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

APPEAL NO.E/657 to 660/2010

(Arising out of Order-in-Appeal No.SB/45 to 48/Th-II/10 dated 26/02/2010 passed by the Commissioner of Central Excise (Appeals), Mumbai)

Gypsy Rubber Industries : **Appellant**

VS

Commissioner of Central Excise : **Respondent**

Appearance

Shri Vinay Sejpal, Advocate for Appellant
Shri. A.B. Kulgod, Asst. Comm. (A.R) for respondent

CORAM:

Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 31/10/2018
Date of decision : 21/02/2019

ORDER NO.

Per : P Anjani Kumar

1. The appellants, M/s.Gypsy Rubber Industries are manufactures of Polyurethane Moulded Parts of Chairs of various models and polyurethane moulded seats for motor vehicles. The appellants have claimed the classification under 94019000 and 94012000 respectively and have availing SSI exemption under Notification No.8/2003-CE dated 01/03/2003. Revenue disputed the classification and has held that the classification of the same should be under 39263010 as

“Polyurethene moulded form seat cushion” and the benefit of said notification is not available. A show cause notice dated 14/05/2008 was issued to the appellant and was confirmed by the order-in-original dated 31/03/2009, which was upheld by the impugned order dated 12/02/2010.

2. The appellants submitted that they are manufacturing polyurethene moulded parts of chairs and moulded seats and backs as per the specific requirements of the customers and they are directly used as parts and components of chairs for assembling chairs. The end users had issued certificate to substantiate that the goods supplied by the appellants are used as direct parts of chairs. The impugned goods are manufactured, perceived, recognized, bought and sold and used as parts of chairs and therefore, the classification under Chapter 94 is appropriated as per the decision of the Hon’ble Supreme Court in the following cases:

i) Metagraphs Pvt. Ltd. – 1996 (88) ELT 630 (SC)
ii) OK Play (India) Ltd., - 2005 (180) ELT 300 (SC)
iii) International Tobacco Co. Ltd. – 2008 (231) ELT 207 (SC)

2.1 The appellant submits that their competitors are also manufacturing identical/similar goods and their classification had not been challenged by the department. He submits that the explanatory note to HSN in Chapter 39 & 94 illustrates that parts under heading 9401 to cover identifiable parts of chairs and other seats, such as backs, bottoms and arm-rests (whether or not upholstered with straw or cane, stuffed or sprung) and spiral springs assembled for seat upholstery. They submit that as per Hon’ble Supreme Court decision in the case of *Wood Craft Product Ltd. – 1995 (77) ELT 23 (SC) and Bakelite Hylam Ltd., - 1997 (91) ELT 13 (SC).* HSN notes are binding especially when the tariff is that part with HSN. They also submitted that in view of the ratio of the following cases, the products manufactured by them merit classification under Chapter 94:

i) The classification of Chapter Heading 39 and 94 in the CETA, 1985 during the period Juy 2002 to March 2005 is as under:

For the period July 2002 to March 2005, the heading 39.26 read as under:

36.26	Other articles of Plastics and articles of other materials of heading Nos.39.01 to 39.14
3926.10	Of polyurethane foam
3926.90	Other

For the period April 2005 to May 2007 the new classification for heading 3926 is as under:

39.26	Other articles of plastics and articles of other materials of heading 3901 to 3914
3926.10	Office or school supplies
3926.30	Fittings for furniture, coach work or the like
3926 30 10	Of Polyurethane Foam
3926 30 90	

For the period from July 2002 to March 2005 Chapter heading 9401 read as under:

94.01	Seats (other than those of heading No.94.02) whether or not convertible into beds and parts thereof

For the period from April 2005 to May 2007 the new eight digit Central Excise Tariff Act 1985 for Heading 9401 read as under:

94.01	Seats (other than those of heading No.94.02) whether or not
9401 10 00	Seat of a kind used for ai8rcraft
9401 20 00	Seats of a kind used for motor vehicles
	Other seats with metal frames
9401 71 00	Upholstered
9401 79 00	Other
9401 80 00	Other seats
9401 90 00	Parts

2.2 As an alternate submission, the appellant submits that if the classification proposed by the department is accepted the duty demand needs to be arrived after giving cum duty benefit and Cenvat Credit should be allowed.

3. Learned AR for the Revenue has reiterated the findings of the order-in-original/order-in-appeal and submitted that the tariff entry in Chapter 39 is more specific containing specific for articles of polyurethene foam and Chapter 94 refers to parts and therefore, more specific heading should be preferable to a general heading. As per Chapter Note 10 of Chapter 39 of heading Nos.39.20 and 39.21, the expression "plates, sheets, film, foil and strip" supplies only to plates, sheets, film, foil and strips (other than those Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use). As per explanation given in page No.718 (Section VII, Chapter 39) of Harmonized Commodity Description and Coding System, such blocks of regular geometric shape are not primary forms and are covered by the expression "plates, sheets, film, foil and strip" (which falls under heading Nos.39.20 and 39.21) and if these are cut into shapes other than rectangle/square are generally classified in

