CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 86934 of 2013

(Arising out of Order-in-Appeal No. 191 (Gr.II-G)/2013 (JNCH)/IMP-147 dated 05.03.2013 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva)

M/s. Motherson Sumi Electric Wire **Appellant**
A-33, Sector 60, Noida,
Dist. Gautam Budha Nagar,
Uttar Pradesh 201 307.

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**
Jawaharlal Nehru Custom House,
Post Uran, Dist. Raigad 400 707.

Appearance:

Shri T. Viswanathan with Shri Akhilesh Kangsia, Advocates, for the Appellant
Shri S.B. Hatangadi, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 23.09.2022
Date of Decision: 23.09.2022

FINAL ORDER NO. A/85972/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. 191 (Gr.II-G)/2013 (JNCH)/IMP-147 dated 05.03.2013 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva. By the impugned order, following has been held:

"I uphold the Order in Original No. 1446/2012AM(I) dated 04.05.2012 and reject the appeals no's. S/49 -422/2012 Misc. /JNCH dated 07.06.2012."

2.1 Appellant filed Bill of entry No. 6170246 dated 05.03.2012 for clearance of import of goods declared as "PVC Compound TZ (hereinafter referred to as "goods). The goods were supplied by M/s. Cabopol Polymer Compounds S.A., Portugal vide invoice No. 120068 dt. 23.01.2012. The declared weight was 17700 kgs and declared assessable value of the goods was Rs. 1,63,9671 (Rupees One Lakh Sixty Three Thousand Nine Hundred and Sixty

Seven Only). Importer claimed BCD benefit under Notification 021/2002 Sr. no. 480 which is available to "Polymers of Vinyl Chloride".

2.2 Assessing officer was of the view that the item under import was "PVC compound T2 & not the polymers of vinyl chloride. Therefore appellant was asked to justify their claim for exemption. Appellant explained that item under import is PVC compound & is a mixture of ingredients like resin, plasticizer, filler etc. and also submitted that they didn't have any facility to Manufacture PVC Compound & therefore, they were not importing PVC resin.

2.3 After consideration of submissions assessing officer decided the issue of exemption as per the order as follows:

"ORDER

In view of the above, I hereby deny the BCD exemption under notification no. 21/02-Sr. No. 480 claimed by importer & instead extend the benefit of Sr. no. 559 of Notification No. 21/2002-Cus for the goods imported under Bill of Entry No. 6170246 date 05.03.2012

This order is passed without any prejudice to any other action that may be taken against the above mentioned importer under the provisions of the Customs Act, 1962 or any other law for the time being in force."

3.1 We have Shri T Viswanathan and Shri Akhilesh Kangsia, Advocates for the appellant and Shri S B Hatangadi, Assistant Commissioner, Authorized representative for the revenue.

3.2 Arguing for the appellant learned counsels submit that

- The composition of the imported PVC compound on which there is no dispute is as under:

Component	Percentage-Composition	Nature of Component
PVC resin	63%	Resin
Diundecil Phthalate	21%	Plasticizer
Calcium Carbonate	10%	Filler
Ca/Zn Stabilizer	6%	Stabilizer

- The classification of the imported PVC compound under Heading 39.04 has not been disputed by the Customs department. Heading 39.04 of Customs Tariff covers "Polymers of Vinyl Chloride". Sub-Heading 3904.22 covers "Plasticized" PVC and Tariff Item 3904 22 90 covers other plasticized PVC. Having accepted the classification as 'polymers of vinyl chloride', it is completely incorrect and erroneous to deny exemption significantly when exemption notifications grants to "Polymers of Vinyl Chloride" of Heading 39.04. This is because, when the notification refers to PVC, it refers to all forms and grades of PVC, falling under heading 39.04.

