

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

Appeal No.E/31/2012

[Arising out of Order-in-Appeal No.330/2011 dt. 17.10.2011 passed by Commissioner of Central Excise (Appeals), Madurai]

Madura Coats Private Ltd.

Appellant

Versus

Commissioner of Central Excise,
Tirunelveli

Respondent

Appearance :

Shri N. Venkatraman, Sr.Advocate
Shri J. Shankaraman, Advocate
For the Appellant

Shri K. Veerabhadra Reddy, JC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 19.06.2018

FINAL ORDER No. 41941 / 2018

Per Bench

The facts of the case are that M/s.Madura Coats Pvt. Ltd., the appellants herein were inter alia engaged in the manufacture of "coated fusible interlining fabrics of cotton". Appellants had originally classified the impugned fabrics under Central Excise Tariff

Heading (CETH) 5903 consequent to insertion of Note 2(c) in Chapter 59 of the Central Excise Tariff Act, 1985 (CETA) w.e.f. 01.03.1989. The said chapter note was omitted w.e.f. 16.03.1995, subsequent to which appellants sought reclassification of the impugned fabrics under CETH 5207. This did not find agreement with the department. Accordingly, two show cause notices were issued, inter alia proposing classification of the impugned fabrics under CETH 5903, demand of consequential differential duty liability. These proposals were confirmed by the adjudicating authority. On appeal, vide an order No.14/98 (MDU) dt.22.01.1998, the Commissioner (Appeals) vide order dt. 22.01.1998 set aside the order of lower authority and directed him to go for retesting of the material on the basis of samples available and then pass a de novo order on the basis of results thereof and allowed the appeal by way of remand. Appellants further preferred appeal before CESTAT Chennai which was disposed of vide Final Order No.1828/98 dt. 16.09.1998 upholding the appellant's submission that Board's Circular No.5/89 dt. 15.6.89 should be taken into account while deciding the case. The Tribunal allowed the appeal by way of remand, inter alia ordering that remnant samples be tested for composition and that while taking a decision about the specific classification, the said circular also to be

considered. Consequent to this CESTAT order, the de novo adjudication culminated in a Order-in-Original dt. 07.02.2011 reiterating the classification of the impugned fabrics under CETH 5903.90 and ordering that applicable interest should be paid on the differential duty payable, if any, from 01.07,.2000 till the date of payment. In appeal, the Commissioner (Appeals) vide the impugned order No.330/2011 dt. 17.10.2011 upheld the order of the original authority and rejected the appeal. Hence the appellants are once again before this forum.

2. Today when the matter came up for hearing, the appellants represented by Shri N. Venkatraman, Sr. Advocate, assisted by Shri S. Muthuvenkatraman, Advocate, made various submissions which can be broadly summarized as under :

i) The period of dispute involved in this appeal is from 07.10.1996 to 30.04.2003.

ii) Ld. Sr. Advocate drew our attention to comparison chart of the Notes to Chapter 59 of the CETA to point out that sub note (c) namely Note 2 (c) was added w.e.f. 1.3.1989. The said Note 2(c) when introduced, read as under :

“Textile fabrics, partially or discretely coated with plastic by dot printing process (heading NO.59.03)”

iii) Note 2(c) was modified w.e.f. 20.03.1990 as under :

**“Textile fabrics, partially or discretely coated with plastic
(heading NO.59.03)”**

The Note 2(c) was deleted w.e.f. 16.03.1995, hence for the period of dispute, the said note 2(c) was not in operation.

iv) This being so, the Chapter 59 of the CETA w.e.f. 16.03.1995 will require to be interpreted in the same manner as it existed prior to the introduction of said Chapter Note 2 (c).

v) Hence the relevant Board's circulars clarifying the classification of the impugned goods prior to introduction of Note 2(c) will have a direct bearing in the present appeal.

vi) The Board's Circular No.24/Coated Fabrics/88-CX.1 dt. 2.9.1988 was issued which inter alia clarified that Fusible Interlining Cloth, to merit classification as coated fabrics under CETH 5903, should meet the following requirements :

- a) It should have a continuous and adherent film or layer of plastic on one side of the fabric surface
- b) The fabric should be impervious
- c) It should satisfy the conditions prescribed in Note 2 of Chapter 59.

vii) This clarification was further amended vide telex dt. 30.09.1988 which removed the requirement of plastic layer being “continuous”

and merely required such film or layer to be “adherent” on one side of the plastic surface.

