



आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टेलीफैक्स 07926305136



DIN: 20231064SW0000888FA0

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/38/2023-APPEAL/6878-79

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-100/2023-24
 दिनांक Date : 28-08-2023 जारी करने की तारीख Date of Issue 09.10.2023

आयुक्त (अपील) द्वारा पारित
 Passed by Shri Shiv Pratap Singh, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 27/AC/D/2022-23/AM दिनांक: 30.10.2022, issued by
 The Assistant Commissioner, CGST, Division-IV, Ahmedabad North

घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s. Parikh Packaging Pvt. Ltd., Opp. Rotomac Pens, Sarkhej-Bavla
 Highway, Vill- Moraiya, Taluka- Sanand, Ahmedabad-382213
 Respondent

The Deputy/Assistant Commissioner, CGST, Division-IV, Ahmedabad North,
 2nd Floor, Gokuldharm Arcade, Sarkhej-Sanand Road, Ahmedabad-382210

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति
 नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application,
 as the one may be against such order, to the appropriate authority in the following way :

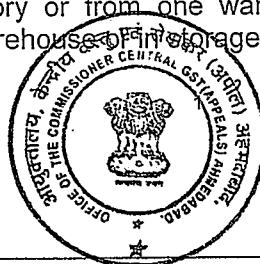
भारत सरकार का पुनरीक्षण आवेदन :
 Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त
 धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त
 मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी
 चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision
 Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building,
 Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the
 following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में
 या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे
 वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a
 warehouse or to another factory or from one warehouse to another during the course of
 processing of the goods in a warehouse or in a factory or in a warehouse.



(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हों।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50' Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है .



For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER IN APPEAL

M/s. Parikh Packaging Pvt. Ltd. Opposite Rotomac Pens, Sarkhej-Bavla Highway, Moriya, Taluka –Sanand, Ahmedabad-382213 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 27/AC/D/2022-2023/AM dated 31.10.2022, (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-IV, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*'). The appellant were holding Central Excise Registration No. AABCP7894FXM001.

2. The facts of the case, in brief, are that during scrutiny of ER-1 Return filed for the period March, 2016 to June, 2017, it was noticed that the appellant had paid Central Excise duty @12.5% on clearance of goods namely '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' classifying the same under Chapter 39239090 of CETA, 1985. Whereas the said goods are classifiable under CETH 39232100 and as per Notification No.12/2016-CE dated 01.03.2016, the applicable rate of duty has been 15%. It appeared that the appellant have been clearing the said goods at lower rate of duty i.e. 12.5% instead of 15% by way of misclassification. In the month of January, 2017 & February, 2017, the appellant classified the said product under CETH 39232100 as '*Polythylene Film Bags (PE Bags)*' and cleared the said goods on payment of central excise duty @ 15% classifying the goods. It appeared that the appellant deliberately misclassified the goods to avoid higher rate of duty and thereby contravened the provisions of Rule 4, Rule 6 and Rule 8(1) of the CER, 2002 and Section 3 of the CEA, 1944 read with the provisions of Notification No. 12/2016-CE dated 01.03.2016.

2.1 A SCN No. V.39/03-16/D/2018-19 dated 09.03.2021 was therefore issued to the appellant proposing classification of goods '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' under Chapter 39239090 of CETA, 1985, cleared during the period from March, 2016 to June, 2017; demanding Central Excise duty of Rs.18,15,232/- alongwith interest under Section 11A(4) & Section 11AA respectively; Penalties under Section 11AC of the CEA and under Rule 25 of the CER, 2002 was also proposed.

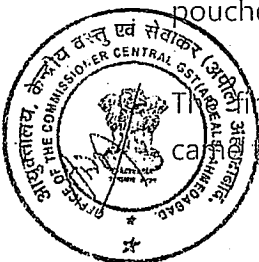
3. The said SCN was adjudicated vide the impugned order wherein the adjudicating authority confirmed the classification of goods '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' under Chapter 39239090 of CETA, 1985 for the period from March, 2016 to June, 2017; confirmed the C.Ex. duty demand of Rs.18,15,232/- alongwith interest; Imposed penalty of Rs.18,15,232/- under Section 11AC read with Rule 25(1) of the CER, 2002.

4. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, on the grounds elaborated below:-

- The impugned order has failed in addressing the issue of classification of the goods namely "Printed/unprinted Laminated Flexible Packaging Pouch". The defence reply to the SCN was not negated in the manner and therefore the impugned order is not sustainable.



- The Bags/Sacks and Pouches are different products and therefore not classifiable under one and same heading; in the ER-1 returns for the months of January 2017 and February 2017, the Appellant not only cleared Polyethylene Film Bags under CETH 39232100 but cleared Laminated Pouches also under CETH 39239090 and therefore the allegation of the change of classification in particular months is not correct; The laminated pouches manufactured are not made mainly of Polyethylene and therefore cannot be classified as Sacks/Bags of polymers of ethylene under CETH 39232100; The Appellant was classifying the laminated pouches under CETH 39239090 for so many years without any objection being raised by the Department at any point of time. The Appellant never suppressed any fact/information from the Department and the records were audited regularly by the Department. The entire demand is on the basis of the scrutiny of ER-1 returns only and therefore extended period of limitation not invocable. The issue is related to the classification of the goods and therefore the proposal of imposition of the penalty under Section 11AC of the Act is not tenable.
- At Para 21 of the impugned order it has been clearly recorded that the Appellant has been manufacturing and clearing pouches under CETH 39239090 for long and only during the scrutiny of the ER-1 returns it was observed. It was bonafide belief of the Appellant that the laminated pouches are classifiable under CETH 39239090 and such belief was created on the basis of the ruling of the Apex Court in the case of M/s. Sharp industries Ltd. 2005 (188) ELT 146 (SC). It was categorically argued by the Appellant that in such case, invocation of extended period for raising demand is patently incorrect and the entire demand is totally time barred. Reliance placed on the decision in the case of M/s. Ugam Chand Bhandari 2004 (167) ELT 491 (SC).
- Samples of the goods manufactured and cleared by the Appellant have never been drawn and in absence of any specific test reports the charge of classification under a specific heading cannot be substantiated. The pouches manufactured and cleared by the Appellant are laminated with Aluminium Foil and contains polyester and/or BOPP film. So, it does not contain polyethylene predominantly but mixture of plastics and Aluminium metal. In absence of any test report, jumping to a conclusion that the pouches are made of plastic precisely predominantly containing polymers of ethylene is patently incorrect. Such a view is without any basis just to make the pouches to attract higher rate of duty introduced by way of insertion of entry under the Notification No. 12/2016-CE dated 01.03.2016.
- It is undisputed fact that sacks/bags and pouches are different products. Bag, Sack and Pouch denote a container made of flexible material having opening at the top. Bag is general description for holding something. Sack is used to describe bag made of coarse material and normally of oblong shape. Pouch is a small bag and normally is opened/closed by means of gathering string, zipper or flap. The finding of the adjudicating authority that CETH 39232100 which stands for the Sacks and Bags of polymers of ethylene is most specific description for the laminated pouches manufactured by the Appellant is not tenable.



The findings under Para 23 of the impugned order states that the Department cannot know about the short payment of duty only after initiation of an inquiry is

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beginning and it was known to the Department as the Appellant was filing ER-1 returns regularly. The records of the Appellant were audited every year and till the issuance of the SCN no dispute/objection was raised by the Department for classification of the goods as there was no difference in the rate of duty. The factual aspects of classification of laminated pouches under CETH 39239090 were not unknown to the Department. The Department is precluded merely picking and choosing the classification that offers the higher of the rates of duty and it is not even permissible in the light of Supreme Court's decision in the case of Jayaswals Neco Ltd. 2006 (195) E.L.T. 142 (S.C.). This decision is further relied in the case of S. K. Industries 2007 (210) E.L.T. 104 which is maintained by the Apex Court at 2012 (277) E.L.T. A56 (S.C.). In light of above, imposition of penalty under Section 11AC of the Act read with Rule 25 of the Rules is not tenable. Following decisions in this regard are relied upon:

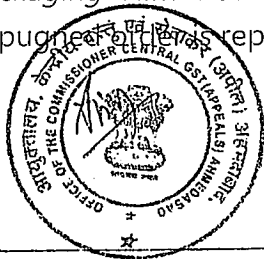
- SYNCOM FORMULATION (I) LTD. 2002 (150) ELT 1228
- S. NARENDRA KUMAR & CO. 2003 (156) ELT 1001
- ABRAHAM J. THARAKAN 2007 (210) ELT 112
- KRIP CHEM P. LTD. 2015 (325) ELT 339
- RAI DEV BLOCKS 2017 (357) ELT 356

5. Personal hearing in the matter was held on 11.08.2023. Shri K. J. Kinariwala, Consultant, appeared for personal hearing. He reiterated the submissions made in the appeal. He submitted that the matter pertains to classification of the item, plastic laminated pouches manufactured by the appellant. During the relevant period, central excise duty under CETH 39232100 for sack and bags was 15%. Whereas, the appellant cleared pouches manufactured by them under CETH 39239090, where the duty was 12.5% in respect of residual other items. He submitted that the classification claimed by the appellant was prior to increase in the rate of duty in the previous years, wherein audit was conducted regularly and no objection was raised regarding classification. Therefore, the demand made by the lower authority in the impugned orders, seeking different classification is not justified. Moreover, since the classification was always in the knowledge of the department, no allegation for suppression can be made against the appellant and therefore extended period cannot be invoked in their case. He therefore requested to set-aside the impugned order.

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made by the appellant in the appeal memorandum as well as those made during personal hearing. The issue to be decided in the present case is as to whether the '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' are classifiable under CETH 39239090 or under CETH 39232100?

The demand pertains to the period March 2016 to June 2017.

7. The adjudicating authority classified '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' under CETH 39232100. Relevant extract of para-22 of the impugned order is reproduced below:-



"I find that the goods manufactured and cleared by the noticee i.e. 'Printed/ Unprinted laminated Flexible Packaging Film Pouch' have been predominantly made of plastic and the same were laminated with other materials. The said goods have been used as conveyance for packing of materials and therefore the said goods are rightly classifiable under CETH 39232100. I find that the noticee has been classifying the goods under CETH 39239090 as 'Other', which is residual entry and covers the goods of other plastic materials. I find that their product are most suitable classifiable under CETH 39232100 and not under CETH 39239090 which is a residual entry. I find that even Rule 3(a) of the Interpretative Rules states, heading which provides the most specific description shall be preferred to headings providing a more general description'. The said goods are correctly classifiable under 39232100 instead of 39239090. I find that the noticee in support of their claim that the said goods are classifiable under Central Excise Tariff Sub-heading 39239090, relied upon the case law of Sharp Industries Limited 2005 (188) ELT 146 (SC)."

7.1 The appellant however claim that the laminated pouches manufactured by them are not made mainly of Polyethylene and therefore cannot be classified as Sacks/Bags of polymers of ethylene under CETH 39232100. They claim that sacks/bags and pouches are different products. Bag, Sack and Pouch denote a container made of flexible material having opening at the top. Bag is general description for holding something. Sack is used to describe bag made of coarse material and normally of oblong shape. Pouch is a small bag and normally is opened / closed by means of gathering string, zipper or flap. The pouches manufactured and cleared by them are laminated with aluminium foil and contains polyester and/or BOPP film. So, it does not contain polyethylene predominantly but mixture of plastics and aluminium metal. They claim that they were under the bonafide belief that the laminated pouches are classifiable under CETH 39239090 and such belief was created on the basis of the ruling of the Apex Court in the case of M/s. Sharp industries Ltd. 2005 (188) ELT 146 (SC).

7.2 I find that **CETH 3923** is for goods of the description 'ARTICLES FOR THE CONVEYANCE OR PACKING OF GOODS, OF PLASTICS; STOPPERS, LIDS, CAPS AND OTHER CLOSURES, OF PLASTICS'. The relevant entries under CETH 3923 are reproduced as under:-

3923 ARTICLES FOR THE CONVEYANCE OR PACKING OF GOODS, OF PLASTICS; STOPPERS, LIDS, CAPS AND OTHER CLOSURES, OF PLASTICS

Sacks and bags (including cones):

3923 21 00 -- Of polymers of ethylene

3923 90 90 --- Other

Explanatory notes to HSN: This heading covers all articles of plastics commonly used for the packing or conveyance of all kinds of products. The articles covered include :

- {a} Containers such as boxes, cases, crates, sacks and bags (including cones and refuse sacks), casks, cans, carboys, bottles and flasks.



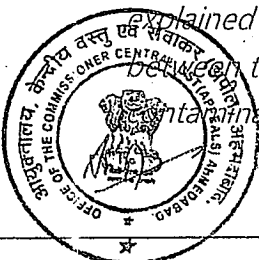
The heading also covers:

- (i) Cups without handles having the character of containers used for the packing or conveyance of certain foodstuffs, whether or not they have a secondary use as tableware or toilet articles;
- (ii) Bottle preforms of plastics being intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape.
- (b) Spools, cops, bobbins and similar supports, including video or audio cassettes without magnetic tape.
- (c) Stoppers, lids, caps and other closures

7.3 In the above HSN Explanatory Notes to Chapter 39 it is clarified that products consisting of plastic remain covered by Chapter 39. The appellant claim that the laminated pouches manufactured by them does not contain polyethylene predominantly but mixture of plastics and aluminium metal and therefore cannot be classified as Sacks/Bags of polymers of ethylene under CETH 39232100 hence have classified laminated pouches under CETH 39239090. They classified the said goods under CETH 39239090 under the bonafide belief created by the ruling of the Apex Court in the case of M/s. Sharp industries Ltd. 2005 (188) ELT 146 (SC).

7.4 In the case of M/s. Sharp Industries Ltd. 2000 (120) ELT 825 (Tri), the appellants therein manufactured 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 there was, 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 Department. Tribunal held that;

"5. There is no dispute that the products, foils, with which we are concerned, consists of two layers of plastics separated by a layer of aluminium. The advocate for the appellant contends that this aluminium foil is what is needed to make the pouches from out of the sheets, either by the appellant or the buyers of this product. Samples of such pouches or sheets intended to be converted into pouches were shown to us indicating that the products to be packed in consists of such variegated goods such as fertilizers, coffee powder, etc. That the aluminium foil is used to make containers of packing of goods is clear from the HSN Explanatory Notes to heading 76.07, which indicates its use inter alia for packing foodstuff, cigarettes, tobacco, etc. What we are concerned with however is not plain aluminium foil, but aluminium foil between two layers of plastic. It was explained to us that the internal layer of plastic is necessary, to prevent contact between the packed article and the metal and the aluminium which would result in contamination of that packed article. To that extent, it is the plastic that



contributes to the essential characteristics of the foil. What the object was in the outer layer of the plastic was not explained to us. Obviously it has some use since no manufacturer would use it unless it was necessary. **It is not in dispute that the plastic predominates over weight of the foil accounting for around two third of the total weight. Taking these aspects into account it is difficult for us not to conclude that it is the plastic that confers the essential characteristics of the product. In any event, in such a situation, it is rule 3(b) that will have to be resorted to since it will be evident from the precedent discussion that none of the rules preceding it would apply.**

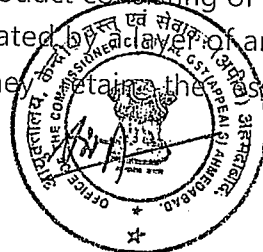
6. XXX

7. On merits therefore the classification of both the foil and pouches will have to be confirmed under chapter 39."

7.5 The above decision was challenged by the department and Hon'ble Apex Court - **2005 (188) ELT 146 (SC)**, held that;

"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"

7.6 It is relevant to mention here that in the above decision, the appellant therein had claimed classification of foils and pouches under chapter 76 (foils under heading 76.07 and of the pouches under 76.12). The department however was of the view that they are classifiable under heading 3920.38 and the pouches under heading 3920.90. Applying the ratio of the above judgment it can be concluded that the product consisting of plastic remains covered under Chapter-39 even though they are separated by a layer of another material such as foil, paper, aluminum etc. provided they retain the essential characteristics of articles of plastic.



7.7 The appellant claim that based on the above decision, they have classified their laminated pouches under CETH 39239090. In the instant case, it cannot be disputed that the appellant was clearing laminated pouches predominately made of plastics hence was classified under CETH 39 as this chapter specifically covers 'Plastics and articles thereof'. However, the question arises whether the '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' are classifiable sub-heading CETH 3923-2100 or CETH 3923-9090. It is observed that CETH 3923-2100 covers 'Sacks and bags (including cones)' of polymers of ethylene whereas CETH 3923-9090 covers 'Others'. I find that the expression "Sacks and bags (including cones)" is restrictive to the scope of the goods covered. Thus, only Sacks, Bags and Cones are covered under CETH 3923-2100. As per the dictionary meaning, a **Sack** is "*a large bag made of strong cloth, paper, or plastic, used to store large amounts of something*" and a **bag** is defined as "*a soft container made out of paper or thin plastic, and open at the top, used to hold foods and other goods.*" Whereas a **pouch** means "*a bag or soft container for a small object or a small amount of something.*" Pouches can be made with zippers (to make them resealable and reusable), spouts (to easily pour out liquid products), handles (to make them easy to carry around), and other design features. Bags, on the other hand, are offered in various designs. I therefore, find that sacks, bags pouches have different description and are intended to be used for different purpose. The function of an article is one of the most important criteria for determining the essential character of an article. The Supreme Court in the case of *Atul Glass Industries Ltd. v. CCE - 1986 (25) E.L.T. 473 (S.C.)* had observed that the identity of an article is associated with its primary function and that it was only logical that it should be so. When a consumer buys an article, he buys it because it performs a specific function for him. There is a mental association in the mind of the consumer between the article and the need it supplies in his life. It is the functional character of the article, which it identifies in his mind. A customer will never buy a pouch for holding big / large articles and similarly they will never buy a sack / bag to carry or small articles. A pouch is generally used for packing small thing hence cannot be classified under CETH 3923-2100 which covered Sacks & bags (including cones). Thus, I find that the classification of pouches resorted by the appellant under CETH 3923-9090 under heading '**Others**' is a more appropriate/suitable classification because a pouch is different from a bag and a sack, hence, would not merit classification under CETH 3923-2100. Thus, on merits I find that the demand is not sustainable.

7.8 Further, I find that the mis-classification was disputed by the department during the scrutiny of ER-1 wherein the appellant has been regularly classifying the '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' under sub-heading CETH 3923-9090. As the above alleged misclassification was not noticed during audit/preventive action, I find that the suppression of facts cannot be alleged against the appellant when the above classification was already in the knowledge of the department. So, to that extent also I find that the demand is not sustainable as facts were known to the department hence extended period cannot be invoked alleging suppression of facts.

8. In light of the Apex Court's above decision, I find that classification of '*Printed/Unprinted laminated Flexible Packaging Film Pouch*' under sub-heading CETH 3923-9090 is not sustainable. Accordingly, the demand of Rs.18,15,232/- is also not sustainable and is set-aside.



9. In light of above discussion and findings, I set-aside the impugned order and allow the appeal filed by the appellant.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

Shiv Pratap Singh
28-8-23
(शिव प्रताप सिंह)
आयुक्त (अपील)

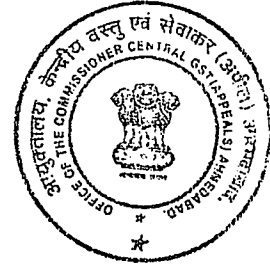
Date: 28/08/2023

Attested

Rekha A. Nair

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST



To,
M/s. Parikh Packaging Pvt. Ltd.,
Opposite Rotomac Pens, Sarkhej-Bavla Highway,
Moriya, Taluka -Sanand,
Ahmedabad-382213

Appellant

The Deputy Commissioner,
CGST, Division-IV,
Ahmedabad North
Ahmedabad

Respondent

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North.
(For uploading the OIA)
4. Guard File.