- The addition of the plasticizer, filler and stabilize does not chemically modify the nature of PVC resin. HSN Explanatory notes to Heading 39.04 itself provides that in order to improve the properties of PVC, commonly, plasticizers, fillers, and stabilizers are added. The relevant portion of HSN explanatory notes reads as under:
    - "PVC is rigid colorless material with limited heat stability and with a tendency to adhere to metallic surfaces when heated. For these reasons, it is often necessary to add stablisers, plasticisers, extender and fillers, etc. to make useful plastics..."
- Even after addition of these in the resin, it is still categorized and classified as primary form of PVC under Headings 39.01 to 39.04, by HSN.
- HSN explanatory notes itself permits addition of plasticizers, fillers, and stabilizers and to treat such compound in granule form as primary form' of PVC. The relevant portion of the HSN explanatory note is extracted below:
    - Liquid and Pastes: These may be the basic polymer which requires "curing" by heat or otherwise to form the finished material or may be dispersions (emulsions and suspensions) or solutions of the uncured or partly cured material. In addition to substances necessary for "curing" (such as hardeners (cross-linking agents) or other co reactants and accelerators), these liquids or pastes may contain other materials such as plasticizers, stabilizers, fillers and colouring matter, chiefly

intended to give the finished products special physical properties or other desirable characteristics. The liquids and pastes are used for casting, extrusion, etc., and also impregnating materials, surface coatings, bases for vanishes and paints, or as glues, thickeners, occulants, etc.

- Powder granules and flakes: In these forms they are employed for moulding, for the manufacture of varnishes, glues, etc. and as thickeners, flocculants, etc. They may consist of the unplasticized materials which become plastic in the mo process, or of the materials to which plasticizers have been added; these materials inay incorporate fillers (e.g. wood flour, cellulose, textile fibers, mineral substances, starch), colouring matter or other substances cited in Item (1) above. Powders may be used, for example, to coal objects by the application of heat with or without static electricity."

... (Emphasis Supplied)

- PVC compound in granule form is indeed a primary form of PVC.

3.3 Arguing for the revenue of learned authorized representative while reiterating the findings in the impugned order submits that:

- The Entry No 480 of Customs Notification No. 21/2002 covers polymers of Vinyl Chloride classifiable under CTH 3904 whereas the Entry No. 559 of customs Notification covers all goods classifiable under CTH 3901 TO 3915.
- The findings of the Original Adjudicating Authority and the Appellate Authority are based on the explanation and the Material Data Sheet submitted by the Appellant themselves. According to the Appellant's explanation the impugned goods were resultant products of a compounding process wherein the constituents went through a mixing process and produced a compound known "PVC Compound T2 or CBB/9900/30F" this is a distinctly identifiable product having identifiable physical and chemical characteristics. Hence, there is no doubt that the impugned goods are chemically modified goods. Apart from their bland claim,

the Appellant has not adduced any technical evidence to support their claim that the impugned goods are polymers of vinyl Chloride. The appellate Authority has rejected the classification claimed by the Appellant by relying on the chemical composition of the impugned goods, specified in the Material data sheet. A tariff heading, based on composition of goods, is also specific heading like a heading based on commercial nomenclature.

- The basic reasoning of Original Adjudicating Authority as well as the Appellate Authority was that the Appellant has failed to establish that the impugned goods are Polymers of Vinyl Chloride. In the absence of any conclusive technical evidence both authorities have placed the impugned goods in the category which includes all categories. It is admitted fact that the Appellant/importer while claiming benefit under any concessional scheme has to produce document which proves admissibility and eligibility. The Department has asked for an explanation which is very much within its right to do so but the Appellant has failed to produce any document which conclusively prove that the impugned goods were Polymers of Vinyl Chloride.
- I have enclosed a sample Material Data Sheet for PVC Compound of a random company available in the internet for reference purpose only. This is to show Your Lordships as to how much technical detail the Material Data Sheet should contain. Such a Material Data Sheet or an Expert opinion would have helped the Department or the Hon'ble Tribunal to arrive at an informed conclusion. But the Material Data Sheet submitted by the Appellant contains nothing more than the chemical composition of impugned goods..
- CITATION- HSN EXPLANATORY NOTES
    - (A) Chemically defined compounds (Chapter Note 1)

      A separate chemically defined compound is a substance which consists of one molecular species (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. In a crystal lattice, the molecular species corresponds to the repeating unit cell.

Separate chemically defined compounds containing other substances deliberately added during or after their manufacture (including purification) are excluded from this Chapter. Accordingly, a product consisting of saccharin mixed with lactose, for example, to render the product suitable for use as a sweetening agent is excluded (see Explanatory Note to heading 29.25).

