for the respondents, Ld. Advocate Shri G. Natarajan submits that substantial demand under first SCN is hit by limitation since detailed manufacturing process had been informed by appellants to department while applying for registration on 4.1.2001 and 16.6.2005 and hence no suppression can be alleged. He further submits that under the erstwhile six digit tariff 'plasters' are classifiable under Chapter heading 2505, if they consist of a basis of calcium sulphate. However, in the eight digit nomenclature 'plasters' fall under Chapter 2520. That calcium sulphate need not be a basis and its mere presence is sufficient. For these reasons, Ld. Advocate contends that the impugned order is fair and just and does not require any interference.

4.1 Heard both sides. From the facts on record, it emerges that the impugned products are used as first layer in irregular brick works, first layer plastering in regular brick works etc. As per assessee's own letter dt. 16.06.2005 referred to in para 11.2 of the adjudication order dt. 10.02.2009, found in page 4 of the Appeal Book, "Roofit Dry Ready Mix" is a mixture of graded sand and cement with suitable additives, for use in brick works, rough and smooth plastering. The assessee has claimed classification of the impugned product under CETH 2505 prior to 1.3.2005 and CETH 2520.00 w.e.f. 1.3.2005. The earlier CETH 2505 read as under :

Heading No.	**Sub heading No.**	**Description of goods**	**Rate of duty**
(1)	(2)	(3)	(4)
25.05	2505.00	Mineral substances notelsewhere specified (including clay, earth colours, natural abrasives, sulphurs, slate and stone), lime; plasters with a basis of calcium sulphate, whether or not coloured, but not including plasters specially prepared for use in dentistry	Nil

Thus, upto 1.3.2005, only plasters with a basis of calcium sulphate can find place under CETH 2505. From the facts on record, it is not disputed that the ingredients that go into the impugned product are graded river sand, portland cement, white cement and lime stone powder in specific proportions along with some additions for water retention and crack free nature. Evidently, this mixture does not have a basis of calcium sulphate and hence it could not have come within the fold of CETA classification 2505.00 in the erstwhile Central Excise Tariff prior to 1.3.2005.

4.2 For the period w.e.f. 1.3.2005, corresponding CETH 2520 seeks to cover "*Gypsum: Anhydrite; Plasters (consisting of calcined Gypsum or Calcium Sulphate) whether or not coloured, with or without small quantities of Accelerators or Retarders*". We thus find that even in the new 8 digit regime, CETH 2520 will include only those plasters consisting of calcined gypsum or calcium sulphate. Hence even after 1.3.2005, we are not able to find any merit in the assessee's claim for classification under CETH 2520.00.

4.3 On the other hand, we find that CETH 3214.00 of the erstwhile Tariff sought to cover putty resin cements, painters' fillings and non-refractory surfacing preparations reading as follows :

Heading No.	**Sub-heading No.**	**Description of goods**	**Rate of duty**
(1)	**(2)**	**(3)**	**(4)**
3214	3214.00	Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; non-refractory surfacing preparations for facades, indoor walls, floors, ceilings or the like, but excluding primers (heading No.32.08), varnishes (heading No.32.09)	16%

Even after the introduction of 8 digit classification w.e.f. 1.3.2005 there was no major change in the tariff entry which reads as follows :

Tariff Item		Description of goods	Unit	Rate of duty
3214	-	**Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; non-refractory surfacing preparations for facades, indoor walls, floors, ceilings or the like**		
3214 10 00	-	Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings	kg.	16%
3214 90	-	*Other :*		
3214 90 10	---	Non-refractory surfacing preparations	kg.	16%
3214 90 20	---	Resin cement	kg.	16%
3214 90 90	---	Other	kg.	16%

We further find that the HSN Chapter heading 3214 reads as follows :

32.14 - **GLAZIERS' PUTTY, GRAFTING PUTTY, RESIN CEMENTS, CAULKING COMPOUNDS AND OTHER MASTICS; PAINTERS' FILLINGS; NON-REFRACTORY SURFACING PREPARATIONS FOR FACADES, INDOOR WALLS, FLOORS, CEILINGS OR THE LIKE**

3214.10 – **Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings**

3214.90 - **Other**

As clarified in the HSN, the products of heading 32.14 are "preparations of widely differing composition which are essentially characterised by the uses to which they are put; these preparations are usually put up in a more or less pasty form and in general they harden after application; however, some are in solid or powder forms; the products of this heading are usually applied with a caulking gun, a spatula, a trowel, a plasterer's float or similar tools".

4.4 Viewed in this light, we are of the considered opinion that the impugned product can only be classified in CETH 3214.00 prior to 1.3.2005 and 3214 90 10 thereafter as correctly held by both the original adjudicating authorities in the two OIOs dt.10.02.2009 and 16.07.2009. The impugned orders setting aside this classification cannot therefore be sustained and is therefore set aside in its entirety which will have the effect of restoring the classification upheld by the original adjudicating authorities. So ordered.

4.5 At the same time, we find merit in the Ld. Advocate's contention that substantial period of the first SCN dated 10.03.2008, for the period July 2005 to Jan 2008, whereby duty demand of Rs.42,71,429/- was confirmed by the OIO dated 10.02.2009, is hit by limitation. The detailed manufacturing process had been informed by the appellant to the department as far back as on 4.1.2001 and 16.6.2005 as averred by the Ld. Advocate. In such circumstances, appellant cannot be charged with any of the ingredients for invoking extended period like suppression of facts, misstatement etc. We therefore hold that confirmation of differential Central Excise duty with interest in respect of the proceedings initiated by SCN No.39/2008 dt.

10.03.2008 will have to be restricted only to the normal period of limitation. Only for this limited purpose, the matter is remanded to the adjudicating authority. So ordered.

4.5 No interference is made with respect to the demand of duty with interest in respect of the second SCN dated 19.01.2009.

5. As the issue involved was interpretational, we hold that the penalties imposed on the assessee under Section 11AC of the Act and on the other Directors / Employees under Rule 25/26 of the Central Excise Rules, 2002 are set aside.

To sum up,

1) Impugned order is set aside
2) The original adjudication orders dt. 10.02.2009 and 16.07.2009 confirming the Tariff Classification of impugned goods under CETH 3214 90 10 for the period July 2005 to January 2008 and February 2008 to March 2008 are restored
3) However the demand of differential duty upheld by impugned order pertaining to OIO dated 10.02.2009 in respect of proceedings initiated by SCN dated 10.03.2008 is restricted only for the normal period of limitation. The matter is remanded to adjudicating authority for a limited purpose of recalculating the duty liability for the normal period of limitation with interest thereon.

4) The demand of Rs.1,00,376/- confirmed in the OIO dt. 16.07.2009 in respect of proceedings initiated in SCN dt. 19.01.2009 is restored.
5) Penalties imposed on the assessee and their Directors/employees by the adjudicating authorities in their OIOs dt. 10.02.2009 and 16.07.2009 under Section 11AC of the Central Excise Act and Rule 25 / 26 of the Central Excise Rules, 2002 are set aside.

Department appeal disposed of on above terms.

(Pronounced in court on 05.06.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(SulekhaBeevi C.S)
Member (Judicial)

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