

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

Excise Appeal No. 124 of 2012

(Arising out of Order-in-Original No. 05/CEX/2011 dated 27.10.2011 passed by the Commissioner of Central Excise, Pune-III)

M/s. Ecoboard Industries Ltd.

Appellant

Velapur, Dist. Solapur 413 113.

Vs.

Commissioner of C.E. & S.T., Pune-III

Respondent

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

WITH

**Excise Appeal No. 259 of 2012
E/Cross/79 of 2012**

(Arising out of Order-in-Original No. 05/CEX/2011 dated 27.10.2011 passed by the Commissioner of Central Excise, Pune-III)

Commissioner of C.E. & S.T., Pune-III

Appellant

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

M/s. Ecoboard Industries Ltd.

Respondent

Velapur, Dist. Solapur 413 113.

WITH

Excise Appeal No. 474 of 2012

(Arising out of Order-in-Original No. 22/CEX/COMMR/KOP/2011 dated 30.11.2011 passed by the Commissioner of Central Excise, Kolhapur)

Commissioner of CGST, Kolhapur

Appellant

Vasant Plaza, Rajaram Road,
Kolhapur 416 003.

Vs.

M/s. Ecoboard Industries Ltd.

Respondent

36/1, Preet Chambers, 2nd Floor,
Pune-Mumbai Road, Wakdewadi,
Pune 411 003.

WITH

Excise Appeal No. 581 of 2012

(Arising out of Order-in-Original No. 22/CEX/COMMR/KOP/2011 dated 30.11.2011 passed by the Commissioner of Central Excise, Kolhapur-III)

M/s. Ecoboard Industries Ltd.

Appellant

Jambhulwadi, Peth Naka,
Near Islampur, Tal. Walve,
Sangli 415 409

Vs.

Commissioner of CGST, Kolhapur

Respondent

Vasant Plaza, Rajaram Road,
Kolhapur 416 003.

WITH

Excise Appeal No. 1469 of 2012

(Arising out of Order-in-Original No. 15/CEX/COMMR/KOP/2011 dated 30.03.2012 passed by the Commissioner of Central Excise, Kolhapur-III)

M/s. Ecoboard Industries Ltd.

Appellant

Jambhulwadi, Peth Naka,
Near Islampur, Tal. Walve,
Sangli 415 409

Vs.

Commissioner of CGST, Kolhapur

Respondent

Vasant Plaza, Rajaram Road,
Kolhapur 416 003.

WITH

**Excise Appeal No. 89844 of 2013
E/Cross/91037 of 2014**

(Arising out of Order-in-Appeal No. PUN-EXCUS-003-APP-277-13-14 dated 08.10.2013 passed by the Commissioner of Central Excise (Appeals-III), Pune)

Commissioner of C.E. & S.T., Pune-III

Appellant

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

M/s. Ecoboard Industries Ltd.

Respondent

Velapur, Dist. Solapur 413 113.

WITH

Excise Appeal No. 85062 of 2014

(Arising out of Order-in-Appeal No. PUN-EXCUS-003-APP-277-13-14 dated 04.10.2013 passed by the Commissioner of Central Excise (Appeals), Pune-III)

M/s. Ecoboard Industries Ltd.

Appellant

Velapur, Dist. Solapur 413 113.

Vs.

Commissioner of C.E. & S.T., Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

WITH

Excise Appeal No. 85974 of 2015

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-0008-14-15 dated 28.01.2015 passed by the Commissioner of Central Excise (Appeals), Pune-III)

M/s. Ecoboard Industries Ltd. **Appellant**
Velapur, Dist. Solapur 413 113.

Vs.

Commissioner of C.E. & S.T., Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

WITH

Excise Appeal No. 85847 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-210-15-16 dated 05.01.2016 passed by the Commissioner of Service Tax & Central Excise (Appeals-III), Pune)

Commissioner of C.E. & S.T., Pune-III **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

M/s. Ecoboard Industries Ltd. **Respondent**
Velapur, Dist. Solapur 413 113.

WITH

Excise Appeal No. 85899 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-210-15-16 dated 07.01.2016 passed by the Commissioner of Central Excise (Appeals), Pune-III)

M/s. Ecoboard Industries Ltd. **Appellant**
Velapur, Dist. Solapur 413 113.

Vs.

Commissioner of C.E. & S.T., Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

WITH

Excise Appeal No. 87789 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-231-16-17 dated 12.09.2016 passed by the Commissioner of Service Tax & Central Excise (Appeals-III), Pune)

Commissioner of C.E. & S.T., Pune-III

Appellant

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

M/s. Ecoboard Industries Ltd.

Respondent

Velapur, Dist. Solapur 413 113.

WITH

Excise Appeal No. 86381 of 2017

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-231-16-17 dated 12.09.2016 passed by the Commissioner of Central Excise (Appeals), Pune-III)

M/s. Ecoboard Industries Ltd.