- CITATIONS - TECHNICAL LITERATURE
  - British Plastics Federation

    The essential raw materials for PVC are derived from salt and oil. The electrolysis of salt water produces chlorine, which is combined with ethylene (obtained from oil) to form vinyl chloride monomer (VCM). Molecules of VCM are polymerised to form PVC resin, to which appropriate additives are incorporated to make a customised PVC C pound.
  - PVC and Additives

    Before PVC can be made into products, it has to be combined with a range of special additives. These additives can influence or determine a number of the products properties, namely; its mechanical properties, weather fastness, its colour and clarity and indeed whether it is to be used in a flexible application. This process is called compounding.

    The functional additives used in all PVC materials include neat stabilizers, lubricants, and in the case of flexible PVC, plasticisers, Optional additives include a range of substances from processing aids, impact modifiers, thermal modifiers, UV stabilizers, flame retardants, mineral fillers, pigments, to biocides, and blowing agents for specific applications.
- Teknor Apex- Leading Manufacturer of PVC Compound
  - A compound is defined as a substance formed when two or more elements are chemically bonded together. But how does PVC resin transform to vinyl compound?

New compound formulations are developed to meet an application requirement or a processing limitation. Chemists and formulation engineers create custom compounds by blending a variety of additives, modifiers and stabilizers with PVC resin to achieve specific properties.

- PVC resin has a nebulous structure and inherently exhibits fire retardant and chemical resistant properties. Custom rigid, flexible and blended vinyl compounds are formulated by mixing vinyl resin with a variety of plasticizers, stabilizers and modifiers to achieve certain properties - scuff and mar resistance, UV resistance, weatherability, color considerations and texturing capability, to name a few.
- Making PVC resin and vinyl compounds are very technical, scientific and labor-intensive processes. There are several industries, and a large and varied job sector, that play a supporting role in providing manufacturers all over the world with the compounds they need, which enables them to make the products we all use every day.

- Omnexus
  - Basic Forms of PVC

    Polyvinyl Chloride is widely available in two broad categories: Flexible and Rigid. But, there are more types like CPVC, PVC-O and PVC-M.
    - Plasticized or Flexible PVC (Density: 1.1-1.35 g/cm"): Flexible PVC is formed by the addition of compatible plasticizers to PVC which lower the crystallinity. These plasticizers act like lubricants resulting in a much clearer and flexible plastic. This type of PVC is sometimes called as PVC-P.
    - Unplasticized or Rigid PVC (Density: 1.3-1.45 g/cm): It is a stiff and cost-effective plastic with high resistance to impact, water, weather, chemicals and corrosive environments. This type of PVC is also known as UPVC, PVC-U or PVC.

    - Chlorinated Polyvinyl Chloride or perchlorovinyl: It is prepared by chlorination of PVC resin. High chlorine content imparts high durability, chemical stability and flame retardancy. CPVC can withstand a wider range of temperatures.
    - Molecular Oriented PVC or PVC-O: It is formed by reorganizing the amorphous structure of PVC-U into a layered structured. Bi-axially oriented PVC has enhanced physical characteristics (stiffness, fatigue resistance, lightweight, etc.).
    - Modified PVC or PVC-M: It is an alloy of PVC formed by addition of modifying agents, resulting in enhanced toughness and impact properties.
  - Processing of Vinyl Plastic

    Some of the main processes include extrusion, calendering, injection molding, stretch blow molding, etc. The intimate mixing of the PVC resin with its associated additives is necessary prior to converting into a thermoplastic melt. Thermal stabilization is required for processing rigid PVC, otherwise material may decompose during processing. Also, spray, blush & peel are very common molding defects associated with rigid PVC

- In the factual matrix of the case as detailed above and in the absence of any conclusive evidence, the mute question remains to be decided whether the PVC Compound T2" after the compounding process still remains Polymer of Vinyl Chloride or not. I have enclosed in my synopsis technical literature available in the website of manufacturers of PVC Compounds which conclusively prove that PVC Compounds are chemically modified substances.
- Reliance is also placed on the decisions as follows:
  - Mysore Metal Industries {1988 (36) ELT 369 (SC)
  - Dilip Kumar and Company [2018 (351) ELT 577 (SC)]

4.1 We have considered the impugned order along with the submissions made in the appeal in the appeal and during the course of arguments.