headings 39.18, 39.19 or 39.22 to 39.26 and even if the blocks are cut into rectangular/square shape the same would merit classification under Chapter heading No.39.20 and 39.21, as per the Chapter Note 10 of Chapter 39. He further submitted that Chapter note 1 (a) of Chapter 94 of CETA 1985, Chapter 94 does not cover (a) pneumatic or water matt5resses, pillows or cushions, of Chapter 39, 40 or 63. He also submitted that CBEC Vide Circular No.10/89 dated 10/02/89 clarified that if the polyurethene foam product obtained were in the form of blocks of regular geometric shape, that is to say were similar to each other in dimension like height, breadth, length and curventure whether or not printed or otherwise surface worked (evenif when so cut, they become articles ready for use) then by virtue of note 10 of Chapter 39, such products would merit classification under Heading 39.21.

4. Heard both sides and perused the records.

5. For a proper appreciation of the dispute involved, it is worthwhile to have a look at the relevant chapter notes of CETA, 1985 of Chapter 39 and 94 reproduced below:

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9401 79 00	Other
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5.1 We find that Chapter sub-heading 39.29 covers other articles of plastics and articles of other materials of heading 3901 5o 3914. We find that 3926 30 10 is a sub-heading for fitting for furniture cut work or article under chapter heading 3926 3010, pertains to such articles made of polyurethene foam. Therefore, we find that the description given in the chapter is specifically covering the articles manufactured by the appellants. On going through the drawings and pictures, etc. given by the appellants. It is seen that they are supplying polyurethene foam blocks cut into different shapes. These are further used in the manufacture of chairs or moor vehicle seats. When there is a specific heading, the same is to be preferred. It is seen that the items manufactured by the appellants are basically cushion for seats.

6. In view of the chapter note 1 (a) to Chapter 94 Section XX, these are not covered under Chapter 94. Therefore, we find that this cannot be classified under Chapter 94 as claimed by the appellants. We find that the learned Commissioner (Appeals) has correctly found that the products manufactured by the appellant is polyurethene form in the required shape to be used as cushion for revolving chairs are furniture, as such they do not find any entry under Chapter 94 and in views of the specific entry under Chapter 3926 30 10 and as clarified by the CBEC vide circular cited above, the products are to be classified as held by the order-in-original/order-in-appeal.

7. As regards the appellant's contention based on the different case laws cited by them, we find that the original authority has correctly distinguish the case and holding that the ratio of the said case is not applicable to the dispute in the instant case. He held that in case of M/s. U-Form Pvt. Ltd., dispute was between chapter heading 9401 & 9404; in case of Mutual Industries Ltd., between Chapter heading 9401 and 9403 and in case of Matador Foam between Chapter heading 4808 and 9401. Therefore, we are not inclined to rely upon the case laws cited by the appellants.

8. The appellants have further submitted that in case the claimed classification is not allowed cum duty benefit may be allowed for quantification of duty and Cenvat Credit may be held to be admissible. We find that the original authority has given a finding in respect of the Cenvat Credit that the appellants may make an application before the jurisdictional Assistant Commissioner of Central Excise, Palghar Division, who shall cause necessary verification and determine whether the appellants are entitled for Cenvat Credit as per the provisions of law.

9. Regarding the request for cum duty benefit, we hold that the appellants are eligible for cum duty benefit in order to verify the eligibility of the appellants for Cenvat Credit and for quantification of demand after allowing cum duty benefit, the case requires to go back to the jurisdictional Assistant/Deputy Commissioner.

10. Regarding the penalty imposed under Section 11AC, the applicant submits that the issue relates to classification of goods and interpretation of statutory provisions and therefore, in view of the *bonafide* belief of the no penalty can be imposed on them. On going through the order-in-original, we find that the issue has already been raised by the department and Additional Commissioner vide adjudication order dated 03/08/2007 has confirmed the classification in favour of the Revenue. In spite of the same, the appellants continued to classify the impugned goods under Chapter 94. It is not brought to our notice if an appeal has been filed against the said order and if a stay was granted. In the absence of the same, we find that

the appellants have continued to classify the goods under Chapter 94 defines in the adjudication order issued by the Additional Commissioner. Therefore, we do not find that there is a reason to interfere with the penalty imposed.

11. In the result, we uphold the classification of the impugned goods under CETA Heading 3926 3010 and remand back the case to the original authority for re-quantification of the demand after allowing cum duty benefit and to examine the eligibility of the appellants to avail Cenvat Credit during the relevant period in terms of provisions of Cenvat Credit Rules.

12. In view of the above, the appeal is partially allowed and remanded to the extent of re-quantification of demands after allowing cum duty benefit and to verify the claim of the appellant on the applicability or eligibility of Cenvat Credit. Penalties imposed on Shri Shambhoobhai Valabhai Vora, Shri Dinesh Shambhoobhai Vora and Shri Rajesh Shambhoobhai Vora are set aside and all the appeals are disposed off accordingly.

(Pronounced in Court on 21/02/2019)

(S.K. Mohanty)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

PJ