Appellant

Velapur, Dist. Solapur 413 113.

Vs.

Commissioner of C.E. & S.T., Pune-III

Respondent

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

AND

Excise Appeal No. 86243 of 2019

(Arising out of Order-in-Appeal No. PUN-CT-APPII-000-187-18-19 dated 08.02.2019 passed by the Commissioner of Central Tax & GST (Appeals), Pune-II)

M/s. Ecoboard Industries Ltd.

Appellant

Eco House, 65/1 A, Akarshak Bldg.,
Opp. Nal Stop, Karve Road,
Pune 411 004

Vs.

Commissioner of C.E. & S.T., Pune-II

Respondent

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri K.A. Sayed, Advocate, for the Appellant/Assessee
Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised
Representative for the Revenue

CORAM:

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

Date of Hearing: 09.02.2023
Date of Decision: 09.02.2023

FINAL ORDER NO. 85412-85424 / 2023

PER: SANJIV SRIVASTAVA

These appeals as detailed in table below have been filed by the appellant/assessee – Ecoboard Industries Ltd. and also the Revenue on the issue which is arising out of the orders as indicated in the table:

S. No.	Appeal No.	Impugned order No. & date
1.	E/124/2012	Order-in-Original No. 05/CEX/2011 dated 27.10.2011
2.	E/259/2012	Order-in-Original No. 05/CEX/2011 dated 27.10.2011
3.	E/474/2012	Order-in-Original No. 22/CEX/COMMR/KOP/2011 dated 30.11.2011
4.	E/581/2012	Order-in-Original No. 22/CEX/COMMR/KOP/2011 dated 30.11.2011
5.	E/1469/2012	Order-in-Original No. 15/CEX/COMMR/KOP/2011 dated 30.03.2012
6.	E/89844/2013	Order-in-Appeal No. PUN-EXCUS-003-APP-277-13-14 dated 08.10.2013
7.	E/85062/2014	Order-in-Appeal No. PUN-EXCUS-003-APP-277-13-14 dated 04.10.2013
8.	E/85974/2015	Order-in-Appeal No. PUN-SVTAX-000-APP-0008-14-15 dated 28.01.2015
9.	E/85847/2016	Order-in-Appeal No. PUN-SVTAX-000-APP-210-15-16 dated 05.01.2016
10.	E/85899/2016	Order-in-Appeal No. PUN-SVTAX-000-APP-210-15-16 dated 07.01.2016
11.	E/87789/2016	Order-in-Appeal No. PUN-SVTAX-000-APP-231-16-17 dated 12.09.2016
12.	E/86381/2017	Order-in-Appeal No. PUN-SVTAX-000-APP-231-16-17 dated 12.09.2016
13.	E/86243/2019	Order-in-Appeal No. PUN-CT-APPII-000-187-18-19 dated 08.02.2019

2.1 Appellant/assessee is manufacturer of plain bagasse particle board and pre-laminated bagasse particle board. During the course of manufacture of finished products, intermediate

product viz. impregnated paper also comes into existence. Appellant/assessee has been clearing the finished products viz. plain bagasse board and pre-laminated bagasse board under exemption as per Notification No. 6/2006-CE dated 01.03.2006 as amended from time to time.

2.2 As the intermediate product which arises during the course of lamination is dutiable, appellant was required to discharge the duty on these impregnated papers which they failed to do. Accordingly show cause notices were issued to them from time to time as detailed below:-

Sr. No.	Appeal No.	Show cause notice No. & date	Period	Amount
1	E/124/2012	V(48)15-99/Adj./Commr./2010 dated 29.09.2010	Oct 2009 to March 2010	2,36,99,659/-
2	E/259/2012	-do-	Sept. 2005 to March 2010	13,14,420/-
3	E/474/2012	V(48)15-119/Adj/Kop/09 dt. 31.08.2009	2004-05 to 2009-10	3,43,93,814/-
4	E/581/2012	V(48)15-119/Adj/Kop/09 dt. 31.08.2009	Aug 2008 to July 2009 & Aug 2009 to March 2010	78,15,432/-
5	E/1469/2012	V(48)15-22/Adj/2011 dt. 26.04.2011	April 2010 to Sept 2010	70,207/-
6	E/89844/2013	V(44)15-3/Adj/ADC/2011 dt. 04.05.2011	April 2010 to Feb 2011 & March 2011 to Feb 2012	81,08,813/-
7	E/85062/2014	V(44)15-3/Adj/ADC/2011 dt. 04.05.2011	April 2010 to Feb 2011 & March 2011 to Feb 2012	81,08,813/-
8	E/85974/2015	DGCEI/WZU/204/30-128/2002 dt. 19.09.2002 & V(44)15-51/Adj/P-II/2003 dt. 25.04.2003	March 2012 to Oct 2012	40,40,705