4.2 For upholding the order in original Commissioner (Appeal) has observed as follows:

"5.1 First, I will consider the contention of the appellants that the impugned goods are specifically covered under Sr. No. 480 to the Notification 21/2002 which allows concessional rate of 5% BCD. The above said Sr. No. read as under:

Sr. No.	*CTH*	*Description of the goods*
480	*3904*	*Polymers of Vinyl Chloride*

5.2 I find that Sr. No. 480 of Notification covers only Polymer of Vinyl Chloride as enumerated above. Now question arises as to what is PVC (Polymers of Vinyl Chloride). Answer to this question can be had from Sub heading Note 1(a) which read as under:

"The designation in a subheading of a polymer by the prefix 'poly' means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95% or more by weight of the total polymer content.

In the instant case the % age as claimed by the appellant himself is just 63%. Therefore, it is beyond the scope of Sr. No. 480

Further, Sr. No. 559 to the Notification 21/2002 which allows concessional rate of 7.5% BCD read as under:

Sr. No.	*CTH*	*Description of the goods*
559	*3901 to 3915(except 3908)*	*All goods*

Comparison of both the serial numbers clearly indicate that the goods classifiable at CTH-3904 may fall under Sr. No. 480 provided the total polymer counts are 95% or more by weight and rest of the product having polymer contents less than 95% are covered under Sr. No. 559.

5.7 In view of the above discussion I conclude that notification benefit under Sr. No (480) of notification 21/2002 is not available to impugned goods and has rightly be denied."

4.3 Admittedly in the present case the appellant had filed the Bill of Entry claiming the classification of goods under the CTH 39042290, and claimed the exemption as per Sl No 480 of the Notification No 21/2002-Cus dated 01.03.2002. The classification as claimed by the appellant has not been disputed by the revenue. The only dispute is in respect of the exemption claimed by the appellant. Revenue authorities have held that appellant is not entitled to exemption at Sl No 480 of the said notification but to Sl No 559 of the same notification. Since the entries in the notification have been reproduced in the impugned order we do not reproduce them here again.

4.4 Commissioner (Appeals) has in his order relied upon the sub heading note 1(a) to hold that the exemption as claimed by the appellant is not available to them because the monomer unit or the constituent of the monomer units of the named polymer should contribute 95% or more by weight of the total polymer content and in the present case admittedly it is only 63%. It is settled principle that Section Notes, Chapter Notes and subheading notes are the aid towards the classification of the goods and not for determining the eligibility to an exemption Notification. In the present case there is no dispute to the classification of the goods and classification as claimed by the appellants under heading no 39042290 has not been amended/ modified by the lower authorities. Further during the argument both the sides have relied upon HSN explanatory notes and technical literature to establish that the impugned goods are/ are not "poly vinyl chloride". We do not find any merits in the submissions made because the classification of the goods have been made under 3904, which is reproduced below:

3904		*POLYMERS OF VINYL CHLORIDE OR OF OTHER HALOGENATED OLEFINS, IN PRIMARY FORMS*
3904 00	*-*	*Poly (vinyl chloride), not mixed with any other substances:*
3904 10 10	*---*	*Binders for pigments*
3904 10 90	*---*	*Other*
	-	*Other poly vinyl chloride*
3904 21	*--*	*Non-plasticized*
3904 21	*---*	*Poly vinyl chloride resins*
3904 21 90	*---*	*Other*
3904 22	*--*	*Plasticized:*
3904 22 10	*---*	*Poly (vinyl chloride) (PVC) Resins (emulsion grade)*
3904 22 90	*---*	*Other*

From the above it is quite evident that by classifying the goods under CTH 3904 22 90, revenue admits that the impugned goods are Poly vinyl chloride as that is the single dash entry preceding the CTH in which the classification has been held. Having held, so revenue cannot for deciding the claim to exemption, hold a contrary view. The exemption at Sl 480, is admissible to all poly vinyl chlorides classifiable under heading 3904.

