IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
COURT NO.II

APPEAL No.E/1173 & 1174/2009

(Arising out of Order-in-Original No.210-211/05-06/V/2009/Commr/KS dated 27/08/2009 passed by the Commissioner of Central Excise, Mumbai-V)

Pee Tee Extrusion Products Pvt. Ltd., : Appellant
Shri Prakash Mehta

VS

Commissioner of Central Excise : Respondent
Mumbai-V

<u>Appearance</u>

Shri.Gajendra Jain, Advocate for Appellant
Shri.S. Hasija, Supdt. (AR) for respondent

CORAM:

Hon'ble Shri C.J. Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing : 26/07/2018
Date of pronouncement : /2018

ORDER NO.87593-87594/2018

Per : **C.J. Mathew**

1. This appeal has been filed by M/s.Pee Tee Extrusion Products Pvt. Ltd., against order-in-original no.210-211/05-06/V/2009/Commr/KS dated 27th August 2009 of Commissioner of Central Excise, Mumbai-V, which has held that 'flexible plastic hollow corrugated board', classifiable under heading no.3920.39 of the Schedule to the Central Excise Tariff Act, 1985 and confirmed demand of duty of Rs.25,72,389/- on clearance effected from April 1995 to August 1997, with appropriate interest thereon, besides imposing a penalty of Rs.12,00,000/- under rule 52A (8) of Central Excise Rules, 1944. Penalty of Rs.13,26,532/- under section 11AC of Central Excise Act, 1944 on M/s.Pee Tee Extrusion Products Pvt Ltd, and further

penalty of Rs.2,50,000/- on Shri Prakash Mehta, Managing Director were also imposed. In addition, demand of Rs.8,35,513/-, with appropriate interest, was also confirmed in disposing off show-cause notice dated 30th November 2000.

2. It is the contention of Learned Counsel for the appellant that a dispute relating to classification of the product manufactured by them had been dealt with by Tribunal in *Caprihans India Ltd v. Commissioner of Central Excise [2002 (145) ELT 664 (T)]* and the goods were held to be classifiable under heading no.3916 of the Schedule to the Central Excise Tariff Act,1944. It is pointed out that this decision of the Tribunal was upheld by the Hon'ble Supreme Court in *Commissioner of Central Excise v. Caprihans India Ltd. [2008 (226) ELT 18 (SC)].*

3. Learned Authorised Representative contends that the dispute of the assessee arose from denial of exemption notification no.15/94-CE dated 1st March 1994 and no.4/97-CE dated 1st March 1997. According to him, the exemption notification in relation to heading no.3916, claimed by the appellant during the hearing, is limited only to plastic and none other would, therefore, be eligible for the benefit of exemption notification. Furthermore, on the contention of the Learned Counsel that the classification adopted by the Tribunal for the said product could not be applied for recovery as the show-cause notice in *Caprihans India Ltd* did not cover the finally ascertained classification. Reliance was placed on decision of the Tribunal in Mehul *Enterprises v. Commissioner of Central Excise [2018 (11) GSTL 170 (Tri-Mum)]* which has held that:

> '***5*** *As regard . the issue whether flock printing fabric is classifiable under 5907 or otherwise, it is necessary to ascertain the nature of flock printing. There is no dispute that flock printing done by the appellant on the fabric is in the form of design. The tariff entry and relevant Chapter 5(c) are reproduced below :*

As per tariff entry though after the main heading with one dash description is given as fabric covered partly or fully with textile flock or with preparation contained textile flock, however as per chapter note 5(c) the fabric partly covered with flock and bears designs resulting from this treatment is excluded from heading 5907. From the combined reading of Tariff entry and chapter note 5(c)., we find that flock print on the fabric which resulted into design, the said flock printed fabric is excluded from heading 5907 and if the fabric is though printed with flock but it does not result into design, the said fabric will be classifiable under 5907. In this fact of the present case there is no dispute that flock printing was done for the purpose of design, therefore we are of the clear view that flock printed fabric with design is not classifiable under 5907. However the product is otherwise appears to be classifiable under 52, 54, 55 depending upon the composition of material used. The appellant also claimed that the flock printing fabrics is not classifiable under 5907, however, same may be classified as 52, 54, 55 in their reply to the show cause notice. Ld. Counsel strongly raised the issue that once the classification proposed by the Revenue is rejected, demand of duty adjudged thereof will not sustain. In this regard, we find that there are various judgments, wherein it was held that even though correct classification was subject matter in the dispute however correct classification can be decided even though it is not subject matter of the show cause notice. In this regard, we take of following decision into consideration :

(a) Maize Products v. Collector of Central Excise, Ahmedabad [1995 (75) E.L.T. 329]

(b) Collector of Central Excise, Ahmedabad v. Maize Products [2003 (151) E.L.T. 484 (S.C.)]

(c) Venus Plywood Pvt. Ltd. v. Collector of C. Ex. [1991 (52) E.L.T. 319 (Tri.)]

(d) Voltas Ltd. v. Collector of Customs, Bombay [1997 (91) E.L.T. 261 (S.C.)]

(e) O.K. Play (I) Ltd. v. Commissioner of C. Ex. Delhi-III (Gurgaon) [2004 (171) E.L.T. 378 (Tri.-Del.)]

(f) Hydraulics Ltd. v. Commissioner of Central Excise, Chennai [2001 (133) E.L.T. 201 (Tri.-Chennai)]

From above decision, we are of the considered view that after rejection of the proposal of the department regarding classification of subject goods under 5907, correct classification under 52, 54, 55 must be arrived at. This aspect has not been considered by the adjudicating authority. There is also a dispute that if the flock printing is done without aid power then product may not be dutiable, however, this also the matter of facts which require a relook. In the above position of the case, we are of the view that now adjudicating authority must decide correct classification under Chapter 52/54/55 and thereafter, aspect of dutiabiity depending on the fact whether the activity of flock printing is carried out with the aid of power and without aid of power has to be ascertained. The issue of limitation is also kept open. As per our above observations, we dispose of the appeal by way of remand to the adjudicating authority for passing a fresh order in the above terms.

4. It is not in dispute that the goods in question are the same as that which is agitated before the Tribunal and before the Hon'ble Supreme Court in *Caprihans India Ltd.* It is also not in dispute that if that classification is followed, the consequent availment of exemption will not be available to the appellant. On perusal of the show-cause notice, it is seen that the show-cause notice proposed the classification as 3020.39 of the Schedule to the Central Excise Tariff Act, 1985 instead of 3926.90 which would have entitled them to the benefit of notification no.15/94-CE dated 1st March 1994 at serial no.21. The proposed classification of goods under heading no. 3920.39 of Schedule to Central Excise Tariff Act, 1985 would also have denied them to the benefit of the said exemption. The classification of the said goods under heading no.3916 of the Schedule to the Central Excise Tariff Act, 1985 has attained finality which cannot be re-opened. Consequently, the proposal in show-cause notice to subject goods to the burden of duty, as well as fiscal deterrent, from a revised classification is beyond the scope of proceedings under Central Excise Act, 1944.

5. In view of the proceedings for the proposed classification being without authority of law, the denial of exemption notification is, in consequence, without authority of law. Accordingly, we set aside the impugned order and allow the appeals.

(Pronounced in Court on…………………………..)

(Ajay Sharma)
Member (Judicial)

(C.J. Mathew)
Member (Technical)

PJ