9	E/85847/2016	V(44)15-02/Adj/ADC/2014-15 dt. 16.04.2014	Nov. 2012 to March 2013	77,00,592/-
10	E/85899/2016	V(44)15-81/Adj/ADC/2013 dt. 03.12.2013	Nov 2012 to March 2013, April 2013 to Sept 2013 & Oct 2013 to March 2014	28,10,813/- 25,33,112/- 23,56,667/-
11	E/87789/2016	V(44)15-29/Adj/JC/15-16 dt. 21.04.2015	April 2014 to March 2015	23,17,778/-
12	E/86381/2017	V(44)15-29/Adj/JC/15-16 dt. 21.04.2015	April 2014 to Nov. 2014 & Dec. 2014 to March 2015	12,95,830/- 10,21,948/-
13	E/86243/2019	V.Ch.(44)15-88/SCN-Ecoboard Ind./2017-18/252 dt. 23.03.2018	April 2016 to June 2017	28,92,775/- 9,83,181/-

2.3 The show cause notices, have been adjudicated by the orders impugned before us by the concerned adjudicating authority/appellate authority. Aggrieved by these orders, these appeals are filed.

3.1 We have heard Shri K.A. Sayed, Advocate for the appellant/assessee and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant/assessee, learned counsel submits that:-

- The issue in the present case is in respect of impregnated paper classifiable under tariff heading 48115900 which comes into existence during the process of manufacture of pre-laminated bagasse board and captively consumed.
- Appellant/assessee disputes the contention of the Revenue that any intermediate products come into existence during the manufacture of pre-laminated bagasse board.
- The short point for consideration is whether the impregnated paper which comes into existence as

intermediate product for using manufacture of pre-laminated bagasse board can be considered as an excisable product on test of its marketability.

➤ It has been held in series of decisions that only those goods which are marketable can be subjected to excise duty. Reliance is placed on following decisions:-

- Moti Laminates (P) Ltd. [(1995) 3 SCC]
- Bhor Industries [1989 (1) SCC 602]
- Ambalal Sarabhai Enterprises [1989 SCR (3) 784]
- Golden Paper Udyog [1983 ELT 1123]
- Dalhouse Jute Co. Ltd. [AIR 1970 Cal 497]
- Shapoorji Pallonji & Co. [2005 (192) ELT 92 Bom]
- United Phosphorus Ltd. [2000 (4) SCC]
- Colgate Palmoliv India Ltd. [1979 ELT 567]
- Delhi Cloth & General Mills Co. Ltd. [AIR 1963 SC 791]
- South India Viscose Ltd. [1995 (78) ELT 737 (Tri.-Del.)]
- Delhi Cloth & General Mills Co. Ltd. [1997 (92) ELT 315 (SC)]
- Dharampal Satyapal [2005 (183) ELT 241 (SC)]
- United Phosphorus Ltd. [2000 (117) ELT 529 (SC)]
- Jagajit Industries Ltd. [2002 (141) ELT 306 (SC)]
- Ambalal Sarabhi Enterprises [1989 (43) ELT 214]
- Union Carbide India [1986 (24) ELT 169 (SC)]
- Modern Paper Industries [1983 ECR 636-D Bombay]
- Indian Tool Manufacturers Ltd. [1983 (13) ELT 1170 (Tri.)]
- Calcutta Steel Industries and Ors. [1989 (39) ELT 175 (SC)]
- Sonic Electrochem (P) Ltd.
- Moti Laminates Pvt. Ltd. [1995 3 SCC]

➤ Appellant/assessee contends that the goods in the present case are not suitable and cannot be marketed as such and they cannot be considered as excisable goods for the purpose of levy of excise duty.

➤ Further they are not marketing these goods for the purpose of marketing. Hence in view of the following decisions, duty cannot be demanded in this regard:

- Bombay Tyres International Ltd. [1983 ELT 1896]

- Madras Rubber Factory Ltd. [1995 (77) ELT 433 (SCC)]
- In the present case since duty demand cannot be sustained, penalty and interest also cannot be demanded.
- Accordingly the appeals filed by the appellant/assessee need to be allowed in their favour and the appeals filed by the Revenue need to be dismissed.

3.3 Learned AR submits that:-

- The goods viz. impregnated paper is a marketable commodity.
- Commissioner has in the impugned order recorded the finding that the said goods are freely imported in India. As these goods are imported, they are having requisite shelf life and should be considered as excisable goods for the purpose of payment of duty.
- Accordingly he submits that the appeals filed by the appellant/assessee are devoid of any merits and should be dismissed.
- He also submits that the appeals of Revenue be allowed as while confirming the demand, Commissioner has dropped the demand on the basis of extended period of limitation and has not imposed penalty under Section 11AC.