4.5 Similar view was taken by the tribunal in the case of Ajay International Corporation Ltd. [205 (323) ELT 385 (T-Mum)] in following words:

"From the above tariff description, it can be seen that the said Heading 3904 covers, not only PVC not mixed with any other substance but also PVC mixed with other substances. It also contains compounds of PVC and copolymers of PVC such as, vinyl chloride-vinyl acetate copolymers, vinylidene chloride polymers, fluro polymers. Thus, all forms of PVC merit classification under Heading 3904. It is also provided in sub-heading note 1(b) that chemically modified polymers should be classified under sub-heading appropriate to the unmodified polymers. As per Note 6, primary forms has been defined to include liquids and pastes, including dispersions and solutions and blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms. As per HSN Explanatory note, primary forms may contain other materials such as plasticizers, stabilizers, fillers and colouring matter, chiefly intended to give the finished products special physical properties or other desirable characteristics. From the Encyclopedia of Chemical Technology, copy of which has been submitted by the appellant, it is seen that PVC is chlorinated so that it can be used in high temperature applications such as hot-water piping. Therefore, chlorinated PVC remains under Heading 3904 as primary forms of PVC. Even if it is assumed that by chlorination, PVC has been chemically modified, as per sub-heading Note 1b(2), they remain classified under the same heading as appropriate to the unmodified polymers.

5.2 *In view of the above, we do not find any reason to classify the products chlorinated PVC in any other heading other than heading 3904. Vide Notification No. 21/2002 in Sr. No. 480, the concessional rate of duty of 5% has been prescribed for PVC* *falling under Heading 3904. The said entry covers all forms of PVC. Sr. No. 559 provides the concessional rate of duty of 7.5% on all goods falling under 3901 to 3915 except 3908. When two rates are specified in a notification for a product, the assessee is entitled to the benefit of that exemption, which gives him greater relief regardless to the fact that the notification as general in terms or other notification is more specific to the goods as held by the Hon'ble Apex Court in the case of HCL Ltd. (supra). Similarly, in the case of Commissioner of Sales Tax, the Hon'ble Bombay High Court held that the term 'milk' would ordinarily include 'milk in all its forms' including evaporated or dehydrated milk or milk powder. Even though the said decision pertains to Bombay Sales Tax Act, the ratio of the decision would apply to the facts of the present case. Accordingly, it is held that the expression 'polymers for vinyl chloride' used in the notification would cover all forms/types of PVC. The decision of the Tribunal in the case of Henkel Teroson India Ltd. (supra) also supports the above view. The question, which arose for consideration in that case, was whether co-polymers of vinyl chloride/vinyl acetate would fall under the broad category of polymers of vinyl chloride under Heading 3904 and eligible for benefit of Notification No. 21/2002 in Sr. No. 480 and this Tribunal held that the said entry would cover all forms of poly vinyl chloride and accordingly, the benefit would be available.*

***6.** In the light of the foregoing discussions, we are of the considered view that the chlorinated PVC merits classification under CTH 3904 and is eligible for the concessional rate of duty of 5% BCD in Sr. No. 480 of Notification No. 21/2002. Thus, the appeal is allowed with consequential relief, if any."*

4.6 In the case of Henkel Teroson India Ltd [2012 (278) 499 9T-Mum)], Mumbai bench observed:

***"3.** On a perusal of the Tariff entry, we find that CTH 3904 covers "Polymers of vinyl chloride or of other halogenated olefins, in primary forms" and sub-heading 3904 30 covers "Vinyl chloride-vinyl acetate copolymers". Chapter Note 4 explains the expression "copolymer" thus - "the expression 'copolymer' covers all polymers in which no single monomer unit* *contributes 95% or more by weight to the total polymer content." As vinyl chloride and vinyl acetate monomer contents in the imported goods are 93% and 7% respectively, the polymer qualifies to be a "copolymer" and consequently the goods should remain classified under sub-heading 3904 30. Once again, the question which arises is whether this copolymer can be called a "polymer of vinyl chloride". To answer this question, we would like to look at the description of goods against the main Heading 3904, which reads thus - "Polymers of vinyl chloride or of other halogenated olefins, in primary forms." It is nobody's case that vinyl acetate is a halogenated olefin. Therefore, the copolymer of vinyl chloride and vinyl acetate must fall under the broad category of "polymers of vinyl chloride" as mentioned in the first part of the description of goods against Heading 3904.*

4. *In the result, the goods imported by the respondent can be regarded as a "polymer of vinyl chloride" for all purposes of Heading 3904. The item answers the description of goods at Sr. No. 480 of the Table annexed to Notification No. 21/2002-Cus. and is eligible for the benefit of the Notification."*

4.7 Revenue has relied upon two decisions which are not at all relevant to the controversy in hand. We have no dispute with the ratio of the decisions relied upon by the revenue, but the said decisions do not apply to the facts of the present case.

5.1 Impugned order is set aside and the appeal allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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