Read - 1. Application dt. 28.3.2007 by M/s. Thermoshell Industries holder of TIN No. 27030262947V
2. Application dt. 31.10.2007 by M/s. Beardsell Limited holder of TIN No. 27210383322V
Heard–1. Shri. C. B. Thakar, Advocate on behalf of M/s. Thermoshell Industries.
2. Shri. Deepak Bhosale, S.T.P. on behalf of M/s. Beardsell Limited.

PROCEEDINGS

(U/s. 56 (1)(e) and section 56(2)of the Maharashtra Value Added Tax Act, 2002).

No. DDQ 11/2007/Adm-3/14 – 45/ B- 2 Mumbai, Date :- 16.02.2008

A set of two applications has been received from M/s. Thermoshell and M/s Beardsell Industries wherein a common issue is put forth for determination. The issue is disposed through a common order.

2. FACTS OF THE CASE

A) M/S. THERMOSHELL INDUSTRIES

It is stated by them that they are in the business of manufacturing and sale of EPS products. The details of the transaction are as below:

TABLE 1

Sr. No.	Invoice No./Date	Name of Product	Excise Chapter Code as givenby the applicant	Rate of Tax charged by applicant	Effective rate as per entry C-54 and date of effect.
1	01787 / 10.3.2007	E.P.S.*(Thermocole)Blocks Size 1M X 1M X1/2M *Commonly also known as Thermocole	3921 90 10	12.5%	4% w.e.f. 1.10.2006
2	01457 / 26.12.2006	E.P.S. (Thermocole) Sheet Size 380MM X 380MM X 15MM	3921 90 10	12.5%	4% w.e.f. 1.10.2006
3	01649 / 7.2.2007	E.P.S. Scrap	3915 20 00	12.5%	4% w.e.f. 1.9.2005

4	01795 / 23.3.2007	E.P.S. moulding for packing for various Household Electrical items and E.P.S. Moulded Boxes for packing.	3923 90 90	4%	4% w.e.f. 1.4.2005
5	01718 / 23.2.2007	E.P.S. Perfoamed Beads	3926 90 99	12.5%	4% w.e.f. 1.4.2005
6	01804 / 13.3.2007	E.P.S. Carved pipe Section 25 MM X 40MM	3926 90 99	12.5%	4% w.e.f. 1.4.2005
7	00699 / 31.7.2006	E.P.S. Decorative products like Astavinayak etc.		12.5%	4% w.e.f. 1.4.2005

It is contended by the applicant that the products (1) to (4) are duly covered by notification under entry C-54 for Industrial Inputs and Packing materials. Therefore they are liable to tax @ 4%. However as a precaution they are charging tax @ 12.5% on items (1) to (3) and @ 4% in relation to item (4). It is submitted that the other products i.e. from (5) to (7) are also so covered in the above Entry C-54 and liable to tax @ 4%. It is submitted that as a matter of abundant caution, they have charged tax @ 12.5% although they should also be held as liable to tax @ 4%.

It is submitted that , in case the above products are held as covered by schedule E-I liable to tax @ 12.5%, then prospective effect be given on facts of the case.

It is submitted that it is a common fact that in so many earlier DDQs, it has been held that even if the goods are covered by the C.E. tariff head covered by notification for Industrial Inputs and Packing materials, if the said goods are not strictly covered in the category of Industrial Inputs and packing materials, such goods cannot fall under the said entry for Industrial Inputs. Therefore, the applicant has submitted the matter for determination.

The applicants have also submitted the following :

i. The manufacturing process in respect of 'EPS Blocks', 'EPS sheet', 'EPS moulding for packing for household electrical appliances & Boxes', 'EPS preformed Beds' carved pipe section & decorative products .
ii. Photographs of all the items .
iii. Samples of the products .

iv. In respect of the trade/commercial parlance, copy of purchase orders received from customers, where the rate of tax @ 4% is specified by their buyers considering the item as Industrial Inputs under Entry C-54 . Certain letters received from purchasers for using their products for preparing packing materials are also attached.

v. It is submitted that EPS moulding for packing for various house hold electrical items and EPS moulded boxes for packing covered by heading 39239090 are already held as covered by entry for Industrial inputs and packing material covered by the then schedule entry C-1-29 through DDQ-11/2002/Adm-5/69-44/42/B-2 dt. 13.11.2002 passed in applicant's own case.

vi. It is submitted that EPS scrap is scrap of the products which are covered by entry C-54 and accordingly this should be covered by entry C-54, even if they are not specifically covered under the said entry.

vii. It is also submitted that the decorative products are also covered by entry C-54 as they are covered by entry 3926 9099. This heading is covered by C-54 and hence they should be considered to be in the same entry. It is also stated that for entry C-54, the items which are notified by the Government under said Entry C-54 are to be considered as Industrial Inputs. Therefore even if in normal circumstances such items are not Industrial Inputs, since they fall in notified tariff of notification, they are to be covered under entry C-54.

PROCESS OF MANUFACTURE

STEP – 1:-The expandable beads are put in an pre-expander and prefoamed and expanded in size with the help of steam and water.

STEP – 2:-The expanded beads are then stored in huge ventilated bags called Silos. The beads are stored in the Silos for maturing.

STEP- 3 :- After maturing, the beads are further expanded and fused together with the help of steam, water and air under pressure, in the form of E.P.S. Blocks of different sizes.

STEP – 4:-Beads are also expanded and fused in various shape moulds for producing packing as per the client specification.

STEP – 5:-The Blocks of various sizes are further cut into either sheets or pads to be sold to customers for packing.

STEP – 6:-Also Block are carved into half cylinder pipe sections to be sold for insulation purposes.

STEP – 7:-All these are then packed to be sold and dispatched.

B) <u>M/S. BEARDSELL LIMITED</u>

The applicant has requested determination on the rate of tax on "Expanded Polystyrene sheets & cut pipe sections '. The copy of invoice no 00137 dt. 18.4.2007 shows sale only of EPS sheet. The copy of invoice showing sale of 'pipes' is not given.

It is submitted that M/s Beardsell Limited manufacture and sell the following products :

1) Expanded Polystyrene sheet
2) Expanded Polystyrene pipes section
3) Expanded Polystyrene cut-piece, other shapes
4) Expanded Polystyrene moulded goods used for packing.
5) Prefabricated building used for colds storages/cold rooms and other applications with expanded polystyrene slab as inner core and steel lamination on both side.
6) Expanded Polystyrene contour shapes

It is submitted that the raw material used for this is 'expanded polystyrene' . This is made from styrene (poly-dictionary meaning is –many) in other words of many styrene. Styrene is the chemical generic name. This styrene is chemically reacted with pentane gas to enable it to foam. Styrene and pentane gas are obtained from petroleum and are therefore pure hydrocarbon compounds from which *expanded polystyrene* is obtained through a process of suspension polymerization.

It is submitted that as per Central Excise Tariff this polystyrene in primary form is classified under Chapter heading 3903 and - expansible polystyrene is classified under chapter head as - 3903 11 00. This expanded polystyrene is further treated as finished foam and is converted into blocks and moulded parts in three stages:

Pre-expansion

This styrene is heated to about 80° C to 110° C (176° F to 230 ° F) in special foaming units normally called as pre-foaming unit using steam. During the process the apparent density of the material drops from 630 kgs/m3 (39 pcf) to 10 kg/m3 (0.625 pcf) depending on the temperature and residence time. For molding into blocks it is pre-expanded to 18-30 kg/m3. This pre-foaming converts the compact beads of styrene into foam beads with small, closed cells.

Intermediate aging

Freshly pre-foamed beads are allowed to cool down, blowing agent and steam condenses inside the cells, producing a vacuum equalized by air diffusing into cells. This imparts greater mechanical stability to the beads, as well as extra foaming power, which is essential for further processing. This process takes place during intermediate aging in ventilated silos. At the same time, the beads dry.

Mouldings

The cavity of foaming mould, which is usually in two or more parts, is now filled pneumatically with the pre-foamed beads. The mould walls are equipped with holes or slits to connect the mould cavity with the steam chamber. Steam provides the necessary energy for the moulding. A surge of steam causes the beads to soften again and to expand. The expansion pressure compresses the beads and at the same time, forces them against the mould walls so that they fuse and bind together. The resultant part is then cooled by spraying water onto the mould and by applying vacuum. When it has cooled down sufficiently, the moulded component can be taken out from the mould. This is the manufacturing process to make Expanded Polystyrene Blocks/ Shape Mouldings .

This Expanded Polystyrene block is then skinned and further cut by passing it through the parallel arranged electrically heated wires to obtain desired thickness of sheets. Further the Expanded Polystyrene Blocks are cut by pipe section cutting machines, to get Half Round pipe sections. These pipe sections are used for thermal Insulation on chilled water lines etc (as Insulators to reduce heat conduction)This is the process of making sheets out of a block of expanded polystyrene.

These expanded polystyrene products are cleared from factory duly packed and branded by the company as “Thermofrost” Expanded Polystyrene Sheets. “Thermofrost” is the registered brand name of the company under Trade Mark and Patent Act. It is submitted that this “Thermofrost” Expanded Polystyrene sheets, cut pipe section are classified by the company under Excise Tariff Chapter heading 3921 11 00.

3. HEARING

The cases were fixed for hearing on 15.1.08. Shri. C. B. Thakar, (Advocate) attended on behalf of M/s. Thermoshell Industries. Shri. Deepak Bhosale, S.T.P. attended on behalf of M/s. Beardsell Limited. Shri. C. B. Thakar, stated that determination is sought on a number of EPS products like sheets, blocks,scrap , moulding, pre-formed beads , EPS pipes and EPS products . He stated that EPS blocks, EPS sheets are covered by excise heading 3921 which is notified as 'industrial input'. He stated that EPS scrap is also an 'industrial input' while “EPS moulding' is covered by 3923 9099 and is an industrial input. He informed that 'EPS beads' is covered by excise heading 3926 .In the alternative, he contended that it is covered by schedule entry C-75. He contended that EPS pipes is an industrial input and they all be held so accordingly.

4. DECISION

I have gone through the facts of the case. The contention of the applicant is with respect to coverage under schedule entry C-54 which covers ' industrial inputs and packing material'. The concerned schedule entry notifies certain excise headings and the products covered by them as 'industrial inputs'. The rules of interpretation for excise tariff heading are guided by explanatory notes from publication of Customs Co-operation Council, Brussels and the same is applicable to these notifications. The determination of rate of tax on all the products therefore would be with reference to the description of the excise headings, the entry as notified under the MVAT Act and the explanatory notes in the HSN. I would take up the products in the sequence given in the Table no.1 at the beginning of this order.

1) EPS sheets : It is contended that the product is covered by excise heading 39219010. The heading 3921 was notified for the purpose of schedule entry C-54 w.e.f 1.10.2006.The heading under the MVAT Act is as below :

3921	Other plates, sheets, film, foil, and strip of plastics	4%	1.10.2006 to date

The heading as under the Excise Tariff Act is as follows :

3921	Other plates, sheets, film, foil, and strip of plastics	4%	
3921 90 10	Thermocol		

The sale invoice given by the applicant shows clearance under the excise heading 3921 90 10. This is a fairly conclusive proof of coverage as the description under the Excise Tariff matches verbatim with the description under the MVAT Act. The product , which is commonly known as 'Thermocol' ,is not used in the retail industry and is not meant for ready consumption. It is used as an input for making packaging goods and therefore it can be called as an 'industrial input'. Moreover, the excise entry specifically describes 'Thermocol' under sub-heading '3921 90 10. I have also come across a Departmental Clarification issued by the CBEC reported in 42 ELT (T5) wherein it is clarified that Polystyrene classifiable under heading no 3903 is the basic raw material for the manufacture of 'thermocol' and therefore sheets, blocks and boards,plates of thermocol would be appropriately classifiable under Heading 3920 or 3921 depending on whether they are cellular or non-cellular. Therefore, I agree that EPS sheet would be covered by schedule entry C-54 , as it falls under excise heading 3921 which is notified for the purpose of C-54.

2) **EPS blocks** : There is a similar contention that the product is covered by excise heading 3921 9010 and therefore it is an industrial input covered by schedule entry C-54. The heading 3921 is notified for the purpose of schedule entry C-54 w.e.f 1.10.2006. The heading as under the MVAT Act is as below :

3921	Other plates, sheets, film, foil, and strip of plastics	4%	1.10.2006 to date

The heading as under the Excise Tariff Act is as follows :

3921	Other plates, sheets, film, foil, and strip of plastics	4%
3921 90 10	Thermocole	

The excise heading covers only certain forms of plastic – plates, sheets, film, foil and strip of plastics. The heading does not cover the 'blocks' of plastic. However, the Note. No 10 in the explanatory notes to the Chapter 39 says the following :

> " In headings 3920 and heading 3921, the expression "plates, sheets,film, foil and strip' applies only to plates, sheets,film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if they are cut they become articles ready for use)

The above note explains that the block of plastic are also covered by this heading even though the shape is not specified in the explanation. However, only those blocks are covered which are merely cut and surface worked. I have seen the sample of the product. The blocks were plain blocks and they were not further worked. Therefore, the EPS blocks which are covered by the excise heading 3921 90 10 are covered by schedule entry C-54. This view was also held by the Commissioner Of Central Excise, Faridabad in the case of M/s. Npi Packaging (P) Ltd. (196-ELT -0299) wherein it is held that EPS blocks are covered by excise heading 3921.

3) EPS scrap : The scrap is cleared by the applicant under excise heading 3915 20 00 which is notified for the purpose of schedule entry C-54. The heading under the MVAT Act is listed at sr.no 198 as below :

3915	Waste, parings and scrap of plastics	4%	1.9.2005 to date

The heading as under the Excise Tariff Act is as follows :

3915	Waste, parings and scrap of plastics	4%
3915 20 00	Of polymers of styrene	

The EPS scrap is generated out of EPS. EPS stands for expanded polystyrene. Heading 3915 20 00 covers the scrap of polystyrene. The product ,' EPS scrap' is the scrap of the sheets, blocks etc. The scrap is used for further processing in industry. Therefore, the product 'EPS scrap' is covered by schedule entry C-54 being an 'industrial input' and covered by excise heading 3915 which is notified at no.198 in the notified list.

4) EPS moulding : The applicant has cleared the product under excise heading 3923 90 90. The EPS moulding is used for packing goods. The rate of tax on moulded packaging has been determined by the Commissioner in the case of M/s Thermolite Packaging (India) Pvt. Ltd.(cited supra). It has been held that EPS moulded products would be 'packing material' covered by excise heading 3923 which was notified under the then entry for industrial inputs. The excise heading 3923 as notified under the entry under BST is similar to the entry under MVAT Act. The schedule entry as under the BST Act was as follows :

C-I-29	Industrial inputs and packing material, as may be specified by the State Government, from time to time, by notification in the Official Gazette	1.5.2000 to date

The heading as notified under the entry was as follows:

3923	Articles for the conveyance or packing of goods, of plastics, stoppers, lids, caps of other plastics but not including a) insulated ware b)bags of the type which are used for packing of goods at the time of the sale for the convenience of the customer including carrying bags.	9.5.2002 to date

The excise heading as notified for the purpose of schedule entry C-54 under the MVAT Act is as follows:

Heading	Central Excise	Notification dt.1-4-2005	Notification dt.1-9-2005
3923	Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures of plastic.	Articles for the conveyance of packing of goods of plastics; stoppers, lids, caps and other closures, of plastics but not including— (a) insulated wares (b)bags of the type which are used for packing of goods at the time of sale for the convenience of the customer including carry bags.	Articles for the conveyance or packing of goods, of plastics, stoppers, lids, caps and other closures, of plastics but not including- (a) insulated wares, (b) carry bags that is to say bags of the type which are used for packing of goods at the time of sale for the convenience of the customer.

It is clear from the above that the heading 3923 as notified under the entry in BST Act is similar to the heading as notified under the MVAT Act. Therefore, the determination order is also applicable to the present period.

5) **EPS pipes** : It is seen that the EPS pipes are covered by excise heading 3926 90 99. The heading 3926 is also notified for the purpose of schedule entry C-54 . The heading as notified under the MVAT Act is as below :

3926	Plastic fabrics of the type used for making plastic woven sacks and plastic woven sacks	4%	1.9.05 to date

The heading as under the Excise Tariff Act is as follows :

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914.	4%

As per note no (2) of the rules of interpretation given under the notification to schedule entry C-54 ,where any commodities are described against any heading or sub-heading or, as the case may be, tariff items and the aforesaid description is different in any manner from the corresponding description in the Central Excise Tariff, 1985, then only those commodities described as aforesaid will be covered by the scope of the notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification. Thus, as for heading 3926 the heading as notified for the purpose of C-54 does not match with the corresponding description under Excise Act. In such a case, only the product described in 3926 for the purpose of the notification would be covered by it. The notified entry covers only plastic sacks and material used for weaving sacks. It does not cover the EPS pipes. In such a case, the EPS pipes would not be covered by the schedule entry C-54. In absence of any specific entry, it would be covered by the residual entry.

6) EPS beads : EPS beads are cleared by the applicant under excise heading 3926 90 99. The scope of heading 3926 as notified has already been examined in the preceding paragraph. The heading 3926 as notified for the purpose of schedule entry C-54 does not cover plastic pre-formed beads. Therefore, these beads would not be covered by the schedule entry C-54.

The other contention of the applicant is that the beads are covered by schedule entry C-75. The entry is reproduced below :

C-75	Plastic granules,, master batches , plastic powder and scrap.	4%

It is the submission of the applicant that the beads are 'plastic granules' covered by C-75. These granules are made of expanded polystyrene. Headings 3901 to 3914 of the Central Excise Tariff Act cover the primary forms of plastics like lumps, powders, blocks ,liquids, pastes, granules, flakes etc. The polymers of styrene in primary forms are covered by excise heading 3905.The heading 3903.11 specifically covers the expanded polystyrene in primary forms. If the product was primary polystyrene then the product would have been covered by this specific heading 3903.11. However, it is cleared under heading 3926 which under excise covers the articles of plastic. In such a case, the product would not be covered by schedule entry C-75.

The applicant has contended that the entry is not referential to the Excise Tariff and therefore, treatment under the Excise Act is not a relevant guiding point. I do agree with this. But, it is also equally true that though the treatment under the Excise Act is not a essential parameter, it does provide guidelines which cannot be disregarded. The schedule entry C-75 under the MVAT Act does not cover 'article of plastics'. All the products covered by it are the basic forms of plastics- granules, scrap, batches. Therefore, when the product is not considered as a primary product but an article under an Act whose Chapter headings 39 are heavily borrowed for the purpose of notification under MVAT,the classification under MVAT cannot run contrary to it. It is therefore held that the Plastic preformed beads are not covered by schedule entry C-75 , but are covered by the residual entry.

7) E.P.S. Decorative products like Astavinayak etc: This product is cleared under heading 3926 90 99. The polemics of classification under the MVAT Act vis-s-vis Excise Act,when the descriptions do not match has been discussed by me. Heading 3926 as notified under MVAT covers only plastic material used for making plastic sacks. It does not cover the plastic decorative articles. These articles are not industrial inputs. They are ready products. Therefore, they are neither industrial inputs nor are they covered by the notified list. They would be covered by the residual entry as there is no other entry which covers the product.

B) M/S BEARDSELL

They have also requested determination on 'EPS sheets and EPS pipes. I have already dealt with the above in the preceding paragraphs.

5. PRAYER FOR PROSPECTIVE EFFECT

The applicant has requested for prospective effect in case the determination is not passed in their favour. However, I see no grounds for prospective effect. There is no statutory misguidance and there is no ambiguity in the matter. Therefore, the request for prospective effect is rejected.

6. In view of the aforesaid discussion, I passed the order as follows:-

O R D E R

(Under Section 56(1) (e) and section 56(2)of the Maharashtra Value Added Tax Act, 2002)

No. DDQ 11/2007/Adm-3/14 – 45/ B-2 Mumbai,dt.16.02.2008

1. The products sold by M/s Thermoshell and the tax rate thereon is given in the following table :

Sr. No.	*Invoice No and date*	*Particulars of Products*	*Schedule entry*	*Rate of tax*	*Period*
1	01787/10.3.2007	E.P.S.(Thermocole) Blocks Size 1M X 1M X1/2M *Commonly also known as Thermocole	E-1	12.5%	1.4.2005 to 30.9.2006
			C-54	4%	1.10.2006 onwards
2	01457/26.12.2006	E.P.S. (Thermocole) Sheet Size 380MM X 380MM X 15MM	E-1	12.5%	1.4.2005 to 30.9.2006
			C-54	4%	1.10.2006 onwards
3	01649/7.2.2007	E.P.S. Scrap	E-1	12.5%	1.4.2005 to 31.8.2005
			C-54	4%	1.9.2005 to date

Sr. No.	*Invoice No and date*	*Particulars of Products*	*Schedule entry*	*Rate of tax*	*Period*
4	01795/23.3.2007	E.P.S. moulding for packing for various Household Electrical items and E.P.S. Moulded Boxes for packing.	C-54	4%	1.4.2005 to date
5	01718/23.2.2007	E.P.S. Perfoamed Beads	E-1	12.5%	1.4.2005 to date
6	01804/13.3.2007	E.P.S. Carved pipe Section 25 MM X 40MM	E-1	12.5%	1.4.2005 to date
7	00699/31.7.2006	E.P.S. Decorative products like Astavinayak etc.	E-1	12.5%	1.4.2005 to date

(2) The prayer for prospective effect of M/s Thermoshell Industries is rejected.

(3) The sale of 'EPS sheets' by M/s Beardsell Limited through invoice no 00137 dt. 18.4.2007 is held covered by schedule entry C-54 taxable @ 4% .

SANJAY BHATIA
Commissioner of Sales Tax,
Maharashtra State, Mumbai