viii) Pursuant to introduction of Note 2 (c) to CETA 59, the Board issued a clarification by Circular No.5/89 dt. 15.6.1989 conveying the fact and purpose of the said note 2(c). The circular also clarified that prior to 1.3.1989 textile fabrics partially or discretely coated with plastic will get covered under Chapter 52 to 55 depending upon the textile materials used whether cotton or man-made fabrics etc.

ix) These Board clarifications will hold good even for the period after the Note 2(c) was deleted w.e.f 16.3.1995.

x) After the deletion of Note 2(c) w.e.f. 16.3.1995, in view of certain doubts regarding classification of fusible interlining cloth, the Board issued a circular dt. 27.11.98. In that circular, it was clarified that omission of Chapter 2(c) was neither intended to nor resulted in changing the classification of fusible interlining cloth under Heading 5903. It was further clarified that classification of such fabrics under Chapter Heading 59.03 may thus be considered as an exception to Chapter 2 (a) (4) of Chapter 59 and that fusible interlining cloth would be appropriately classified under CETH 59.03 only. Appellants preferred a writ petition against the said circular dt. 27.11.98 to the High Court of Madras. The Hon’ble High Court vide judgment

reported in 2004 (163) ELT 164 (Mad.), inter alia held that the said circular must be taken to be illegal and *ultra vires* and is hereby quashed. In the appeal filed against this judgment by the department, the Division Bench of the High Court of Madras vide their order dt. 05.01.2009, inter alia set aside the impugned circular on the ground that it is contrary to the proviso (a) of Section 37B of the Act and not on the ground that it is *ultra vires of the Constitution of India*.

xi) However, notwithstanding setting aside of said circular dt. 27.11.98 and the earlier remand order of the CETAT Chennai dt. 16.9.98, both the adjudicating authority and the Commissioner (Appeals) without naming the said circular have nonetheless applied the instructions contained therein.

xii) CESTAT Chennai remand order had inter alia upheld the directions for retesting of remnant sample for composition. The results of the retest have been communicated by Central Revenue Control Laboratory (CRCL) vide their communication dt. 16.8.1989 and 6.4.2000. The report dt. 16.8.1989 clearly indicates that the characteristics of the test and material are such that it could have been out of the scope of Note 2(a) of CETH 59. The re-test report dt. 16.4.2000 inter alia clarifies that samples have “discrete coating of plastic on one side, each is not entirely coated with plastic to cover

the interstices wholly and each is not impervious to air and moisture; hence as per the report, the re-tested fabrics would not satisfy the requirement of being “impervious” as clarified in Board’s circular dt. 2.9.1988 and subsequent telex dt. 30.9.1988. In spite of such clear findings in the re-test, the decision of the Commissioner (Appeals) to uphold the classification of the impugned goods under CETH 5903 and not under CETA 52 is unjustified and requires to be set aside.

3. On the other hand, Ld. A.R Shri K. Veerabhadra Reddy made the following submissions :

i) To fall under CETH 5207, the woven fabrics should contain 85% or more by weight of cotton. However, as per the CRCL reports, the content of plastic coating has been shown as 33.9%, 28.9%, 19.5% etc. and the content of cotton fabric has been shown as ‘below 85%’. Hence impugned fabrics cannot be classifiable under CETH 5207.

ii) Textile fabrics which are impregnated or coated or covered with plastics will be classifiable under CETH 5903 unless they fall in any of the exclusions (i) to (v) of Chapter Note 2(a) of Chapter 59 of the Tariff. However, the impugned fabrics do not bear any designs which are not resulting from the treatment of plastic coating. Hence impugned fabrics would only be classifiable under CETH 5903.

iii) The tariff description and chapter notes will have primacy for the purpose of classification over circulars issued by the CBEC.

iv) Even then as per the circular dt. 2.9.88 relied upon by the Ld. Counsel one of the requirements is that the fabrics should be “impervious” to justify classification in CETH 5903.

v) However, the retest report dt. 6.4.2000, inter alia states that the samples of fabrics are not “impervious” to air and moisture. Ld. A.R drew our attention to para-8 of the impugned order where Commissioner (Appeals) has analyzed this very issue and has noted that it is incredible that cotton fabrics with plastic coating to the extent of 34% of the fabric weight are not impervious. Ld. AR also points out that there has been no test conducted to ascertain whether the impugned fabrics are impervious to liquids or otherwise.

4. Heard both sides and have gone through the facts of this appeal.

5.1 The issue that comes up for decision concerns the classification of the impugned interlining coated fabrics, for the purpose of the CETA, whether under Chapter 5903 as coated fabrics or in Chapter 52, based on the base textile material contained therein.