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

4.2 For confirming the demand against the appellant/assessee, Commissioner has in the impugned order dated 27.10.2011 observed as follows:-

“29. M/s Ecoboard Industries Ltd. are obtaining base paper as well as other raw materials for the manufacture of a type of laminated particle board called bagasse board. This bagasse board is exempted from duty under notification No.6/2002 dated 1.3.2002 and subsequently 6/2006 dated 1.3.2006. The base paper is procured by M/s Ecoboard indigenously or through import after due payment of duty. The paper is first dipped in resin binders (such as urea formaldehyde, melamine, ethylene

glycol etc) and then passed through heating chambers to reduce the moisture content, then cut to the size of particle board and finally pressed to the particle board under suitable conditions as a result of which the final product viz. laminated particle board emerges.

30. When the base paper is dipped in the resin, the resin enters the pores in the paper and the base paper becomes impregnated. The show cause notice alleges that when the base paper is impregnated with the resin, a new excisable product viz. "impregnated paper emerges which is subject to central excise duty under Tariff item 4811 5900- others' -paper and paper board, coated, impregnated or covered with plastics (excluding adhesive)," and attracts the Central Excise Duty @ 16%, 14%, 10% or 8% Adv. as applicable during the relevant period.

31. Since the final produce viz. base paper is exempt from duty, this impregnated paper is dutiable and accordingly the demand has been issued.

32. The noticee's main submission is that the impregnated paper is not goods in its own right as it is not marketable. It has a very short shelf life and immediately after it comes into existence it has to be pasted on the board and if not pasted it dries up and goes hard and is unable to use. They have also argued that such products are nowhere manufactured or marketed in India.

33. With reference to their argument about perishability, I find from the show cause notice that normally base paper is dipped in the binders (which are resins like urea formaldehyde, melamine, monothelic menthol, etc) and immediately thereafter cut to proper sizes on to the particle board to obtain the final produce viz. laminated board. However this is not invariably the case. It is found from the statement of the Senior Production Manager of the company Shri Patil that the impregnated paper manufactured is stored in cold storage and used from time to time as per need. This clearly shows that the impregnated paper is capable of being stored, although it requires to be stored in cold temperature. The noticee has tried to explain that the

impregnated paper stored in the air regulated room are nothing but the leftover of the papers not used in the process on account of some defect or being in excess and/or pending disposal awaiting for disposal as, scrap.

34. *However it not clear why, if these are indeed defectives/leftovers, these should be stored in a special air-conditioned room. Also Shri Patil has not withdrawn his statement. These circumstances go against the defence of "perishability".*

35. *Further there is substantial evidence given in para 7.1 to 7.4 of the show cause which indicate that resin impregnated paper is bought and sold in the international market and it is also imported into India. These paras are reproduced below.*

"7.1 From such a search made, the one example of the company manufacturing impregnated paper is - Pura Group, Indonesia. The so group is an integrated companies in paper making, converting, printing and engineering industry with the philosophy Ongoing operation again took steps with its tradition as the pioneer of a new product for import substitute in Indonesia and surrounding region. They are into manufacturing and selling of the Impregnated paper. The URL of the website is <http://www.tradema.com/global/index.php/d/2037> Pura BARUTAMA. A copy the print out of the relevant web paper is relied upon, which is listed at Sr. No. 12 of Annexure-A of this show cause notice.

7.2 The another example is JianFeng, China who is engaged in the manufacturing of melamine impregnated paper, the details of unity of such paper mentioned is that "the superior chemical and physical characteristics, various texture possibilities of 'melamine paper make itself most popular among laminate flooring furniture and interior decoration industry. The URL of their website <http://www.cdifsc.com>. <http://jianfengdecor.fuzing.com> and <http://www.bt kudo.com/> /details/47202/melamine.impregnated paper. A copy of the print out of the relevant web paper is relied upon,

which is listed in para 18 of this show cause notice. Other similar evidence obtained from website viz. <http://www.alibaba.com/products-gs/219500641/melamine> dipping paper http://lianmax.en.alibaba.com/product/2175248750410411/impregnated_paper.html A copy of the print out of the relevant web paper are relied upon which is listed at Sr.No. 13 & 14 of Annexure-A of this show cause notice.

7.3 Thus, it can be safely concluded that impregnated paper manufacturers existed in the international market, who are manufacturing various impregnated paper and selling the same. Also buyers of impregnated paper did exist. The result of net surfing so obtained as appeared relevant to the facts and circumstances of the subject case, is therefore brought on record and relied upon as an evidence to establish that impregnated paper manufactured by the 'Noticee' is known and available to be bought and sold in the international market as such.

