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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/4804/2004 Date 19/06/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S UNIVERSAL CABLES LTD.
POST BOX NO-9, SANTA (M.P.)
M/S UNIVERSAL CABLES LTD. Appellant
Vs
C.C.E. BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No.**352/2008 **Excise** dated 17-6-08

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. BHOPAL
   178, BHAGYA BHAWAN, ZONE II, M.P. NAGAR, BHOPAL
2. Adv. / Consult SH. P.C. JAIN & MS. DEEPTI SARIN, ADV., C/O APPELLANT
3. C.D.R.
4. ~~I.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI, COURT NO.1
EXCISE APPEAL NO.4804 OF 2004

Date of Hearing: 5^{th} – 6^{th} June,2008
Date of Decision: 17th June, 2008

[Arising out of Final Order No.65-CE/BPL/2004 dated 11.2.2004 passed by the Commissioner (Appeals), Customs & Central Excise, Bhopal]

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982. :
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether Their Lordships wish to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental authorities :

Universal Cables Ltd. Applicant
[Rep. by: Shri P.C.Jain & Ms. Deepti Sarin,Advocates]

Versus

CCE, Bhopal Respondent
[Rep. Shri Deepak Garg, DR]

Coram: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

FINAL **ORDER** 352/08-EX

Per Justice S.N.Jha:

The appellant is engaged in the manufacture of insulated wires and cables. According to the appellant, the wires & cables require protective cover to prevent exposure to moisture etc. and preserve its utility. Thus, for manufacturing insulated wires and cables, the appellant has to purchase hessian cloth which is dipped and dried in a suitable compound then cut into tapes and impregnated with bitumen which are wrapped around the wires & cables for securing its life and utility. The 'impregnated proofing tape coated with bitumen' is thus one of the components of insulated wires & cables. It is captively consumed. It is a semi-finished product and is not marketable as such.

2. The appellant was served with show cause notice alleging that it had not paid duty on impregnated hessian cloth falling under Chapter Sub-heading 5909.00 from 28.2.1986 and, in fact, had not submitted price list and classification list regarding the same. The appellant took a stand that the hessian cloth processed by them for use in the manufacture of wires & cables is not exigible to excise duty and, therefore, it was not required to file classification list or price list or to maintain other statutory record. The Assistant Commissioner of Central Excise, Satna vide order-in-original dated 6.2.1996 accepted the appellant's case and dropped the demand. On appeal by the Revenue, the Commissioner (Appeals) set aside the order vide his order dated 26.2.2004. The Commissioner accepted the Revenue's contention on the basis of some report of the Chemical Examiner that hessian cloth has a shelf-life and is therefore, capable of being marketed.

3. Shri P.C. Jain appearing for the appellant submitted that the shelf-life of any goods is not decisive of the excisability of the goods as held by the Supreme Court in **Gujarat Nermada Valley Fert. Co. Ltd. Vs. Collector of Excise & Customs** – 2005 (184) ELT 128 (SC), and therefore, the order-in-appeal of the Commissioner (Appeals) is fit to be set aside on this short ground. Shri Jain submitted that the true test of the goods being excisable goods or not is its marketability and its alleged shelf-life which has no nexus with the marketability, could not be the basis for upholding the demand. Counsel also submitted that hessain tape has no market of its own, it is a

commodity which is used only for covering the wires & cables, and is otherwise not known to the market. According to the Counsel, the goods can be called excisable goods only if is known to the market, and as there are no buyers of hessian cloth tapes in open market, it does not qualify as excisable goods.

4. The former submission of the counsel is undoubtedly well-founded. Shelf-life can never be test of the excisability of the goods. The true test is its marketability. A goods having negligible shelf-life may be marketable while another goods having a long shelf-life may not be marketable at all.

5. However, prima-facie, we do not find merit in the latter submission of Shri Jain, as noted hereinabove. We do not wish to go into the issue of marketability in-depth and record any finding. There is no evidence available in the records on the basis of which the marketability of the hessian cloth tape could be decided. Of course, there is a report of the Range Superintendent who appears to have visited the market and submitted some kind of a report that the item is not sold by the party nor available in the market. Less said the better about said report. We are at a loss to understand as to how the Range Superintendent could be asked to verify the marketability of the goods on the basis of availability in the market and how could any such report be the basis for the conclusion (by the Adjudicating Authority) that the goods are not marketable. The true test as consistently held by the Courts is whether the goods are 'marketable' and not whether it is 'available in the market'. As a matter of fact, Courts have gone to the extent of holding that even in the case of the single buyer, the goods could satisfy the test of marketability. In **A.P. State Electricity Board Vs. Collector of Central Excise, Hyderabad** -1994 (70) ELT 3(SC), the

Supreme Court held that the 'marketability' is a question of fact to be decided in the facts of each case. The fact that it is not actually marketed is not relevant, nor the number of purchasers is a relevant consideration. It may be useful to quote the relevant observations as under :-

> "......The 'marketability' is thus essentially a question of fact to be decided in the facts of each case. There can be no generalization. The fact that the goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country."

6. We do not wish to cite other decisions on the point which are available in plenty nor we propose to decide the question in the absence of relevant evidence. As the dispute can be decided on facts, in the absence of any material, we are of the view that it would be appropriate to remand the case to the original authority so that parties may produce evidence and a proper finding can be recorded.

7. It was submitted on behalf of the appellant that having regard to the amount of duty involved and financial condition of the appellant, a de novo adjudication would be harassing. In our opinion, as the dispute relates to classification, notwithstanding the revenue involved, there is no option but to remand the case, since the issue cannot be left undecided, and it is not possible to finally decide it on the materials on record.

8. In the result, the impugned orders of the Assistant Commissioner as well as Commissioner (Appeals) are set aside and the matter is remitted back to the original authority for de novo adjudication.

[Pronounced in the open Court on 17-6-2008]

[Justice S.N. Jha]
President

[M. Veeraiyan]
Member(Technical)

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