5.2 The department has taken the view that the impugned goods are required to be classified only under CETH 5903.90 and had

issued SCN, inter alia proposing the same. In the first round of litigation, the original adjudicating authority vide order dt. 26.9.97 / 14.10.97 finalized the provisional assessment classifying the said fabrics under 5903.90 and demanded differential duty, which on appeal was allowed by the Commissioner (Appeals) by way of remand order dt. 22.1.98 with directions to go for re-testing of the materials on the basis of the samples available. On further appeal to the CESTAT Chennai, the Tribunal vide Final Order No.1828/98 dt. 16.9.98 had disposed of the appeal with directions that (i) remnant sample be tested for composition and (ii) to consider the circular No.5/89 dt. 15.6.89 while taking a decision about the specific classification.

5.3 At this point, it is important to take note that the said Tribunal order dt. 16.9.98 was not appealed against by the department. Hence it can be safely said that the said order was accepted in toto not only by the appellant-assessee but also by the Revenue. In this scenario, it would have been expected that the de novo authority would strictly conduct adjudication proceedings within the parameters and the directions as laid down by the Tribunal in the said order dt. 16.9.98 as aforesaid.

5.4 However, the de novo adjudicating authority as well as the lower appellate authority have clearly given these directions a go-by and have given reasoning and conclusions arrived at in the first stage of litigation. Even on this preliminary ground, we find that the impugned order has gone beyond the scope of the directions in de novo proceedings given by the earlier Tribunal order and is legally impaired.

5.5 We also take up the matter on merits. We find that Note 2(c) to Chapter 59.03 was added w.e.f 1.3.1989 and then amended w.e.f. 20.03.1990. Note 2 (c) was deleted w.e.f 16.3.1995. During the hearing, Ld. Senior Advocate has argued that for the period prior to 1989, the clarification issued by the CBEC on classification of “Fusible Interlining Cloth” on 2.9.1998 and 30.9.1988 will have to be taken into account while deciding the classification of such goods. We note that these circulars had been issued consequent to doubts raised regarding the classification of “Fusible Interlining Cloth”. After examination of the issue and reference to “Complete Textile Encyclopaedia, Encyclopaedia of Textiles, and the Harmonized System of Nomenclature (HSN), the CBEC clarified that to merit the classification as coated fabrics under CETA 5903, three tests would require to be satisfied namely,

- Should have a continuous and adherent film or layer or plastic on one side of the fabric surface
- The fabric should be impervious
- To satisfy the conditions prescribed in Note 2 of Chapter 59.

The telex dt. 30.9.89 reiterated the same basis except for removing the requirement of 'continuous' in the first test.

5.6 The introduction of Note 2 (c), in our opinion, was extended to widen the types of textile fabrics which could be brought under the fold of CETH 5903. Accordingly, notwithstanding Chapter 2 (a), even those textile fabrics "partially or discretely coated plastic" would now be classifiable under CETH 5903. However, such widened scope for includibility in CETA 5903 came to an end on 16.3.95. Thus, w.e.f. 16.3.95, in our view, to determine whether any such fabric could be classified under CETH 59.03, the erstwhile Chapter Note 2 (a) read with Board's circulars of 2.9.88 and 30.9.88 would remain the only guiding stars for determining the classification. It is in this context that in the previous round of litigation before the Tribunal, the appellant had made a plea that circular No.5/89 dt. 15.6.89 should be applied in their case even for the period after 16.3.95. On a perusal of the circular, we find that in para-4 therein it is clarified that prior to introduction of Chapter Note 2(c), from 1.3.1989, "Fusible Interlining

Cloth” made by discrete coating with plastic get covered under chapters 52-55 depending on the textile materials whether cotton or man-made fabrics etc. The Tribunal in their Final Order dt. 16.9.98 had acceded to this plea and had given specific direction in the remand order that the said circular should be taken into account while deciding the matter.

5.7 We therefore find that there was no lack of clarity in the de-novo directions at the stage of adjudication. We are then unable to fathom how both the de novo adjudicating authority as well as the lower appellate authority have not bothered to re-examine the matter through the lens of Circular No.5/89 as per the specific direction given to them. On the contrary, these authorities appear to have reiterated the CBEC guidelines contained in CBEC Circular No.433/66/98-CX dt. 27.11.98 which had expounded that omission of Chapter Note 2(c) was neither intended to, nor resulted in, changing the classification of Fusible Interlining Cloth under CETH 5903; that classification of such fabrics may be considered as an exception under Chapter No.2(a) (iv) of Chapter 59 according to which fabrics partially coated or partially covered with plastics and bearing designs resulting from those treatments are excluded from the scope of CETA 5903. The lower appellate authority for instance, in the impugned

order, without making reference to the Circular, has very much determined the classification on the basis of impugned fabrics coated with plastic on one side bearing designs resulting from the treatments. In the context of the said Board's circular dt. 27.11.98 having been set aside by the Hon'ble High Court of Madras in their Order dt. 05.01.2009 in Writ Appeal No.507 of 2005, that circular can no longer be used as 'litmus' for deciding the classification of the impugned fabric under Chapter 5903.

