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C.A.No. 3724 OF 1999
ITEM No.101(Part-Heard)Court No.5

SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No.3724 of 1999

CAMLIN LTD.Appellant (s)

VERSUS

COMMNR. OF CENT. EXCISE, MUMBAIRespondent (s)

(With appln.(s) for permission to place addl. documents on record and
with office report)

WITH

CIVIL APPEAL NO.9036 of 2003
(With office report)

WITH

CIVIL APPEAL NOS.4439-4447 of 2004
(With appln.(s) for stay and with office report)

WITH

CIVIL APPEAL NOS.4693-4701 of 2004
(with appln.(s) for stay)

Date : 18/01/2005 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.N. VARIAVA
HON'BLE DR. JUSTICE AR. LAKSHMANAN
HON'BLE MR. JUSTICE S.H. KAPADIA

For Appellant (s)Mr. Dushyant Dave, Sr. Adv.
in CA 3724/99,Mr. Aarohi Bhalla, Adv.
CAs 4693-4701/04Mr. Ragvesh Singh, Adv.

Mr. Tarak Damani, Adv.
Ms. Sujata Kurdukar, Adv.
Mr. Haris Beeran, Adv.

For Appellants inMr. Mohan Parasaran, ASG
CA 9036/03, Mr. Nitesh Rana, Adv.
CA 4439-4447/04Mr. K.K. Senthilvelan, Adv.
Mr. A. Subba Rao, Adv.
Mr. Gaurav Dhingra, Adv.
Mr. P. Parmeswaran, Adv.
Mr. B.K. Prasad, Adv.

For Respondent(s) in
CA 3724/99
Mr. Mohan Parasaran, ASG
Mr. Nitesh Rana, Adv.
Mr. K.K. Senthilvelan, Adv.
Mr. A. Subba Rao, Adv.
Mr. Gaurav Dhingra, Adv.
Mr. P. Parmeswaran, Adv.
Mr. B.K. Prasad, Adv.

For Respondent (s)Mr. Dushyant Dave, Sr. Adv.

in CA 9036/03, Mr. Aarohi Bhalla, Adv.
CAS 4439-4447/04 Mr. Ragvesh Singh, Adv.
Mr. Tarak Damani, Adv.
Ms. Sujata Kurdukar, Adv.
Mr. Haris Beeran, Adv.

UPON hearing counsel the Court made the following

O R D E R

Appeal No.3724 of 1999 and 4693 to 4701 of 2004 will stand dismissed whereas Appeal No.9036 of 2003 and Appeal Nos.4439 to 4447 of 2004 will stand allowed in terms of the signed order. The re will, however, be no order as to costs.
(K.K. Chawla)(Vijay Dhawan)
Court Master Court Master

[Common signed order is placed on the file]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3724 of 1999

CAMLIN LTD.Appellant (s)

VERSUS

COMMNR. OF CENT. EXCISE, MUMBAI Respondent (s)

WITH

CIVIL APPEAL NO.9036 of 2003

WITH

CIVIL APPEAL NOS.4439-4447 of 2004

WITH

CIVIL APPEAL NOS.4693-4701 of 2004

O R D E R

In all these Appeals the questions which arise for consideration are: (1) whether the intermediate product manufactured by Camlin Limited is marketable and (2) if it is marketable then whether the product is to be classified under Chapter Heading 32.04 or 96.09.

As regards marketability, the Department has led evidence to show that one of the competitors of the Appellants i.e. Luxor Pen Co. was purchasing and importing into India a product, which according to the Department, is an identical product to the intermediate product manufactured by Camlin Limited. If the product which was so purchased and imported by Luxor Pen Co. is an identical product then the Department would have succeeded in showing marketability of this product. Therefore, the main thrust of the argument, on behalf of Camlin Ltd., has been that the product imported by Luxor is not the same product but a completely different product. At this stage it, therefore, becomes necessary to see what is the product of Camlin Ltd. and what was the product imported by Luxor. It is an admitted position that the intermediate product is manufactured by Camlin Ltd. by thoroughly mixing in a jacket of vessel plastic powder, paraffin wax hard oil, colour pigments and dispersing agents and plasticisers. These are mixed by heating the same and the mixture is then cooled and cut into small irregular shapes. The product of the Respondent which comes into existence is called as "crayplas compound".

What was imported by Luxor Pen Co. is set out in the case of Luxor Pen Company v. Collector of Customs, Calcutta reported in 1994 (70) E.L.T. 294 (Tribunal). It appears that Luxor had imported what they termed as "LDPE Powder". They tried to clear the same by classifying the powder

er under Chapter 39. Therefore, chemical tests were carried out on the product imported by Luxor. It was found that what had been imported was a compound consisting of synthetic resin, wax, colouring matters and inorganic fillers. The percentage of synthetic resin in Luxor Pen Co.'s case varied from 32.7 to 50%. In Camlin's case, the percentage of synthetic resin varies from 40 to 45% but on a chemical analysis of the two products, it is to be seen that the products are identical.

We are unable to accept the submission of learned senior counsel Mr. Dave on behalf of Camlin Ltd. that what Luxor had imported was only LDPE Powder whereas Camlin's product contained not just plastic resins but also wax colouring material fillers etc. and therefore it was a different product. What had been imported by Luxor Pen Co. was clearly not just synthetic resin but a compound which was identical to that being manufactured by Camlin Ltd. As one of the major manufacturers of crayon in this country was importing this material, the Department had clearly established the marketability of this material. It is settled law that for a good to be marketable it is not necessary that there must be actual instances of sale by the assessee. Marketability is essentially a question of fact to be decided on facts of each case and once it is shown that a product has actually been bought, marketability gets established.

The second question is regarding classification. The Department claims that the product has to be classified under Chapter Heading 32.04 which reads as follows:

Heading
No.

Sub-heading No.
Description of goods
Rate of duty
32.04

Synthetic organic colouring matter, whether or not chemically defined; preparations based on synthetic organic colouring matter as specified in Note 2 to this Chapter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined.

- Pigments and preparations based thereon:

3204.11
In unformulated or unstandardised or unprepared forms, not ready for use
60%

3204.19
Other
- Synthetic organic dyes and preparations based thereon:
60%

3204.21
- In unformulated or unstandardised or unprepared forms, not ready for use
60%

3204.29
- other
60%

3204.30
- synthetic organic products of a kind used as fluorescent brightening agents or as luminophores
35%

3204.90
- Other
35%

They so claim on the basis of note 2 to Chapter 32 which inter alia states that Heading 32.04 will also apply to preparations based on colouring matters or which are used as ingredients in a manufacture of colouring preparations. Undeniably this compound is used for manufacture of crayons. The Department contends that Crayon being a colouring material this is an ingredient used in the manufacture of colouring preparation and therefore would fall under tariff item 32.04.

On the other hand on behalf of the Camlin Ltd. it is contended that the correct classification should be under tariff Heading 96.09 which reads as follows:-

"96.09 - PENCILS (OTHER THAN PENCILS OF HEADING NO.96.08), CRAYONS, PENCIL LEADS, PASTELS, DRAWING CHARCOALS, WRITING OR DRAWING CHALKS AND TAILORS' CHALKS.

9609.10- Pencils and crayons, with leads encased in a rigid sheath

9609.20 - Pencil leads, black or coloured

9609.90 - Other"

It is submitted that the test analysis shows that the intermediate compound is essentially the same and that it has all the characteristics of a crayon. Reliance is placed on Rules for the Interpretation of the Schedule to the Central Excise Tariff wherein Rule 2(a) reads as follows:-

"2. (a)Any reference in a heading to goods shall be taken to include a reference to those goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. It shall also be taken to include a reference to those goods complete or finished (or falling to be classified as complete or finished by virtue of this rule), removed unassembled or disassembled."

It is submitted that the compound is nothing but an incomplete or unfinished product which has the essential characteristics of a crayon and therefore must be classified as a finished good by virtue of this interpretive Rule.

Having considered the rival submissions we are unable to accept the submission that this compound is to be classified under tariff Item No.96.09. Chapter 96 deals with manufactured articles. The HSN Explanatory Note also shows that this chapter, and in particular tariff heading 96.09, deal with finished products. Further, there is a big distinction between an intermediate product and an unfinished or incomplete product. Admittedly, the product is an intermediate product. It is not a product in an unfinished stage. Therefore, interpretive Rule 2(a) will have no application. This product being a compound falls under Chapter 32 and it being an ingredient in the manufacture of colouring preparation by virtue of Chapter 32 Note 2 it gets covered by Tariff Item No.32.04.

All these appeals stand disposed of with the above clarification. In this view of the matter, Appeal No.3724 of 1999 and 4693 to 4701 of 2004 will stand dismissed whereas Appeal No.9036 of 2003 and Appeal Nos.4439 to 4447 of 2004 will stand allowed. There will, however, be no order as to costs.

At this stage Mr. Dave states that Camlin would be entitled to MODVAT credit and that therefore the same should be allowed to them. In this matter we cannot and do not go into or deal with this aspect. It is for Camlin Ltd. to make an application if in law they are entitled to do so and if any application is made, it will, undoubtedly be considered on its own merits in accordance with law.

.....J.
(S.N. Variava)

.....J.
(Dr. AR Lakshmanan)

.....J.
(S.H. Kapadia)
New Delhi;

January 18, 2005.