74 Also, further inquiries were made with M/s Decorative Laminates (India) Pvt. Ltd. 67, Yelwai Road, Belavade, Mysore. The Assistant Commissioner (Prev & Intelligence) Mysore vide letter F.No.IV/6/04/2008- HPU Pt. II dated 3.10.08 has reported with regard to the investigation made at the end of M/s Decorative Laminates India Pvt. Ltd. 67, Yelwai Road Belavadi, Mysore. He has enclosed the sample bills of entry with the said letter. The said letter and bills of entry are relied upon as relied upon document and mentioned at Sr.No. 11 of Annexure A of the notice. From the inquiry, it is seen that the said manufacturer are importer of 'Resin' impregnated paper'/ Melamine impregnated paper' and the said paper is used by them in the production of paper over layered plywood/medium density fiber board/particle boards. The bills of entry relating to the import of the 'impregnated paper' are brought on record as evidence. Also the case law 2006(195) ELT 175 (Tri.Bangalore) in the case of M/s Decorative Laminates (I) Pvt. Ltd. vs Commissioner of Customs Bangalore also corroborates the evidence of the import of impregnated paper"

36. *The noticee has not made any substantial argument to refute this evidence.*

37. *In view of the above I am of the opinion that the impregnated paper which comes into existence does have a shelf life even though it has to be stored in controlled conditions. Therefore I hold that it is goods, bought and sold in the market, and having an identity of its own.*

38. *On the question of limitation, the noticee has submitted that the department was aware of the emergence of impregnated paper and the entire manufacturing process of bagasse board. They have relied on OIO No.18/CEX/2003 (F.No.V(44)15-116/Adj/P-II/02) dated 24.12.2003 by the Commissioner, Central Excise, Pune II. On going through this OIO it is seen that the main issue is the classification of bagasse board and the eligibility thereof of benefit of Notification 6/2006 etc. However, this OIO deals exhaustively with the process of manufacture of the laminated particle board, including the emergence of impregnated paper at the intermediate stage. Extracts from paras 7-1, 7-III, 24 and 25 of the OIO is reproduced below.*

"7.I As per the printed literature, M/s EIL. had adopted "Double Dipping Impregnation Technology" to manufacture particleboard described as 'pre-laminated particleboard'. The two components, which M/s EIL were using are plain particleboard as obtained by process explained above and the Imported decorative paper as lamination. The technology as indicated by its name is oriented with resin-impregnation of the Plain particleboard.

7.III Process of paper:

In the 'double dipping impregnation technology, the decorative paper of above quality is heavily impregnated on both the surface by Melamine/Urea Formaldehyde resin (Le. the same resin which are used for blending with sugar cane fiber). The impregnated paper is dried at 120 degree celsius, This is single, i.e. monolayer impregnated paper. As per composition by weight of paper and resins (explained to be in the ratio of 40:60), the

resin is more and predominating. Thus the paper being substantially impregnated with resin, it does not withstand heavy load of resin coating and therefore, becomes very brittle. On the basis of such composition, the resultant product appears to be paper-reinforced plastic sheet rather than its status as impregnated paper. It is also not a plasticized paper (where paper continues to be predominating component) which can be pasted on the board surface to get paper- laminated board as claimed The whole process of heavily impregnating paper to get paper reinforced plastic sheet, aims to impregnate the board itself with resins, under simultaneous surface by decorative/plain paper. Although in the process the paper is heavily impregnated, yet the technology is oriented with the impregnation of the particleboard.

24. The process adopted by the assessee is not merely a process of pasting decorative paper on plain particleboard but involves heavy impregnation with resins in the double Dipping impregnation technology, in which the paper besides imparting decorative surfaces, is also used as resin carrier for impregnation. Due to this impregnation, the board develops additional properties like abrasion resistance, steam resistance, crack resistance, resistance to chemicals and ink, resistance to bent and dent. The resin content in the impregnated paper before the impregnation with 'Plain particle board' is 60% of the total weight.

25. The process adopted for manufacturing the pre-laminated particle board is :-

(I) Impregnation of Imported paper with Melamine resins - The paper is impregnated with resins. Then heated under Infra red light and again impregnated with melamine resins, then dried, cut to size, stacked and stored in air-conditioned room.

(II) The impregnated paper is placed on respective surfaces of plain particleboard and subject to hot processing.

The process adopted provides impregnation/coating to only paper used for the purpose of Lamination and does not provide any impregnation to the particle board."

39. From the above extracts, it is clear that the department was fully aware of the fact of the impregnated paper coming into existence during the manufacture of bagasse board. Therefore the allegations of willfull suppression of fact etc. based on which the extended period is invoked and penalty under 11AC is proposed cannot be sustained. The demand can be confirmed for the normal period i.e. within one year prior to the issue of show cause notice. The quantum of demand for this period comes to Rs.13,14,420/- for the period October 2009 to March, 2010. Penalty is imposable under Rule 25 of the Central Excise Rules, 2002.

