IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.2

Excise Appeal No.16 of 2012
(Arising out of Order-in-AppealNo.262/KOL-III/2011 dated10.10.2011 passed by Commissioner of Central Excise, (Appeal-I), Kolkata.)

M/s.Allied Bitumen Complex India Limited
(98, B.K.Paul Avenue, Kolkata-700005.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-III

.....Respondent

(C.R. Building, 7^{th} Floor, AJC Bose Road, Kolkata-700014.)

APPEARANCE

Shri T.K.Mitra, Advocate for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Revenue

CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 75397/2023

DATE OF HEARING : 12 May 2023
DATE OF DECISION : 12 May 2023

Per : K. ANPAZHAKAN :

Briefly stated the facts of the case are that the Appellants are manufacturers of Bituminized Hessain Tape, Rot-proofed Bituminized Hessian Cloth mixed with Copper Napthalate, Bituminized Cotton Tape (BHT, BHC for short) during the material period i.e. January, 1989 to July 1991.

2. They filed classification list classifying the said goods under the sub-heading 5909 of Central Excise Tariff Act, 1985. Later, on the advice of the Department they have filed another classification list classifying the said goods under Chapter Heading 5906.90 and availed the benefit of Notification No.175/86-CE dated 01.03.1986. The department filed an Appeal against the classification list approved under the above two sub-headings and proposed the classification of

the said goods under the sub-heading 6807 and also proposed to deny the benefit of Notification No.175/86-CE dated 01.03.1986.

3. The Appellant has already undergone two rounds of litigation upto the Tribunal level. The present appeal is against the demand issued vide show cause notice dated 11.11.1993. The Appellant stated that the demand in this notice covers the period ending upto July 91.Although the entire matter was within the knowledge of the department and the classification list was approved by extending the benefit of Notification 175/86 dated 01/03/86, the demand was issued beyond the period of one year by invoking suppression of fact, which is not sustainable.

4. The Appellant stated that the goods manufactured by them are exclusively used for industrial purpose only. The impugned goods used exclusively for industrial purpose, in cable industries, are rightly classifiable under chapter heading 5909 only. For the sake of ready reference, the said sub-heading is reproduced below:-

> "All other textile products and articles of a kind suitable for industrial use"

Accordingly, the Appellant stated that the demand is not sustainable on the ground of limitation as well as on merits.

5. The Appellant cited the judgement of the Hon'ble Supreme Court in the case of CCE, Navi Mumbai v. Amar Bitumen & Allied Products Pvt.Ltd. [2006 (202) E.L.T. 213 (S.C.)], wherein on similar facts and circumstances, the Apex Court has upheld classification of 5909 as approved by the Tribunal. Relevant paras of the said judgement is reproduced below:-

> **"2.** The two points to be decided in the present appeals are (i) whether the article under consideration is to be classified under Chapter Heading 68.07, as contended by the revenue or under Chapter Heading 59.09, as contended by the assessee; and (ii) whether the process of making blown grade bitumen out of straight grade bitumen amounts to manufacture.
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> **4.** The Tribunal relying upon an earlier decision of another Bench of

the Tribunal in *Commissioner of Central Excise, Calcutta-I* v. *Bitumen Products (India)* [1999 (107) E.L.T. 58 (T)], held that 'Bituminised Hessian based felt' is covered under Chapter Heading 59.09 as contended by the assessee and not under 68.07 as contended by the revenue.

5. Admittedly, no appeal was filed by the revenue against the earlier decision of the Tribunal in *Bitumen Products (India)* (supra) and the same has become final.

6. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the same has attained finality, then it is not open to the Revenue to accept judgment/order on the same question in the case of one assessee and question its correctness in the case of some other assessees. The Revenue cannot pick and choose. [See : *Union of India & Others* v. *Kaumudini Narayan Dalal & Another* [2001 (10) SCC 231]; *Collector of Central Excise, Pune* v. *Tata Engineering & Locomotives Co. Ltd.* [2003 (158) E.L.T. 130 (S.C.)]; *Birla Corporation Ltd.* v. *Commissioner of Central Excise* [2005 (186) E.L.T. 266 (S.C.)]; *Jayaswals Neco Ltd*. v. *Commissioner of Central Excise, Nagpur* [2006 (195) E.L.T. 142 (S.C.)], etc.]

7. It was held in *Birla Corporation Ltd.* (supra), as under :

> "In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was, therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in *Pepsico India Holdings Ltd.* (2001 (130) E.L.T. 193) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."

8. Accordingly, we affirm the finding recorded by the Tribunal to the effect that the article under consideration would be classifiable under Chapter Heading 59.09 and the assessee would be entitled to the exemption from payment of excise duty under the notifications in question."

6. In view of the above decision of the Hon'ble Supreme Court, the Appellant stated that the demand is not sustainable and liable to be set aside.

7. The Departmental Representative reiterated the findings of the Adjudicating Authority in the impugned order.

8. Heard both sides and perused the records.

9. We find that the issue is no more Resintegra. On similar facts and circumstances, the Hon'ble Supreme Court has upheld the classification of the impugned goods under the chapter heading 5909 . Consequently, the benefit of Notification No.175/86 dated 01.03.1986 was also allowed. In the present case also the goods are exclusively used for industrial purpose and accordingly the goods are rightly classifiable under the chapter heading 5909. Consequently, the benefit of Notification 175/86 dated 01/03.86 was also available to them.

10. The Appellant has raised the issue of limitation. We observe that the entire issue was known to the department and there was no suppression fact involved in this case. Hence, the Notice issued beyond the period of one year was hit by limitation and liable to be set aside on this ground also. However, since on merits itself the demand is not sustainable, there is no need to set aside the demand on the ground of limitation.

6. In view of the above we hold that the said goods are rightly classifiable under chapter heading 5909 and the Appellants are eligible for the benefit Notification No.175/86 dated 01.03.1986. Accordingly, the Appeal filed by the Appellant is allowed.

(Dictated and pronounced in the open Court.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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