5.8 In the retest of the remnant samples caused pursuant to the earlier Tribunal order dt. 16.09.98, we find that sufficient clarity is found with respect to the characteristics of the samples so sent. In the report dt. 16.8.99 by the same authority, it has been certified that each of these samples received are having the following characteristics :

- (i) Coating on the fabric is visible with naked eye in each case.
- (ii) Each sample without fracturing, bends manually around a cylinder of diameter 7 mm at a temperature between 15° C to 30° C.
- (iii) In each sample, textile fabric is neither completely embedded in plastic nor entirely coated on both sides with plastic material and coating in each sample is visible with naked eye.
- (iv) In each case there is no design from the discrete coating of plastic on the fabric.
- (v) Each sample is not in the form of plates, sheets or strips of cellular plastic combined with textile fabric, and the textile fabric of the sample is not present for reinforcing purpose.

In respect of yet another sample, the following report has been made :

“The sample is a light brownish woven fabric made of cotton, having discrete coating of plastic on one side, with the following percentage composition.

Plastic coating = 2.5% (Two decimal five percent) by wt.

Cotton fabric = 97.5% (Ninety seven decimal five percent) by wt.

The sample has following characteristics :-

- (i) Coating on the fabric is visible with naked eye.
- (ii) Sample without fracture bends manually, around a cylinder of diameter 7 mm. At a temperature between 15° C to 30° C.
- (iii) In the sample textile fabric is neither completely embedded in plastic nor entirely coated on both sides with plastic material and coating in the sample is visible with naked eye.
- (iv) In the sample, there is no design from the discrete coating of plastic on the fabric.
- (v) The sample is not in the form of plates, sheets or strips of cellular plastic, combined with textile fabric, and the textile fabric of the sample is not present for reinforcing purpose.

5.9 Discernably then, the retest reports clearly indicate that the samples of the impugned fabric have characteristics which would fall within the exclusions (i) to (v) of Chapter Note 2 (a) to CETH 59.03. So also, the requirement of “impervious” for

the purpose of Board's telex circular 30.9.88 and Circular No.5/89 dt. 15.6.89 will not then be satisfied. Hence, even based on the output of the retest conducted by the CRCL, New Delhi as per Tribunal's direction it is clear that the impugned fabric will fall outside the scope of classifiability under CETA 5903.

5.10 We also note that at the stage of appeal before the lower appellate authority, appellants had placed reliance on the Tribunal's decision in the case of *CCE Bombay Vs Bombay Dyeing & Mfg. Co. Ltd.* - 1999 (107) ELT 488 (Tribunal) to contend that the impugned fabric cannot be covered under CETH 59.03. The lower appellate authority however dismissed that plea on the grounds that above decision was relating to 1987 to 1999, whereas the Chapter 2 (c) to Chapter 59 was introduced w.e.f. 1.3.89 but omitted on 16.3.1985 and the material period in the present case starts only from 7.10.96. We are not able to appreciate this observation of the lower appellate authority. The Tribunal in the *Bombay Dyeing* case (supra) had dismissed the Revenue's contention that coating referred to Chapter Note 2(a) will not apply to partially or discretely coated fabrics with plastics because such fabrics are

specifically covered by Chapter Note 2 (c). The Tribunal upheld the finding of the lower authority that the fabric under consideration though partially or discretely coated with plastic is not dot printing process. We thus find that Tribunal's decision is based on the non-applicability of Note 2 (c) to that case when all other parameters rendered the impugned goods therein as being out of scope of CETA 5903. In the present case, when Chapter Note 2 (c) itself is no longer in existence, and the impugned goods otherwise did not satisfy the requirements laid down in Chapter Note 2(a) read with CBEC circulars (supra), impugned goods will not get classified under CETH 59.03.

6. In view of the discussions, findings and conclusions herein above, we are of the considered opinion that the impugned order cannot sustain and will have to be set aside, which we hereby do. Appeal is therefore allowed with consequential benefits, if any, as per law.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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