

CASE NO.:
Appeal (civil) 5242 of 2000

PETITIONER:
M/s Sharp Industries Ltd.

RESPONDENT:
Commissioner of Central Excise, Mumbai-III

DATE OF JUDGMENT: 26/09/2005

BENCH:
S. N. Variava & Tarun Chatterjee

JUDGMENT:
J U D G M E N T

S. N. VARIAVA, J.

This Appeal is against the Judgment dated 11th July, 2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (for short CEGAT).

Briefly stated the facts are as follows:

The Appellants manufacture a product which consists of aluminum foil, whose thickness does not exceed 0.2 mm, which is then covered on one side with a polyester film and on the other side with polyethylene. The Appellants also manufacture pouches out of the same material. The question for consideration is as to whether these products are classifiable under Tariff Heading 76.07 and 76.12, as claimed by the Appellants, or under Tariff Heading 39.20.38 and 39.23.90, as claimed by the Respondent. All the authorities below, including the Tribunal in the impugned Judgment, have held against the Appellants. The Commissioner (Appeals) and the Tribunal have based their decisions upon test reports which show that plastic predominates over the aluminium foil accounting for 2/3rd of the total weight. Reliance has also been placed on HSN Explanatory Notes. The findings being based on facts and the Tribunal being the final authority on facts, this Court cannot interfere. It has been held in the case of J. K. Synthetics Ltd. vs. Commissioner of Central Excise, Jaipur reported in (2003) 11 SCC 349 that the Tribunal is the best judge of facts and this Court should not interfere. The same ratio has been laid down by this Court in the case of Ugam Chand Bhandari vs. Commissioner of Central Excise, Madras reported in (2004) 5 SCC 757. For this reason itself this Appeal requires to be dismissed.

However, as the matter has been argued in great detail and as we find that subsequent to the impugned Judgment the Tribunal has adopted an erroneous view, we deem it expedient to also deal with merits and clarify the position.

The concerned Tariff Entries read as follows:

"76.07 Aluminium foil (whether or not printed or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm.

76.12 Aluminium casks, drums, cans, boxes and similar containers (including rigid or collapsible tubular containers), for any material (other than compressed or liquefied gas), of a capacity not exceeding 300L, whether or not lined or heat-insulated, but not fitted with mechanical or thermal

equipment.

39.20 Other plates, sheets, film, foil and strip, of plastics, non-cellular, whether lacquered or metalised or laminated, supported or similarly combined with other materials or not

XXX

XXX

XXX

39.20.38 \026 Flexible, laminated

39.23 Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics

XXX

XXX

XXX

39.23.90 - Other"

Tariff Heading 39 is thus the specific heading which covers such products. This entry covers plates, sheets, film, foil and strip of plastics, non-cellular, whether lacquered or metalised or laminated. From the test reports, it is clear that plastic predominates in the product. 70-80% of the product consists of plastic. There is no denial of this fact. Tariff Entry 76.07 only deals with aluminium foils which are backed with paper, paperboard, plastic or similar other backing material. In this case, the product is not just backed. It is coated with other material on both sides. The term "backed" necessarily means that the coating can only be on one side. An aluminium foil which is covered on both sides, by different materials, cannot be said to be backed. The aluminium foil is in such cases sandwiched between other materials. It is clear that there can never be backing on both sides. Chapter Note (d) of Chapter 76 also makes it clear that Tariff Heading 76.07 will not apply to products which assume the character of articles or products of other headings. In this case, since plastic predominates the product assumes the character of plastic and for this reason it could not be classified under Chapter 76. HSN Explanatory Notes to Chapter 39 also clarify that products consisting of plastic remain covered by Chapter 39 even though they are separated by a layer of another material such as foil, paper etc. provided they retain the essential characteristics of articles of plastic. The test reports show that the concerned products retain the characteristics of plastic. Therefore on merits also we find that the view taken by the lower authorities is the correct view.

