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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/4753/2004 - EX[DB] Date 12/01/2010

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

To :
C.C.E. RAIPUR
CENTRAL EXCISE BUILDING, DHAMTARI ROAD,
TIKRAPARA, RAIPUR 492001.

C.C.E. RAIPUR Appellant
Vs
M/S LLOYD TAR PRODUCTS Respondent

I am directed to transmit herewith a certified copy of **Final order No. 09/ 2010 EX[DB]** dated 17-12-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   M/S LLOYD TAR PRODUCTS
   6-7, HIA, BHILAI, DISTT. DURG (C.G.)
2. Adv. / Consult SH. K. K. ANAND, ADV.,
   A-5, BASEMENT
   LAJPATNAGAR - III, N. DELHI-24
3. C.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT. U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
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18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 4753 of 2004

[Arising out of the Order-in-Appeal No. 138/RPR-II/2004 dated 21/05/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Raipur.]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, 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 would 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 Department Authorities?	:

CCE, Raipur — Appellant

Versus

M/s Lloyd Tar Products — Respondent

Appearance

Shri Surinder Shah, Authorized Representative (DR) – for the appellant.

Shri K.K. Anand, Advocate – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 17/12/2009.
DATE OF DECISION : 17/12/2009.

Final Order No. 09/2010-EX Dated : ___________

Per. Rakesh Kumar :-

The facts leading to this appeal by the Revenue are, in brief, as under.

1.1 The Respondent are engaged in manufacture of various surface coating compounds chargeable to Central Excise Duty under heading 32.08 of the Central Excise Tariff which covers – "Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers, or natural resins whether or not modified, dispensed or dissolved in a non aqueous medium, solution as defined in note 3 to this chapter".

Two of such products manufactured by the Respondent are – "Type C Loid T-8" and "Type B Loid T-7". While the Respondent classified "Type B Loid T-7" under sub-heading SH 3208.90 as "other paints and varnishes", they classified "Type C Loid T-8" under SH 3208.40 as "Insulating varnish" and for this purpose, filed a classification list No. 154/91-92 dated 25/7/91 followed by other classification lists w.e.f. 1/3/92, 28/2/93, 1/3/94 and 16/3/95. The Department, however, sought classification of "Type C Loid – 8" under SH 3208.90 on the ground that as per the information furnished by the Appellant about composition of "Type B Loid T-7" and "Type C Loid T-8", there is just minor difference between these compositions. A sample drawn from "Type C Loid T-8" was sent to CRCL for test and pending the test result the Assistant Commissioner vide order dated 3/11/92 ordered provisional assessment. The chemical examiner vide report dated 23/6/93 reported the sample of "Type C Loid T-8" to be a varnish but was silent as to whether it is insulating varnish.

1.2 The jurisdictional Superintendent of Central Excise issued show cause notices dated 3/6/92, 30/9/92 and 16/12/92 for recovery of duty amounting to Rs. 1,60,265/-, Rs. 1,03,415/- and Rs. 64,516/- respectively for periods from October 1991 to March 92, April 92 to July 92 and August 92 to November 1992 respectively. Subsequently, the Assistant Commissioner issued show cause notice dated 15/6/98 for recovery of duty amounting to Rs. 3,28,195/- for December 1992 to March 1995 period. The Assistant Commissioner vide order-in-original dated 24/2/97 finalised the provisional assessments classifying the "Type C Loid T-8" under 3208.90 and confirmed the duty demands for different periods as under –

(1)	October 1991 to March 92	-	Rs. 1,60,265.00
(2)	April 1992 to July 1992	-	Rs. 1,03,415.00
(3)	August 1992 to November 92	-	Rs. 64,515.00
(4)	December 1992 to March 95	-	Rs. 6,33,418.00
	Total		Rs. 9,61,614.00

1.3 On appeal to CCE (Appeals), the matter was remanded to the Assistant Commissioner vide order-in-appeal No. 260-CE/BPL/98 dated 4/5/98 for de-novo adjudication. The matter was adjudicated de-novo vide order-in-original dated 22/6/99 by which besides confirming the classification of "Type C Loid T-8" under SH 3208.90 and confirming the duty demand of Rs. 9,61,614/- for October 1991 to March 1995 period in course of finalisation of provisional assessment, penalties of Rs. 2,000/- under Rule 9 (2), of Rs. 5,000/- under Rule 523A (8) and of Rs. 5,00,000/- (Rupees Five Lakhs) under Rule 173Q (1) of the Central Excise Rules, 1944 was imposed.

1.4 On appeal to CCE (Appeals), the CCE (Appeals) vide order-in-original dated 21/5/04 held that the product in question is classifiable under heading 3208.40 and set aside the Assistant Commissioner's order.

1.5 It is against this order of CCE (Appeals) that the present appeal has been filed by the Revenue.

2. Heard both the sides.

2.1 Shri Surendra Shah, the learned DR, reiterating the grounds of appeal pleaded that the Respondent manufactured two compounds Loid T-7 and Loid T-8 having similar constituents namely – carbon black, xylene, Trichloro ethylene, chlorinated rubber, Paraffin wax in different proportions, that both the products are used on outer surface of pipes in varying conditions, that in the test certificate issued by the Respondent for Loid T-7, the same has been certified as Synthetic primer of specification BS 4264 - 1987 Type B while in the certificate issued for Loid T-8, the same is certified as "Synthetic primer Type 2 as per specification AWWAL - 203 - 86 which is meant only for primer and coal tar Enamel coating system, that insulating varnish should have minimum electrical strength of 50KVG/MM at room temperature and minimum resistance to tracking of 50 drops and minimum resistivity of 1012 ohms, that there is no evidence that the product Type C Loid T-8 has there characteristics, that a product having characteristics of varnish does not automatically become insulting varnish, that since the assessments were provisional, the duty demands are not time barred, that penalty has been rightly imposed and that in view of the above, the impugned order is not correct.