40. The noticee has also made a submission that cenvat credit should be allowed on the inputs etc. used in the manufacture of impregnated paper in case the duty demand is confirmed. I find this submission to be fully justified. Accordingly the noticee shall be allowed cenvat credit as eligible on the inputs, input services and capital goods etc. while paying the confirmed demand of duty."

4.3 Similar findings have been recorded in the remaining impugned orders also. Hence the findings are not being reproduced for sake of brevity.

4.4 The submissions made by the appellant in respect of the positions of law are not disputed. For attracting excise duty, the impugned goods should be marketable. Appellant does not dispute that the impugned goods arise during the course of manufacture of the finished goods were under exemption and they are classifiable under Central Excise tariff. The only argument advanced is that the said goods are not marketable and not marketed by them. Appellant/assessee submitted that these products soon become perishable and do not have any shelf life.

4.5 Hon'ble Supreme Court in the case of Moti Laminates (P) Ltd. [1995 (76) ELT 241 (SC)] laid down the test for determining the marketability as follows:-

"7. The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be useable, moveable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling. Since the solution that was produced could not be used as such without any further processing or application of heat or pressure, it could not be considered as goods on which any excise duty could be levied.

8. But the learned Additional Solicitor General urged that resin or solution which was produced by the appellant was technically known as resols. Reliance was placed on its meaning in the dictionary. The learned counsel submitted that the tariff schedule has divided the items into specific and general. Resols being one of the items mentioned under Item 15A it was a specific item, therefore, once it was found that the intermediate goods produced by the appellants were resols then it was exigible to duty and it could not further be required to satisfy the common parlance test specially because this was a chemical and not a product which is commonly bought and sold in the market. The learned counsel urged that once it was found that it was manufactured or produced then it should be deemed to have satisfied the test of marketability and consequently it was excisable goods within meaning of the Act and the Tribunal was justified in levying duty on it. The learned counsel submitted that marketing capability depends on nature of goods. The test of marketability and capable of being marketed could not be applied to such goods as resol and, therefore, the submission of the learned counsel for appellants that the resin or resol could be subjected to duty only if it was found that from raw materials

some new substance was brought out and it was known as such was not correct as once the intermediate goods produced by the appellants was found to be resols and it having been mentioned in Item No. 15A the burden of the Department stood discharged.

9. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. An article does not become goods in the common parlance unless by production or manufacture something new and different is brought out which can be bought and sold. In Union of India & Anr. v. Delhi Cloth & General Mills Co. Ltd., 1977 (1) E.L.T. (J 199) (SC) = AIR 1963 SC 791, a Constitution Bench of this Court while construing the word 'goods' held as under :-

"These definitions make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold".

Therefore, any goods to attract excise duty must satisfy the test of marketability. The tariff schedule by placing the goods in specific and general category does not alter the basic character of leviability. The duty is attracted not because an article is covered in any of the items or it falls in residuary cate- gory but it must further have been produced or manufactured and it is capable of being bought and sold. In South Bihar Sugar Mills Ltd. & Anr. v. U.O.I. & Anr. , 1978 (2) E.L.T. (J 336) (SC) = AIR 1968 SC 922 it was held by this Court :

"The Act charges duty on manufacture of goods. The word 'manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be

such an article which would attract the Act was brought out in Union of India v. Delhi Cloth and General Mills Ltd., 1963 Supp. (1) SCR 586 = AIR 1963 SC 791)".

In A.P. State Electricity Board v. Collector of C. Ex., Hyderabad, 1994 (2) SCC 428 this Court reiterated the same principle and observed that marketability was must irrespective of whether it was marketed or not. Reference has already been made to Indian Cable (supra). Thus any goods mentioned in the tariff schedule does not attract duty unless it is marketable or capable of being marketed. The test of marketability was relaxed in Union Carbide India Ltd. v. Union of India & Ors., 1986 (24) E.L.T. 169 and it was held that, "in order to attract `excise duty the article manufactured must be capable of sale to a consumer'."

The question that arose was whether aluminium cans produced by the appellants for the flashlights manufactured by it were goods. It was held :

"The question here is whether the aluminium cans manufactured by the appellant are capable of sale to a consumer. It appears on the facts before us that there are only two manufacturers of flashlights in India, the appellant being one of them. It appears also that the aluminium cans prepared by the appellant are employed entirely by it in the manufacture of flashlights, and are not sold as aluminium cans in the market. The record discloses that the aluminium cans, at the point at which excise duty has been levied, exist in a crude and elementary form incapable of being employed at that stage as a component in a flashlight. The cans have sharp uneven edges and in order to use them as a component in making flashlight cases the cans have to undergo various processes such as trimming, threading and redrawing. After the cans are trimmed, threaded and redrawn they are reeded, beaded and anodised or painted. It is at that point only that they become a distinct and complete component, capable of being used as a flashlight case for housing battery cells and having a bulb fitted to the case. We find it difficult to believe that

the elementary and unfinished form in which they exist immediately after extrusion suffices to attract a market”.

It was explained in Bhore Industries Ltd. v. C.C. E., 1989 (40) E.L.T. 280 SC:

“It appears to us that under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the articles must be capable of being sold in the market or known in the market as goods”.

It was reiterated in Hindustan Polymers v. Collector of C. E., 1989 (43) E.L.T. 165 :

“Excise duty, as has been reiterated and explained, is a duty on the act of manufacture. Manufacture under the excise law is the process or activity which brings into being articles which are known in the market as goods, and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or being sold in the market as such.”

The submission of learned counsel for the Department, therefore, that merely because the intermediate product manufactured by the appellants was resols and it is one of the items mentioned under Item 15A it was exigible to duty ignores the basic and primary test for exigibility of duty. The precise argument advanced by the learned Solicitor General of India was rejected in Bhore Industries (supra) and the order of the Tribunal in that case was set aside as “the test of marketability or capable of being marketed”, was not applied by the Tri.

10. Having traced the development of law that any goods produced or manufactured ipso facto do not attract duty unless they are marketable or capable of being marketed, we may now examine the dutiability of goods captively consumed. Prior to 1979 no duty was levied on such goods. But, as stated earlier, after amendment of Rules 9 and 49 captively consumed goods become exigible to duty. The rationale for not treating such goods as excisable was same that since such goods were not brought to the market for buying and selling they could not be subjected to duty. But when the Rules were amended a fiction was created that any article produced or manufactured if captively consumed was statutorily presumed to satisfy the test of marketability. But this presumption can be rebutted if it is established that the article produced and captively consumed was neither goods nor marketable nor capable of being marketed. The duty is attracted not by captive consumption of any article but it must be a goods within the meaning of the Act which apart from having a distinctive name and known as such must be marketable or capable of being marketed. In *Bhor Industries (supra)* crude PVC films manufactured by the appellants as intermediate product used for captive consumption in manufacture of leather cloth, jute matting and PVC tapes were held not to be excisable goods on the test of marketability. In *Collector of Central Excise v. Ambalal Sarabhai Enterprises*, 1989 (43) E.L.T. 214 the manufacturers produced starch hydrolysate which was captively consumed and fell under item 1E of the Central Excise Tariff. It was held to be goods, no doubt, but it was observed that from a practical point of view it was apparent that the goods were not marketable consequently they were not exigible to duty.”

4.6 In the case of A.P. State Electricity Board [1994 (70) ELT 3 (SC)] Hon’ble Supreme Court has held as follows:-

“10. It would be evident from the facts and ratio of the above decisions that the goods in each case were found to be not marketable. Whether it is refined oil (non-deodorised) concerned in *Delhi Cloth and General Mills*, or kiln gas in *South Bihar Sugar Mills*, or aluminium cans with rough uneven surface in *Union*

Carbide, or PVC films in Bhor Industries or hydrolysate in Ambalal Sarabhai, the finding in each case on the basis of the material before the court was that the articles in question were not marketable and were not known to the market as such. The "marketability" is thus essentially a question of fact to be decided in the facts of each case. There can be no generalisation. The fact that the goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country. The appellant's own case before the excise authorities and the C.E.G.A.T. was that these poles are manufactured by independent contractors from whom it purchased them. This plea itself - though not pressed before us - is adequate to demolish the case of the appellant. In our opinion, therefore, the conclusion arrived at by the Tribunal is unobjectionable."

4.7 The impugned goods are impregnated paper. Appellant/assessee disputes the marketability of the same stating that these are having very short shelf life. However, on going through the records, we find that the impugned goods of the appellant/assessee have been tested for shelf life by Center for Testing and Evaluation of Wood Composites and the test report is reproduced below:-

Center for Testing And Evaluation of Wood Composites

भारतीय प्लाईवुड उद्योग अनुसंधान और प्रशिक्षण संस्थान

INDIAN PLYWOOD INDUSTRIES RESEARCH AND TRAINING INSTITUTE

(भारत सरकार, पर्यावरण एवं वन मंत्रालय का स्वायत्त निकाय)

(Autonomous Body of the Ministry of Environment & Forests, Government of India)

पोस्ट बैग सं. 2273, तुमकूर रोड, बंगलोर - 560 022

Post Bag No. 2273, Next to CMTI, Tumkur Road Off HMT Road, Bangalore - 560 022

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51

सेन्टेक

CENTEC

No.JD/EIL/3850/Chem-4795-96/2011/Pune

Date: 27.10.2011

TEST REPORT

Two impregnated base papers ('A' & 'B') were received from M/s. Eco Board Industries Ltd., 36/1, Preet Chambers, 2nd Floor, Pune-Mumbai Road, Wakdewadi, Pune-411 003 for analysis and differences.