It was however submitted that subsequent to the impugned Judgment, in a number of other matters, the Tribunal has taken a contrary view. It was submitted that in one of the matters, this Court has refused to interfere. In this behalf, reliance was placed upon the Judgment of the Tribunal in the case of CCE, Delhi-II vs. R.T. Packaging Ltd. reported in 2002 (51) RLT 291, wherein the Tribunal relying on the Judgments of the Tribunal in the case of Aluminium Co. vs. Commissioner of Central Excise reported in 2001 (133) ELT 759 and Commissioner of Central Excise, Calcutta v. India Foil Limited reported in 2001 (132) E.L.T. 737 held that such products are classifiable under Chapter Heading 76.07.60 and not under Chapter Heading 39.20. It was pointed out that, on 20th February, 2003, this Court dismissed Civil Appeal No. 5148 of 2002 filed by the Department on the following ground:

"Since the Revenue has accepted the judgment of the

Customs, Excise and Gold (Control) Appellate Tribunal in Commissioner of Central Excise, Calcutta v. Indian Foil Limited [2001 (132) E.L.T. 737 (Tribunal) = 2000 (39) RLT 304] and that judgment has been followed in the case by Tribunal, the civil appeal is dismissed.

No costs."

Reliance was also placed upon the Judgment of the Tribunal in the case of C.C.E., Calcutta-I vs. India Foils Ltd. (supra).

These subsequent Judgments can have no bearing on the correctness or otherwise of the impugned Judgment which is a prior. The Revenue appears to have been negligent in not citing the impugned Judgment, which decided the law correctly, at the time India Foils Ltd's case was being decided by the Tribunal. Had it been cited it would have been a binding precedent. The Department's negligence is further brought out by the fact that the Judgment in India Foils Ltd's case was not carried in Appeal before this Court. However, merely because the Judgment in India Foils Ltd's case is not carried in Appeal would not be a ground for setting aside the impugned Judgment, though it may have been a ground for not interfering with a Judgment which had followed India Foils Ltd's case.

We find on a reading of India Foils Ltd's case that it is based upon decisions of the Tribunal in the cases of Hindustan Packaging Co. Ltd. vs. CCE, Vadodara reported in 1995 (75) ELT 313 (by a larger Bench of the Tribunal) and India Foils Ltd. Vs. CCE, Calcutta II reported in 1998 (99) ELT 101. We, however, find that in Hindustan Packaging Co. Ltd.'s the question was whether the product was covered by the Tariff Heading 76.06 or 48.11.29. Chapter Note (I)(viii) of Chapter 48 provided that metal foil backed with paper or paperboard was not covered by Chapter 48. There is no such note in Chapter 39. In any event what the Tribunal seems to have missed in Hindustan Packaging Co. Ltd.'s case is that the Chapter 76 cannot apply to a product which is covered on both sides with other products. For Tariff Heading 76.06 to apply the aluminium foil must be backed with paper, paperboard, plastic or other similar backing material. That would necessarily mean that the aluminum strip is lined only on one side. Even otherwise a Judgment dealing with a question whether Tariff Heading 76.06 or Tariff Heading 48.11.29 applied would have no bearing when considering a question as to whether or not Chapter 39 applied. In the case of Indian Foils Limited vs. Commissioner of Central Excise, Calcutta-II the question was whether Tariff Heading 76.07 or Tariff Heading 76.12 applied. That case again had no relevance for considering whether or not Chapter 39 applied.

Thus, the subsequent decisions are clearly erroneous and cannot be the basis for overruling a correct decision of the Tribunal.

Reliance was next placed upon an Order dated 7th July, 2005 passed in the Appellants' case, wherein it has been held by the Tribunal that the Appellants' product is classifiable under Tariff Heading 76.07 and not 39.20. This Order is based on R.T. Packaging Ltd.'s case. We find that the Appellants have been dis-honest inasmuch as they did not point out to the Tribunal that in their own case, and for the same period, it has already been held by the Tribunal that the product is classifiable under Tariff Heading 39.20. Instead of pointing out this, they rely upon R.T. Packaging Ltd.'s case. This conduct has to be deprecated in no uncertain terms. In any case, this Judgment is only rendered on 7th July, 2005. Mr. Swami states that the Department is filing an Appeal against this Judgment. It must be mentioned that the Department was represented before the Tribunal. The Department has again been negligent in not pointing out to the Tribunal that in the Appellants' own case and for this very period, it has already been held by the Tribunal that the product is classifiable under Tariff Heading 39.20.

For the above reasons, we see no reason to interfere. The

Appeal stands dismissed. There will be no order as to costs.

JUDIS