CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 1394 of 2007

(Arising out of Order-in-Appeal No. GOA/CEX/MP/94/2007 dated 22.8.2007 passed by the Commissioner of Central Excise & Service Tax (Appeals), Goa)

M/s Sika India Pvt. Ltd. .... Appellant

Versus

Commissioner of Central Excise, Goa .... Respondent

Appearance:

Shri Gajendra Jain, Advocate for the Appellant

Shri Ajay Kumar, ADC, Authorized Representative for the Respondent

WITH

Excise Appeal No. 52 of 2009

(Arising out of Order-in-Appeal No. CEX/GOA/MP/46/2008 dated 22.10.2008 passed by the Commissioner of Central Excise & Service Tax (Appeals), Goa)

M/s Sika India Pvt. Ltd. .... Appellant

Versus

Commissioner of Central Excise, Goa .... Respondent

Appearance:

Shri Gajendra Jain, Advocate for the Appellant

Shri Ajay Kumar, ADC, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. S. SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.A/85887-85888/2019

Date of Hearing: 14.11.2018

Date of Decision: 13.05.2019

Per: Dr. D.M. Misra

These two appeals are filed against respective Orders-in-Appeal passed by the Commissioner of Central Excise (Appeals), Goa, since involve common issue, but for different period, are taken up together for disposal.

2. Briefly stated the facts of the case are that the appellants purchased duty paid 'Styrene Butadiene Latex' falling under Chapter heading 40.02 of the Central Excise Tariff Act, 1985 from two suppliers namely, M/s BASF Ltd. having product name "STYROFAN D 623" and M/s Apcotex Industries Ltd. having product name as "APCOTEX TSN 100". The said raw materials are placed in MS Vessels, diluted with water and after stirring either manually or using electrical power for around 15-20 minutes the resultant material is packed in different packages and sold by the appellant affixing brand names i.e. "SIKA LATEX" (for large consumer) and "SIKA LATEX POWER" (for small consumer). Alleging that the process of diluting the raw material namely, "STYROFAN D 623" and "APCOTEX TSN 100" with water resulting into 'manufacture' as defined under Section 2(f) of Central Excise Act, 1944. Hence, duty is required to be paid on clearance of Sika Latex and Sika Latex Power. Consequently, show-cause notices were issued to the appellant periodically from December, 2004 to March,2007 demanding duty of Rs.22,54,588/-, Rs.18,44,992/- and Rs.18,24,382/- with interest and penalty. On adjudication, the

demands were confirmed with interest and penalty. Aggrieved by the said order, they filed appeal before the learned Commissioner (Appeals), who in turn, rejected their appeal. Hence, the present appeal.

3. At the outset, the learned Advocate for the appellant Shri Gajendra Jain has submitted that the entire reasoning of the learned Commissioner in arriving at the conclusion that dilution of "STYROFAN D 623" and "APCOTEX TSN 100" resulted into manufacture centers around the product literature issued by M/s BASF Ltd. It is his contention that the process of dilution with water does not bring into existence any new product having a distinct name, character and use, therefore, the process/activity of dilution of the raw materials carried out by the appellant does not result into manufacture. In support, they referred to the decision of the Hon'ble Supreme Court in the case of *Union of India Vs. Delhi Cloth & General Mills – 1977 (1) ELT 199 (SC)*.

3.1 Further, explaining the issue he has submitted that in the product sheet, the starting material, namely, 'Styrofan ID 604 AP' describes the product as "Modified Styrene Butadiene copolymer aqueous dispersion". In other words, the starting material 'Styrofan ID 604 AP' is a watery substance wherein the solid i.e. synthetic rubber is throughout finely distributed. The product sheet of the resultant materials namely, 'Sika Latex' and 'Sika Latex Power' describes them as 'Synthetic

Rubber Emulsion". Thus, there is no change in the name of the product as the product continues to be synthetic rubber. Further, the expression 'Sika Latex' and "Sika Latex Power' are their brand name and affixing these brand name does not change the name of the basic chemicals based on which the goods were bought and sold. He has contended that the change in name in excise parlance means the basic change of the product's name under which it is bought and sold and not merely the brand name of the product. In support, he has referred to the judgment of Hon'ble Supreme Court in the case of *State of Orissa Vs. Titagarh Paper Mills – 1985 Suppl SCC 280, Bush India Ltd. Vs. UOI – 1980 (6) ELT 258 (Bom).*

3.2 Further, the learned Advocate has submitted that the resultant products are merely diluted version of the starting material. The activity of dilution with water only reduce the solid content present in the starting materials since 40% of the solid content is to be relevant for end use application. The chemical properties and other characteristics of the starting material remain unchanged even after the concentration of solid content is reduced. Addition of water in the starting materials makes the product more acceptable to the customers. Also, addition of water does not change chemical composition of the product. Further, he has referred to the test report dated 18.5.2004, 20.6.2007 and 1.2.2006 wherein ultimately it is opined that the starting material as Styrofan and the resultant product namely, Sika Latex and Sika Latex

Power are identical in nature and there is no change of chemical characteristics or physical shape of the product. Further, he has submitted that mere change in the grade or quality of the original commodity without any change in chemical composition and identity of the product would not result into manufacture as held by Hon'ble Supreme Court in case of *Commissioner of Central Excise Vs. Osnar Chemical Pvt. Ltd. – 2012 (276) ELT 162 (SC).* Further, he has submitted that there is no change in the use of the raw material "STYROFAN D 623" and "APCOTEX TSN 100" and that of the end product namely, 'Sika Latex' and 'Sika Latex Power' which are used as admixture in cement, mortars, concrete, grout to provide good adhesion and water resistance. Thus, it is their contention that the starting materials as well as the end products are based on Styrene Butadiene Rubber, which has the property of good abrasion and good aging stability. Also, it is used as adhesive. Thus, since there is no change in the character and use of the starting materials after dilution with water, which are meant for sale in the construction industry, therefore, the process of dilution with water has not resulted into 'manufacture' as no new product with distinct name, character or use emerged.