Ref: Letter No.EIL/IPIRTI/2011 dated September 8, 2011

The Samples A & B were evaluated for the resin content by pH Method and small panels were made using the film overlays and hot pressed at two different temperature to study the curing behavior of the film. The test results are as given below:

Sample Code No.	Grams Square Metre (GSM)	Volatile Organic Compound %	Density kg/m ³	pH
A	161.7	3.8%	1155	6.92@30.9°C
B	202.00	7.52%	1139	6.40@30.9°C

It was observed that Sample B withstands Boiling Water Resistance may be due to presence of Melamine whereas Sample A withstands only Moisture resistance grade. The Sample B gets brittle within a day i.e., shelf life was 1 day after the receipt of sample at ambient temperature, while Sample A Shelf Life is 2 months and yet it is not brittle. The sample A is Amino Resin System without Melamine whereas sample B is Melamine based amino resin system.

Joint Director

भारतीय प्लाईवुड उद्योग

INDIAN PLYWOOD INDUSTRIES

अनुसंधान एवं प्रशिक्षण संस्थान

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BANGALORE - 560 022

ECOBORD INDUSTRIES LIMITED

PUNE

Inward Serial No. 361

Date 21/6/12

Time

From the perusal of the above test report, it is evident that the impregnated paper in dispute is having shelf life enough to facilitate its marketability. Hence the arguments advanced by the appellant/assessee to this effect, in view of the specific test report, cannot be sustained.

4.8 Even otherwise, impregnated paper in the form of wall paper, decorative paper etc. is quite commonly available in the market. We do not find any merits in the submissions made by the appellant/assessee for the above reasons.

4.9 Once we hold that these products are marketable, there is no reason for holding contrary with regard to dutiability of the same.

4.10 Accordingly we are of the view that the appeals filed by the appellant/assessee are devoid of merits. Adjudicating/appellant authorities have recorded the reasons for holding them so succinctly and in the impugned orders which are well supported by this test report and availability of these papers in the market. Finding of fact cannot be disputed on the basis of the legal submissions made by the appellant/assessee relying on the various case laws which we find irrelevant, which were rendered in cases where goods were found not to be marketable. Relying on the decision of Hon'ble Apex Court in the case of A.P. State Electricity Board [1994 (70) ELT 3 (SC)] referred above earlier, the demands are confirmed. Adjudicating/appellate authorities have not invoked the extended period of limitation for demanding the duty. The demands are only for normal period of limitation.

4.11 Accordingly the orders as far as under challenge by the appellant/assessee are sustained.

4.12 Revenue has filed appeals challenging the impugned orders stating that the orders should have been confirmed by invoking extended period of limitation and penalties should be imposed under Section 11AC of the Central Excise Act. We do not find any merits in the appeals filed by the Revenue for the simple reason that the entire facts with regard to the production of the impugned goods were within the knowledge of the Revenue. Suppression and extended period of limitation could not have been invoked. As we hold that extended period of limitation cannot be invoked for the lack of ingredients which as per the proviso to Section 11A necessary for invocation of the extended period are absent. As we hold that extended period of limitation is not available in the present case, the prayer for imposition of penalty under Section 11AC cannot be allowed in view of the decision of Hon'ble Supreme Court in the case of Rajasthan

Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] holding as follows:-

“17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : “....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...”. In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision of this Court in *Dharamendra Textile (supra)*. In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in *Dharamendra Textile* and we see no reason to understand or read that decision in that manner. In *Dharamendra Textile* the court framed the issues before it, in paragraph 2 of the decision, as follows :

“2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in *Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr.* [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the “Act”) inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act’) taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the “Rules’) and a decision of this Court in *Chairman, SEBI v. Shriram Mutual Fund & Anr.* [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in

law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.....".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence

submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."

6.2 Accordingly the appeals filed by the Revenue are dismissed.

7.1 Minor penalties have been imposed on the appellant/assessee under Rule 25 of the Central Excise Rules, 2002 which in our view cannot be sustained for the reason that no malafide can be attributed to the appellant/assessee in the

present case. Commissioner in the impugned order has held noticee to be eligible for Cenvat credit for the purpose of paying the duty demanded.

7.2 Impugned orders are upheld in terms as below:-

- All the appeals filed by the Revenue are dismissed.
- Appeals filed by the appellant/assessee to the extent of modifying these orders in respect of penalties imposed under Rule 25 of the Central Excise Rules, 2002 are allowed.
- Demand of duties confirmed along with interest.
- Appeals disposed of accordingly.
- Cross objections disposed of.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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