

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

E/554/2009

(Arising out of Order-in-Appeal No. 90/2009-CEX (SLM) dated 30.6.2009 passed by the Commissioner of Central Excise (Appeals), Salem)

Commissioner of Central Excise, Salem

Appellant

Vs.

M/s. Vivek Polymers

Respondent

Appearance

Shri R. Subramaniam, AC (AR) for the Appellant
Shri R. Balagopal, Consultant for the Respondent

CORAM

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

Date of Hearing / Decision: **30.08.2017**

Final Order No. 41914/2017

Per Bench

Brief facts are that the respondents were clearing the products namely PP bags & rolls, LD/LLD bags & rolls and HM bags (plaint and printed) manufactured by them and cleared by availing full exemption under Notification No. 9/2003 on the first clearance upto Rs. One crore and thereafter paid duty and also availed CENVAT credit on the raw materials. The



department noticed that from February 2005 onwards the respondents had reclassified and cleared their products under Chapter Sub Heading 39.17 and had paid duty @ 8% Adv. Which was in contravention of Central Excise Rules. According to Department, the classification under 39.17 was incorrect and goods ought to have been classified under 39.20 and 39.23. Thus department was of the view that the products manufactured by respondents cannot be considered as a 'lay flat tubing' falling under Chapter 39.17 which attracts 8% Adv. That products ought to have been classified under CSH 39.20 attracting @ 16% Adv. A show cause notice was issued alleging the above and after adjudication, the original authority confirmed duty of Rs.14,38,409/- along with interest and imposed equal penalty besides separate penalty of Rs.3,50,000/- under Rule 25 and also penalty of Rs.30,000/- each on Shri K. Santhanakrishnan and Shri V. Kulandaivelu, who are partners of the respondent herein. In appeal, Commissioner (Appeals) set aside the demand on the ground of limitation observing that there is no suppression of facts on the part of the respondents. Being aggrieved, the department is now before the Tribunal.

2. On behalf of the appellant, Id. AR Shri R. Subramaniam reiterated the grounds of appeal. He submitted that the Commissioner (Appeals) has erred in holding that the products



are classifiable under CSH 39.17. That the respondents had not placed any record to establish that the goods are fit to be used for the purposes of which the products mentioned in the Chapter Notes namely tubes, pipes and hoses are capable of being used, i.e. for conveying, conducting and distributing liquids and gases. The products actually manufactured and removed by the respondents are polypropylene films etc. that are glossy and transparent in look thin and flimsy in structure and useable only as packing materials as such or after conversion into bags. That by no stretch of imagination such goods could be compared to products that are capable of transmitting liquids or gases. Tubing will refer only to products that are not only tubular in structure but also fit for use as tubes.

3: With regard to the finding of the appellate authority that the demand is time-barred, Id. AR submitted that respondents on their own changed the classification by claiming the goods at a lower rate of duty when in fact the goods as cleared by them stood the same on commercial understanding in the market. That this established the intention to evade payment of duty as well as by stressing the fact that extended period was correctly invoked for raising the demand.

4. On behalf of the respondent, Id. Consultant R. Balagopal reiterated the findings in the impugned order. He submitted



that the Commissioner (Appeals) had relied upon the decision of the Tribunal in the case of Commissioner of Central Excise Vs. Flexo Prints – 2008 (221) ELT 410 to hold that the goods are classifiable under 39.17. It is also pointed out by him that rate of duty for CSH 39.17 was increased to 16% from 1.3.2006 and the respondent continued to pay at the old rate of duty @ 8%. These details were fully reflected in their ER-1 returns. On being pointed out, the respondent had immediately paid the differential duty. That the payment of lesser duty was only due to inadvertent error which has been rectified by the respondent on coming to know of the same. Further, it was also submitted by him that the department has not filed appeal against the individual partners and has filed appeal only against the main respondent. Thus, the intention to evade payment of duty cannot be challenged in this appeal when no appeal has been filed by the department against the individual partners.

5. Heard both sides.

6. It is correct that there was an increase in the duty of the products mentioned in CSH 39.17 and respondent had continued to pay the duty in the earlier rate. But undisputedly, they have paid the differential duty immediately on coming to know of the error. However, the department has chosen to issue a show cause notice invoking the extended period.

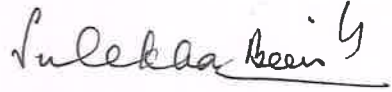


Further, the issue of classification on the impugned products was under litigation before various forums and therefore being an interpretational issue, the respondents cannot be imputed with the intention to evade payment of duty. Further, the partners of the respondent-firm have not been made parties to the present appeal, nor any separate appeal filed against them. For the very same reason, the demand which has been set aside on the ground of limitation does not call for any interference. The appeal filed by Revenue is dismissed.

(Operative portion of the order was pronounced in open court)



(Madhu Mohan Damodhar)
Member (Technical)



(Sulekha Beevi C.S.)
Member (Judicial)

Rex



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