3.3 The learned Advocate further submitted that the issue has already been considered and decided for their other unit at Kolkata by the Hon'ble CESTAT, Kolkata Bench vide Order No. F/076308/2017 dated 12.7.2017. It is his contention that the said order has been accepted by the Department, since no appeal has been filed against the said order.

3.4 Further, emphasizing his argument the learned Advocate has submitted that the product involved and the test report relating to the disputed products for Goa as well as Kolkata unit are more or less same, therefore, the observation of the Tribunal at Kolkata is squarely applicable to the present appeals. Further, referring to various judgment wherein it has held that mere activity of dilution of water is not resulted into manufacture, the learned Advocate submitted that the confirmation of demand by learned Commissioner (Appeals) be set aside.

4. Learned AR for the Revenue reiterates the findings of the learned Commissioner (Appeals).

5. We have carefully considered the submissions advanced by both sides and perused the records.

6. The short issue involved in the present appeal for consideration is whether the addition of water to the raw materials namely, "STYROFAN D 623 AP" and "APCOTEX TSN 100" is resulted into 'manufacture' of 'Sika Latex' and 'Sika Latex Power' within the definition of manufacture under Section 2(f) of the Central Excise Act, 1944 and chargeable to duty. In confirming the process of mixing the said materials with water

carried out by the appellant as 'manufacture', the learned Commissioner (Appeals) has reasoned that the product information submitted by M/s BASF Ltd., who supplied the materials "STYROFAN D 623 AP" reveals that the manufacturer should carry out their own trials in developing product based on "STYROFAN D 623 AP" because experiment on their part could not materialize due to various factors which might exert an influence during production/processing. The mutual compatibility of the components of the formulation, the curing characteristics of the hydraulic binders, the wetting and adhesion on various substrates etc., these tests should include storage trials at 50°C to determine whether viscosity remains stable. Further, from the statement of Shri Aditya, the learned Commissioner (Appeals) analyzing the same concluded that the product 'Sika Latex' and 'Sika Latex Power' had resulted by the process of manufacture carried out on the raw material "STYROFAN D 623 AP" and "APCOTEX TSN 100". Assailing the said observation of the learned Commissioner (Appeals), the appellant referring to the ratio laid down in Delhi Cloth & General Mills' case (supra) argued that by dilution of the raw materials namely "STYROFAN D 623 AP" and "APCOTEX TSN 100", the characteristics, composition, use etc. continued to remain the same and no new product different from the raw material emerged by the said process of dilution of the raw material. Hence, the resultant product cannot be considered as manufactured out of the raw materials even though while clearing the same, the appellants affixed their brand name on the same. In support, they have referred to the various judgments.

7. The Hon'ble Supreme Court recently laid down the test to determine whether a process or series of process on the raw material resulted into manufacture of an excisable goods within the definition of Section 2(f) of Central Excise Act, 1944 in the case of *Servo Med Industries Vs. Commissioner of Central Excise – 2015 (319) ELT 578 (SC)*. Their Lordships observed as under: -

> ***"27.*** *The case law discussed above falls into four neat categories.*
>
> *(1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.*
>
> *(2) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.*
>
> *(3) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are the Brakes India case and cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also no manufacture of goods takes place.*
>
> *(4) Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place."*

8. Applying the said ratio to the facts of the present case, it can safely be inferred that the present issue is covered under the second category of the aforesaid four categories inasmuch as the appellant could able to demonstrate that characteristics

and chemical composition of the raw material namely, "STYROFAN D 623 AP" and "APCOTEX TSN 100" continued to remain same even after addition of water to the said raw materials as it has not lost its original character, chemical composition, use etc. after application of the process of dilution with water. Besides, by addition of the water to the said raw materials, there could be some change in the quality and the efficiency in use of the product but that cannot be the sole criteria for considering dilution as a process of 'manufacture'. In this regard, the reference to the judgment of Hon'ble Supreme Court by the appellant in *Osnar Chemical Pvt. Ltd's case (supra)* is relevant*.* Their Lordships in para 23 observed as follows: -

> ***"23.*** *Having considered the matter on the touchstone of the aforesaid legal position, we are of the view that the process of mixing polymers and additives with bitumen does not amount to manufacture. Both the lower authorities have found as a fact that the said process merely resulted in the improvement of quality of bitumen. Bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely for mixing of aggregates for constructing the roads."*

9. In view of the aforesaid judgment, it can safely be inferred that the process of dilution of the raw materials "STYROFAN D 623 AP" and "APCOTEX TSN 100" cannot be called as a process of manufacture. Consequently, the product Sika Latex and Sika Latex Power also not chargeable to excise duty. Similar view has been expressed by the co-ordinate Bench at Kolkata analyzing the test reports of the National Test

House, Govt. of India. Following the judgment of the Tribunal, on the proceedings initiated subsequently by the Kolkata Commissionerate for the period from April, 2007 to September, 2015 have been dropped.

10. In these circumstances, we do not find merit in the impugned order. Consequently, the same is set aside and the appeals are allowed with consequential relief, if any, as per law.

(Pronounced in open court on 13.05.2019)

(Dr. D.M. Misra)
Member (Judicial)

(S. Srivastava)
Member (Technical)

Sinha