2.2 Shri K.K. Anand, Advocate, the learned counsel for the Respondent, defending the impugned order pleaded that provisional assessment had been ordered by the Assistant Commissioner in respect of classification list No. 473/91-92 w.e.f. 3/11/92 and in respect of classification list No. 485/92-93 w.e.f. 28/2/93, that part of duty demand of Rs. 1,60,265/- for October 1991 to March 1992 period vide show cause notice dated 8/6/92 is time barred, that duty demand of Rs. 6,33,418/- has been confirmed without issue of any show cause notice, that on merits also, the Department has no case as Assistant Commissioner's finding that Loid T-8 is not insulating varnish, is based on theoretical discussion, not on the basis of any test by the chemical examiner, that chemical examiner's report confirms that Loid T-8 is a varnish, that since this product contains 12-14% Paraffin wax, it has electrical insulation properties, that as per condensed chemical Dictionary (1997 edition) use of paraffin wax gives insulating properties, that the product Loid T-7 does not contain paraffin wax, that without simultaneous test of samples from both the products – Loid T-7 and Loid T-8, the Department can not conclude that both the products are the same, that since this was purely a classification dispute, penalty on the Respondent under Rule 9 (2), 52A (8) and 173Q (1) imposed by the Assistant Commissioner was not called for and the same was rightly set aside by the Commissioner (Appeals) and that in view of the above, there is no merit in the Revenue's appeal.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 The Respondent manufacture two products – 'Type B Loid T-7' and 'Type C Loid T-8' and the composition of these products as mentioned in para 4 of the order-in-original dated 22/6/99, based on the information given by the Respondent is as under –

		Type B Loid T-7	Type C Loid T-8
(1)	Xylene	33 – 34%	40 – 42%
(2)	Trichloroethylene	33.5 – 38%	35 – 38%
(3)	Chlorinated rubber	31.5% - 32%	12 – 14%
(4)	Carbon black	0.5 – 0.6%	0.5 – 0.6%
(5)	Paraffin Wax	Nil	12 – 14%

'Type B Loid T-7' is classified under sub-heading 3208.90 and there is no dispute about this. The dispute is about the classification of "Type C Loid T-8", which according to respondent is classifiable under 3208.40 as "insulating varnish" while according to the Revenue it is classifiable under SH 3208.90 as its composition is similar to composition of 'Type B Loid T-7' and both the products are primers.

4. Heading 32.08 of the Central Excise Tariff during the period of dispute was as under

"Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers, or natural resins, whether or not modified, dispersed or dissolved in a non-aqueous medium solution as defined in note 3 to this Chapter.

3208.10	-	Based on polymer
3208.20	-	Based on Acrylic or vinyl polymers
3208.30	-	Based on Cellular nitrate or other cellular derivatives
3208.40	-	Insulating Varnishes
3208.90	-	others"

5. The chemical examiner's report in respect of 'Type C Loid T-8' as given in para 3 of the order-in-original dated 24/2/97 is as under –

"The sample is in form of dark brown coloured free flowing liquid. It is compound of bituminous matter, binding agent and volatile organic solvent. It gives tack free transparent adherent coating. It has characteristics of varnish". The report is, thus, silent on the point as to whether the product has insulating properties. Since the product, in question, is not polymer based, or Acrylic or vinyl polymer based or cellular nitrate based, and there is no such claim by either side, the competing sub-headings would be 3208.40 and 3208.90 and the product would fall under 3208.40 only if it is an insulating varnish. While as per the chemical examiner's report, the product, in question, has characteristics of varnish, it is silent as to whether it is insulating or otherwise. The Department has not produced any evidence that the product, in question, does not has insulating property. No test in this regard has been got conducted by the Department while the Respondent claim that addition of 12 - 14% paraffin wax gives the product in question insulating property and in this regard they have cited "condensed chemical Dictionary - 1997 edition" according to which use of paraffin wax gives insulating properties. We find that this plea is factually correct as this book refers to paraffin wax as having electrical insulation property. In view of this the Respondent's plea that the product, in question, because of presence of paraffin wax, has insulating property and has to be treated as "insulating varnish", can not be said to be without any merit, more so, when the Department has not got any tests conducted in this regard. The adjudicating authority's conclusions are based on similarity between the composition of 'Type B Loid T-7' and 'Type C Loid T-8', which is factually incorrect as while 'Type B Loid T-7' does not has any paraffin wax, the product, in question, has 12 - 14% paraffin wax, which according to the Respondent, gives it the insulating property. Therefore, we hold that CCE (Appeals)'s finding on the question of classification of 'Type C Loid T-8' are correct and in view of this, the order setting aside the duty demand and penalty is also correct.

6. In view of our above discussion, the impugned order is upheld. The Revenue's appeal is dismissed.

(Operational portion of the order pronounced in open court)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK