

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10126 of 2017 - DB

(Arising out of OIO-SIL-EXCUS-000-COM-043-16-17 dated 27/10/2016 passed by
Commissioner of Central Excise, Customs and Service Tax-SILVASA)

Tinna Overseas Limited

Now Tinna Rubber & Infrastructure Ltd,
Sr. No. 166, Plot No. 3 & 4, Village- Naroli
Silvassa, Dadara Nagar Haveli

.....Appellant

VERSUS

Commissioner of C.E & S.T.-Silvasa

Commissioner Central Excise,
Customs & Service Tax, Silvassa,
4th floor, Adarsh Dham Building,
Vapi Daman Road Vapi
Opp. Old Town Police Station
VAPI, Gujarat

.....Respondent

APPEARANCE:

Shri H D Dave, Advocate for the Appellant

Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. 12010/2024

DATE OF HEARING: 20.06.2024
DATE OF DECISION: 12.09.2024

RAMESH NAIR

The issue involved in the present case is that whether the activity of mixing of bought out of Fine Crumb Rubber with 5 % sulphur /yellow powder and 2% Finawax C amounts to manufacture of new excisable goods.

1.2 The brief facts of the case are that the appellant have carried out the trading activity of " Fine Crumb Rubber" during the period 13.05.2010 to 28.07.2012 as under:-

(i) "Fine Crumb Rubber purchased from outside was only re-packed without adding anything to it and sold by appellants as trading activity, during the period 13.05.2010 to 23.09.2011.

(ii) "Fine Crumb Rubber" purch

ased from outside was added with 3% to 5% Sulphur /Yellow Powder and 2 % Finawax C and sold as a Trading Activity from 29.09.2011 to 28.07.2012.

1.3 The Learned Commissioner while adjudicating the show cause notice has passed the impugned order holding that "Fine Crumb Rubber" is significantly different and result of process of mixing/blending of Crumb Rubber with sulphur/yellow powder and wax and the same is distinctly different from the Crumb Rubber that was procured from the market. She has, therefore, confirmed the duty demand for the period from May, 2010 to July, 2012 under Central Excise Tariff Heading 40040000 which is for "Waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom". Learned Commissioner has also applied longer limitation period and imposed equal amount of penalty under Rule 25 of Central Excise Rules, 2002 read with Section 11 AC of Central Excise Act, 1944.

2. Shri Hasit Dave, Learned Counsel appearing on behalf of the appellant submits that "Fine Crumb Rubber" is the mixture of bought out item i.e. "Fine Crumb Rubber" and Yellow powder. Around 95% of "Fine Crumb Rubber" and 5% Sulphur (yellow powder) are mixed by physical/mechanical /process as per buyer's requirement, around 2 % Finawax C is mixed in the "Fine Crumb Rubber". There is no involvement of any chemical process or any chemical reaction. He submits that as per

purchase invoice the description of brought out item is Rubber Fine Crumb Powder and also in the sales invoice the description of sold product is mentioned as "Fine Crumb Rubber". So, there is no change in the name, characteristics and end-use of the original bought out items.

2.2 He submits that there is merely improvement in the quality by simple physical mixing. When bigger pieces of rubber is ground into smaller particles on storage they tend to agglomerate into lumps because of static charge or when stored in high stacks it forms lumps. To prevent these fine crumb rubber particle from forming into lumps, china clay/Finawax is used as lubricant and separating agent and keep them in powder form. Secondly, as regards addition of Sulphur, the Crumb Rubber already contains sulphur and it is again added to enable cross linking while processing. Sulphur enables cross linking of Crumb Rubber with Bitumen, when subjected to high temperature at the time of road surfacing. So, the whole purpose of physical mixing is to improve the quality of the starting material.

2.3 He referred to the test results which is the part of the appeal paper book. According to which there is no significant change after the processing from "Fine Crumb Rubber" (Input) to "Fine Crumb Rubber"(Finished). Therefore, the process of mixing does not amounts to manufacture of distinct product. He placed reliance on the following judgments:-

- CCE vs. Bharat Petroleum Corporation Ltd - 2023(384)ELT 615 (SC)
- CCE vs. Osnar Chemical Pvt Ltd - 2012 (276) ELT 162 (SC)

- Reliance Industries Ltd vs. CCE & ST - 2023(383) ELT 466 (T)

2.4 He further submits that apart from the merits, the demand is also wholly time barred. The show cause notice is issued on 25.05.2015 covering the period from May, 2010 to July, 2012. The appellants have not suppressed the facts or resorted to any wilful misstatement etc. with intent to evade payment of duty. On the contrary, they have been holding a bonafide belief that the simple process of mixing does not amounts to manufacture. In support he relied upon various correspondences dated 09.02.2010, 14.10.2011 and 28.06.2012 whereby the appellant have disclosed /declared the entire activity including the process of mixing of sulphur was with the 95% of Crumb Rubber . Therefore, there is no suppression of fact, the entire demand is liable to be set aside on the ground of time bar also.

3. Shri R.K Agarwal, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that as per the process of mixing of brought out "Fine Crumb Rubber" with 3% to 5% of sulphur/yellow powder and 2 % Finawax C and the judgments cited by the learned counsel it prima-facie appears that the activity dos not amount to manufacture of distinct product in terms of Section 2 (f) of the Central Excise Act, 1944. In this position, we are of the view that the bonafide belief of the appellant that the activity does not amounts to manufacture cannot be doubted.

4.1 We further find that the appellant have submitted letters dates 09.02.2010, 14.10.2011 and 28.06.2012 which are scanned below:-

Tinna Overseas Limited
 Survey No. 166/3 & 4
 Village : Naroli, Silvassa - 396235
 U.T. of Dadra Nagar Haveli
 Tel. : (0260) - 329 3260

Date: 09.02.2010

To,
 The Assisntant Commissioner of Central Excise,
 Division II, Silvass.

Respected Sir,

Sub: Intimation regarding trading of goods-regd
Ref: Letter No. F.No.V/Misc-reg/Tinna Overseas/03-04/3784 dtd. 4-2-2010

With reference to your above cited letter, kindly be informed that the Crumb Rubber we intend to use is "Fine-Crumb Rubber" a variety different from the regular 'Crumb Rubber' used.

Further these goods will be stored separately, segregated from the manufacturing activities, with separate gate, as shown in our map attached.

We believe that there is no restriction in Central Excise rule 2002, by which it can be restricted from doing trading from the same premises even if the raw material are similar. Moreover the 'Crumb Rubber' are received by us, without payment of duty wherein no credit is availed, as such there can't be any misuse.

We would further like to bring to your kind notice that when credit availed raw materials can be allowed to clear as such, why not non-credit availed goods. Department should come up with specific provision in Law wherein trading of similar raw material is restricted in the Central Excise law from the same premise.

We are therefore of the view that trading activities can be done from the manufacturing premises without any permission.

Hoping for your kind cooperation in this matter

Thanking you,

Yours faithfully,
 [Signature]
 Office of the Commissioner
 Tinna Overseas Ltd.
 Central Excise & Customs

Copy to: Commissioner of Central Excise, Vapi; for his kind intervention in the matter

OFFICE OF THE DY. ASST. COMMISSIONER
 OF CENTRAL EXCISE & CUSTOMS
 DIVISION II, SILVASSA
 09 FEB 2010

RECEIVED
 09 FEB 2010
 VAPI / VAPI

Head Office : No. 6, Suitanpur, (Mandi Road), Mehrauli, New Delhi - 110 030 (India)
 Tel : (011) 3295 9599 / 9600 / 9680 Fax : (011) 2680 7073

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14.10.2011

To,
The Superintendent(Audit)
Central Excise Silvassa

Dear Sir,

Ref: Your query regarding Fine Crumb Rubber

We would like to submit that we are trading in Fine Crumb Rubber from our godown situated at survey no. 166/3 & 4 Village Naroli Silvassa- 396 230. We are buying the Fine Crumb Rubber from open market which is exempted from excise duty in the light of following judgements:

1. Elgi Tyre & Tread Ltd. v. Collector - 2003 (155) E.L.T. A235 (S.C.)
2. Collector v. Gujarat Reclaim and Rubber Products Ltd. — 1990 (45) E.L.T. A67 (S.C.)

We are repacking the said material in uniform bags of 25 KG as per customer requirement , as the materials comes in uneven bags and also to detect any foreign material like iron/nylon pieces and selling the same as Fine Crumb Rubber. To make our product different from others we have started adding about 5% Sulphur / vaxes in it from Septemebr 2011 onwards. The process undertaken by us is detailed as under: -

Process:

Crumb rubber powder , which is about 95% of the total batch quantity, is put into slow speed mixer . Sulphur powder/vaxes about 5% of the batch size is also put into the mixer. The normal batch size is 300 kg containing 285KG of crumb rubber and upto 15 kg of sulfur/vaxes. The mixer contains stirrer which rotate the material and mix the same . Outlet of the mixer have magnets which separate any iron piece in the material. The mixed material is packed in bags of 25 KG. **The mixing can be done manually also and some time this exercise of mixing is done manually .**

We understand that the said process does not amount to manufacture in the light of Hon'ble Supreme Court judgement in the case of UNION OF INDIA Versus J.G. GLASS INDUSTRIES LTD. 1998 (97) ELT 5 (S.C.) which read as under para 16.

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" On an analysis of the aforesaid rulings, a two-fold test emerges for deciding whether the process is that of "manufacture". First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether the commodity which was already in existence will serve no purpose but for the said process. In other words, whether the commodity already in existence will be of no commercial use but for the said process. In the present case, the plain bottles are themselves commercial commodities and can be sold and used as such. By the process of printing names or logos on the bottles, the basic character of the commodity does not change. They continue to be bottles. It cannot be said that but for the process of printing, the bottles will serve no purposes or are of no commercial use."

On applying the above said Judgment in our case, we find that our purchased product Crumb Rubber remains Crumb Rubber and it does not lose its identity. The items mixed do not react with each other on blending. The Crumb Rubber bought from the market also contains sulphur.

As we wanted to start the activity at Chennai also so we asked the clarification from the Central Excise Chennai about the excise duty on Fine Crumb Rubber which verbally have been told as not liable to excise duty. Copy of following correspondence in this regard are enclosed herewith:

1. Our letter dtd 21.12.2010 to the Central Excise Division Chennai-C
2. Letter O.C. No.314/2010 dated 29.12.2010 from Central Excise Chennai asking for certain details/clarification
3. Our reply dated 03.01.2011 to the Central Excise Chennai
4. Letter O.C. No. 36/2011 dated 01.02.2011 from Central Excise
5. Our reply dated 10.02.2011
6. Sample test memo dated 08.03.2011 of Central Excise Chennai to Custom House Laboratory in respect of sample of 3 products taken from our godown at Chennai for "Crumb Rubber", "Fine Crumb Rubber" and "Bitumen Modifier" and our declaration regarding the sample drawn.
7. Our letter dated 30.08.2011 requesting for the report/clarification from Central Excise

We hope you will find the same in order. Any further information required shall be submitted as you may require.

Thanking You,

Yours Faithfully,

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For Tinna Overseas Limited

Authorised Signatory

Enclosure:

1. Copy of the case law Elgi Tyre & Tread Ltd. v. Collector - 2003 (155) E.L.T. A235 (S.C.); Collector v. Gujarat Reclaim and Rubber Products Ltd. — 1990 (45) E.L.T. A67 (S.C.) and UNION OF INDIA Versus J.G. GLASS INDUSTRIES LTD. 1998 (97) ELT 5 (S.C.)
2. Copy of Correspondence with Central Excise Chennai as aforesaid

Tinna Overseas Limited
 Survey No. 166/3 & 4, Kanadi Fatak, (National Flask Compound
 Village Naroli-396 235, Silvassa, U.T. of D. & N. H.
 E-mail : tol_Silvassa@hotmail.com
 PH. No. (0260) 3293260.

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28.06.2012

To
 The Assistant Commissioner
 Central Excise, Division -II, Vapi, Silvassa.

*Through: The Superintendent, Central Excise
 Range - III, Silvassa.*

Sub : Audit Objections in pursuance of the Audit conducted
 During October 2011 and thereafter

Dear Sir,

We have received on 21 June 2012 a copy of Audit Report No. 735/11-12 . We would like to state with respect that there is no any case of short payment/ non payment of excise duty and our reply/reasons are as follows:

- 1) During the aforesaid Audit, Audit team have pointed out following discrepancies :
 - a) In respect of clearance of intermediate products transferred to our own factory at Kalamb, we are informed that there is short payment of duty Rs. 379,675 because as against the normal sale value of these intermediate products, we have adopted lesser Assessable Value for such transfer to our factory to Kalamb.

Head Office : No. 6, Sultanpur, (Mandi Road,), Mehrauli, New Delhi - 110 030 (India)
 Tel. : (011) 3295 9599 / 9600 / 9680 Fax : (011) 2680 7073

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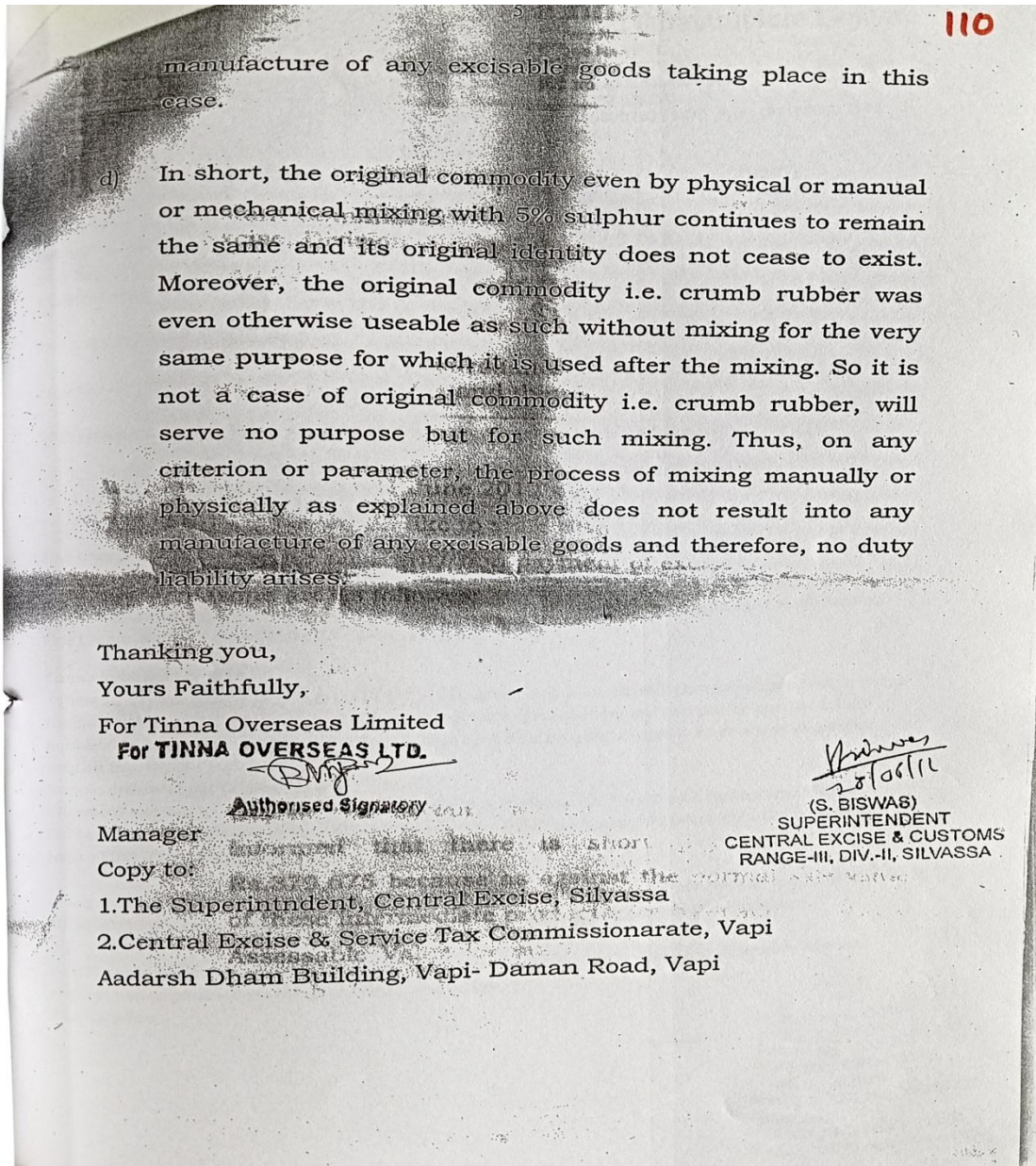
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- b) On the sale of mixture of two bought out items namely Fine Crumb Rubber and Sulphur, the Audit Officer have asked us to pay duty Rs. 5,82,081, whereas we have considered the said item as non-excisable.
- 2) As regards the first objection, regarding intermediate product, we clarify as under :
- a) The intermediate products are Chemical Treated Crumb Rubber and Potassium Tolune Sulphonic Acid Crumb Rubber.
- b) Since these two intermediate products were not sold by us but were transferred to our own factory at Kalamb for consumption in the manufacture of other dutiable goods which were also cleared on payment of duty from the Kalamb factory, we had adopted an Assessable Value in terms of Rule 8 of the Central Excise Valuation (Determination of price of Assesable Value of Goods) Rules, 2000. As per this Rule, we had arrived at cost of production as per CAS 4 method and then determined the Assessable Value at 110% of such cost of production. Accordingly, we had paid duty on such transferred intermediate product at correct

Assessable Value in terms of the said Rule 8. There is no short levy or short payment of duty.

- c) As a matter of fact, the whole exercise of payment of duty on these intermediate products transferred to our own factory at Kalamb is patently a revenue neutral exercise. For example, if we had used the said intermediate products in our factory at Silvassa, we would have not paid any duty on the intermediate products, since we would have paid the duty as per law on the final products when cleared outside factory. Thus, the Government would have received the duty only at the stage of clearance of final product. Exactly, the same thing should happen in the present case, where the intermediate products were transferred to, and used by our Kalamb factory, where the final products were admittedly cleared on payment of full duty. Whatever duty was paid on the intermediate products upon transfer there of to Kalamb factory, the entire amount is earned back by Kalamb factory, as Cenvat Credit. The entire exercise is therefore, nothing but a scriptory work without involvement of any revenue gain or revenue loss. Thus, this is not a case of any, short payment or non payment of duty from this another angle also.

- 3a) The second issue is about demand of duty on a mixture crumb rubber and sulphur. Both these items are bought out items. In the quantity 95% of fine crumb rubber, very small quantity of about 5% of Sulphur is mixed by physical / mechanical / manual process. Since admittedly we are not carrying out any chemical process and since it is only a process of physically mixing of two products in the ratio of 95:5, there does not arise any new commercial commodity. Consequently, no excisable goods comes into existence as a result of such process, because there is also no "manufacture" taking place.
- b) Secondly, the name, characteristics and enduse of Crumb Rubber do not change, specially because even by addition of Sulphur the Crumb Rubber continues to remain the same original commodity.
- c) Thirdly, the Crumb Rubber when bought out is classifiable under Chapter Sub Heading 40040000. This Chapter Sub Heading covers waste, parings and scrap of rubber. The Tariff identification and classification of Crumb Rubber when purchased and after it is mixed with sulphur continues to remain the same i.e. waste, parings or scrap of rubber. There is no transformation taking place into any new commercial commodity. Hence, there is no



4.2 From the above correspondences, it is absolutely clear that the appellant have informed the department from time to time about their activity of sale of "Fine Crumb Rubber" out of bought out Crumb Rubber and mixing of 5% of Sulphur/yellow powder and Wax with 95% of Crumb Rubber. Therefore, as per the above letters the department was very much aware about the activity of the appellant. Hence, there is no suppression of fact on the part of the appellant with intent to evade payment of duty. The show case notice was issued on 25.05.2015 covering the period from May, 2010 to July, 2012 which is much after the normal period of one year. Therefore, the entire demand is not sustainable

on the ground of time bar. Accordingly, we set aside the demand on the ground of time bar alone. Since, the entire demand is beyond the normal period and is set aside on time bar, we do not inclined to give conclusive finding on the merit of the case and the same is left open.

5. As per our above discussion and finding, the impugned order is not sustainable, hence, the same is set aside. Appeal is allowed with consequential relief , if any, in accordance with law.

(Pronounced in the open court on 12.09.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha