

Eupharma Laboratories Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-24-1998

Reported in : (1998)(77)LC545Tri(Mum.)bai

Judge : S Bhatnagar, Vice-, J Balasundaram, S Peeran

Appellant : Eupharma Laboratories Ltd.

Respondent : Cce

Judgement :

1. The appellants are engaged in the manufacture of, inter alia, pharmacopoeial medicines falling under Chapter 30 of the Schedule to Central Excise Tariff. In response to the tender issued by the Government of India and the contract granted to it by the Government of India for supplies under its 'Integrated Child Development Scheme', the appellants manufactured the following pharmacopoeial medicaments: The said medicines manufactured by the appellants were packed in corrugated boxes, as asked by the Government of India, along with duty paid bought out items namely Bandage 5 cm x 5 cm x 12 cm, Absorbent cotton wool 400 gms x 2 pks, Mid upper circumference tape 5 tapes, Brochures in regional language 2 Nos. , Tincture Iodine solution IP 450 ml). They filed classification list No. 7/88-89 dated 1.4.1988 for the period 1988-89 declaring classification under sub-heading 3003.20 which was approved by the Assistant Collector of Central Excise on 29.8.1988.

2. The Collector of Central Excise Division K-II, Bombay vide his order dated 13.3.1989 directed the Assistant Collector to file Review application before the Collector of Central Excise (Appeals) for modification of approval of the classification list to the extent of classifying the above mentioned products under Chapter 30 sub-heading 3005.90 chargeable to duty at the rate of 15% ad valorem. The reason given in the said application for revision of the classification list was as under: Assessee has been packing and clearing the above products in kits for Integrated Child Development Scheme of Government in corrugated boxes along with other medicaments. In view of Chapter Note 3(g) to Chapter 30 of CETA, 1985, the First Aid boxes and kits are specifically classifiable under Chapter 3005.90 and chargeable to duty @ 15% ad valorem. Therefore, products in question even though being pharmacopoeial products but since packed in 'Medicine Kits' are appropriately classifiable under Heading 3005.90 of CETA, 1985 and chargeable to duty @ 15% ad valorem basic duty and 5% special excise duty. On receiving the copy of the said Review application, the appellants filed their Memorandum of cross objection stating that the medicines being manufactured by them are pharmacopoeial medicaments falling under heading 3003.20 as they are medicaments other than patent and proprietary while heading 3005.90 relates to goods not else where specified. They also submitted the use and purpose of their medicine and the scheme to which the same were manufactured and cleared. They laid emphasis on the fact that what they were manufacturing and clearing were not First Aid boxes and kits. Their medicines were not for first Aid. The respondents vide his order in appeal dated 13.2.1990 held that Chapter note 3(g) of Chapter 30 apply to the products of the appellants at Sl. No. (a) to (h) which are to be classified in that heading only and in no other heading of this Schedule. The product at Sl. No. (g) is First Aid boxes and kits and that the products are appropriately classifiable under heading 3005.90 of CETA, 1985 and chargeable to duty at 15% ad valorem.' Hence this appeal by the assesseees.

3. We have heard Shri Dharmesh Misra, earned Counsel and Shri A.K.Madan, learned SDR. To understand what is meant by First Aid and what are First-Aid Boxes and Kits, let us see the definitions contained in Medical Encyclopaedia and Dictionaries: a) Rush-Presbyterian - St. Lukes Medical Centre--Medical

Encyclopaedia, edition 1991 at page 344 defines 'First Aid' as, 'First aid is immediate care given to a victim of an accident, sudden illness or other medical emergency.

b) The Lexicon Webster Dictionary Vol. I printed in 1983 defines first aid as Emergency aid or treatment given to the victim of an accident or sudden illness before regular medical services can be given.

c) Dr. Clifford R. Anderson M.D. in his book Guide to Health defines First aid as, 'First aid is a kind of treatment while waiting for the doctor to come'.

d) Family health Guide and Medical Encyclopaedia of Readers Digest defines first aid as: First-Aid is emergency treatment given to a injured, drowning, unconscious or suddenly ill person before professional medical help arrives.

e) Butterworths Medical Dictionary, 2nd Edition by Macdonald Critchley defines First Aid as: Immediate treatment given on the spot in cases of accidental or other injuries, usually by experienced but not necessarily medically qualified persons, before more expert medical or surgical attention can be obtained. First-Aid Boxes and Kits (contents) a) Rush--Presbyterian--St. Lukes Medical Centre--Medical Encyclopaedia edition 1991 at page 346 by way of illustration gives the contents of a First-Aid Box and Kit as follows: a) Bandages b) Antiseptic lotion c) tissues d) scissors e) safety pins and f) tweezers b) Family health Guide and Medical Encyclopaedia of Readers Digest gives the usual contents of a First Aid box and Kit as: a) Sterile gauze pads b) Adhesive tape c) box of band aids d) absorbent cotton woole) tongue depressors f) flashlight g) safety matches h) pair of scissors c) Remingtons Sixteenth edition of Pharmaceutical Sciences (Page 33 of the paper book) describes first aid supplies to contain: a) Absorbent cotton (b) Cotton balls and buds (c) Sterile rolls and pads of gauze (d) Muslin and elastic bandage (e) Disposable fabric tissues and underpads (0 Eye pads (g) Sponges (h) tissues (i) Towels (j) Plaster of Paris (k) Adhesive plaster (1) Adhesive elastic bandages (m) Aerosol adherent (n) Spray dressings (o) First aid kits (p) Scissors (q) tweezers and applicators d) Rule 63 of the Delhi Factories Rules prescribes that first aid appliance shall be as follows: The First Aid boxes and cupboards shall be distinctively marked with a red cross and shall contain the equipment: (a) Sterile

dressings (b) Burn dressings (c) Alcoholic solution of Iodine (d) Sal-volatile (e) Snake bit lancet (f) Bottle of potassium permanganate crystals (f) Scissors (g) First aid leaflet (h) Aspirin (i) Burn ointment (i) Dettol etc.

e) Similarly Maharashtra Factories Rules 1963 vide Rule 76 provides that First aid appliance shall be as follows: The first aid boxes or cupboards shall be distinctively marked with a red cross on a white background and shall contain following equipment: (a) Sterilized dressings (b) Cetrimide solution or a suitable antiseptic solution (c) Mercurochrome solution (d) Sal volatile (e) Scissors (f) Adhesive plaster (g) Sterilized eye pads (h) Aspirin or other analgesic (i) Ointment for burns (j) Polythene wash bottle for eye wash (k) Snake bite lancet (l) Potassium permanganate crystals (m) First aid leaflet etc.

4. In the light of the above, let us examine the use of the products manufactured by the appellants. They are described in the MIMS (Index for use by Medical Practitioners and Pharmacists) and other Pharmacy texts which are as under: Medicaments Use--Purpose a) Paracetamol Tablets IP Antipyretic, analgesic 500 mg b) Mebendazole Tablets USP Stomach ailments, anthelmintic c) Benzyl Benzoate Application Scabies and Pediculosis (Skin tinea IP infections) d) Merbromin Solution NFI Surface disinfectant for mucous e) Sulphacetamide Eye Eye infection from virus, bacteria drops BP fungus, etc. for local f) Tetracycline Eye Ointment Conjunctivitis--non specific.

ment IP Eye ailment.

All the above products are used to treat/cure diseases/ailments and complaints. Before administering the same, a professional will have to determine the ailment complained of. For example, what is the stomach ailment for Mebendazole tablets, the kind of skin disease (for use of Benzyl Benzoate application) or the kind of eye ailment for (use in the administration of sulphacetamide) or Tetracycline Eye ointment. One of the aforesaid drugs namely mebendazole tablets are Schedule H drugs, as seen from the label of this product at page 16 of the paper book. This is to be sold by retail on the prescription of a Registered Medical Practitioner only and cannot be used without consultation of the medical professional. Therefore, the above six items cannot be considered as medicines for first aid which are

administered to persons in an emergency before professional help is available for the victim.

Even the items purchased from outside like absorbent cotton wool, bandage, which are packed in corrugated boxes and supplied with the above six products manufactured by the appellants, were for effective treatment of the ailment to be treated by administration of the above products. For example, bandage is used for persons suffering from Scabies and Pediculosis for keeping in place/position the Benzyle Benzoate application on the skin and for checking further contact with the cause of the skin infection until the application takes effect to cure the infection. Similarly, absorbent cotton wool is used along with medicines for curing, treating eye infection such as Sulphacetamide and Tetracycline eye ointment to clean the eyes after cleaning before application of the medicines to persons complaining of eye ailment. It is also pertinent to note that the products manufactured by the appellants and packed along with the duty paid bought out items were supplied under a contract to the Government of India for treatment of children under the Integrated Child Development Scheme of the Government for administration free of cost to poor children living in un-hygienic conditions which give rise to ailments for the treatment of which the appellant's products could be used, as seen from the description of the ailment and the usage of the medicines manufactured by the appellants. Hence the products are not First aid boxes covered by Note 3(g) to Chapter 30 which applies to the products supplied and cleared as "First Aid boxes and kits" known to the Pharmaceutical trade as such and which are goods available for sale in the market from Pharmacists and Chemists as first aid boxes and kits with supplies for first aid as set out above. The packing in corrugated boxes was only for the sake of convenience of supply to the Government and is not determinative of the classification of the products as first aid boxes and kits. Since Note 3(g) is not applicable in this case, the goods in question cannot fall for classification under heading 3005 which covers "Pharmaceutical goods not elsewhere specified" and the correct classification of the items in dispute is under heading 3003.20 as admittedly the medicines manufactured by the appellants are "medicaments (other than patent or proprietary) other than those which are exclusively used in Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic systems," attracting nil rate of duty.

5. In the light of the above discussion, we set aside the impugned order and allow the appeal with consequential relief, if any, due to the appellants in accordance with law.

6. With due respects to Hon'ble Member (J), my views and orders in the matter are as follows.

7. It is observed that the basic issue involved in this case is classification of the item in question described by the appellants as a 'corrugated box' containing 6 pharmacopoeial products manufactured by the appellants along with some items purchased from outside (and supplied to the Government of India for Integrated Child Development Scheme).

8. The Department has claimed that the item was in the nature of a first aid box or kit covered by Sub-clause (g) of Chapter Note 3 whereas the appellants have contended that it is a medicine kit but not a first aid kit.

3. Heading No. 30.05 applies only to the following, which are to be classified in that heading and in no other heading of this Schedule: The relevant portion of heading 30.05 reads as follows:--"30.05 Pharmaceutical goods, not elsewhere specified. 3005.90 Others.

10. The appellants have contended that the pharmacopoeial products manufactured by them are all allopathic medicines, other than patent and proprietary medicaments, classifiable under heading 3003.20 attracting Nil rate of duty whereas the Department has contended that in view of Chapter Note 3, the goods are classifiable under heading 3005.90 attracting 15% duty.

11. The A.C. had approved the classification list containing the aforesaid claim of the appellants but Collector (Appeals) set aside the order of the A.C. Hence, this petition.

12. Earned Counsel has argued in details in support of the appellants' contention indicating references to contents and composition of first aid box and kits indicated in various books and Factories Rules of Delhi and Maharashtra. Since these have already been extracted by my learned Colleague in paragraph 3 of the order, I am

not repeating them.

To my mind, the question which arises before us is as to whether we are bound by the old concept of first aid and the one prevailing in European countries or in the context of specialised requirements for the purpose of factories. The appellants have themselves stated that the items have been supplied to the Government of India for Integrated Child Development Scheme and this scheme covers rural areas as well.

They have, however, not enclosed a copy of the contract referred to by them to enable us to judge whether the idea was only to procure and supply only first aid box or kit or something more than that or for a different purpose and insofar as the various citations incorporated by the learned Counsel in the written submissions also are concerned, a difficulty arises from the fact that all of them differ from one another in some respect or the other and the very concept of first aid has been, it appears, changing and gradually expanding and that is why, the various types of kits indicated in various books and in the Factories Rules indicate and incorporate different items (varying in number, nature and uses as well). The nature of first aid required in different places of living or working would naturally make a difference to the contents of the first aid box required by the people or paramedics. Just, for example, in a jungle or field/where there are more snakes, the snake bite lancet and other items required for the purpose are more important but in a factory where accidents due to machines, chemicals, fire or electricity etc. are involved, different things may be required for first aid whereas in schools, simpler other things may be sufficient.

13. It is well known in the development schemes, to provide first aid to villagers, the Government of India and/or state Governments employ paramedics who may be trained to deal with minor common ailments in the area and provide first aid till the regular doctor or medico arrives. The pharmaceutical products mentioned by the appellants are such, use of which is common knowledge these days and today, first aid is taken or given by family members, neighbours or paramedics not merely in case of accident or sudden illness or in emergency only but as a matter of course pending visit to a dispensary or hospital or a visit of a doctor. In

fact, this type of first aid, by itself, or with self help or the help of a paramedico proves sufficient, one may not take the trouble of going to a regular dispensary or a doctor. This is common experience in everyday life.

14. A question which we, however, face is as to whether the term 'first aid box and kit' as used in Chapter Note 3(g) is required to be understood and applied in a broad sense as mentioned above. Secondly, whether each of the medicine contained in the box was required to be classified and assessed separately on merits or the box or kit as a whole was required to be assessed as a distinct item.

15. One thing is clear that the items mentioned in the form supplied cannot be called bulk drugs as claimed by the appellants nor they can be individually assessed independently on merits once together with other items, they are packed and supplied in a box or kit as a distinct composite commodity.

16. Admittedly, they are medicine kits and therefore, irrespective of whether they are first aid box or kit, sensuo stricto, or not, they are required to be classified as such units under heading 30.05 as Pharmaceutical goods, not elsewhere specified... (the fact that they were being supplied to Government of India under a contract for use during a particular scheme does not have a direct bearing on this aspect). Therefore, there was no reason to disturb the conclusion of the Collector to the effect that they were classifiable under heading 3005.90. I, therefore, reject the appeal.

17. In view of difference of opinion between Hon'ble Member (j) and the Vice-President, the matter is submitted to Hon'ble President for reference to a Third Member on the following point: Whether the item was required to be treated as a kit classifiable under heading 30.05 on the grounds mentioned in the order of the Vice-President or the medicines contained in the kit were required to be assessed individually on merits and the item (s) is required to be classified under heading 3003.20 as held by Hon'ble Member (Judicial). Sd/- Sd/-(Jyoti Balasundaram) (S.K. Bhatnagar) Member (J) Vice-President 18. I have heard Learned Advocate, Shri Dharmesh Misra, who has taken me through the literature and evidence on record to support the order proposed by Hon'ble Member (J). Shri S.K. Madan, the Learned SDR did not argue anything just, to say in one sentence that he supports

the order proposed by Vice-President.

19. The appellants packed six items of medicines along with Bandage, Absorbent Cotton Wool etc. as noted in the order of Learned Member (J) in a corrugated box. Can these items be classified in the residuary sub-heading 3005.90 as 'others' or under sub-heading 3002.20 as 'Patent or proprietary medicaments, other than those medicaments which are exclusively used in Ayurvedic, Unani, Siddha, Homoeopathic or Biochemic'.

The appellants had declared their item in their Ch. No. 7/88-89 under subheading No. 3002.20, which was approved by the Assistant Collector.

In the column particulars of the item furnished along with the classification list they had disclosed as follows: Full description Tariff Item Unit
1. Paracetamol Tablets I.P. Each Tablet con 3003.20 500T
tains: Paracetamol I.P. 500 mg.
2. Mebendazole Tablets U.S.P. Each Tablet --do-- 450T
contains: Mebendazole U.S.P. 100 mg.
3. Benzyl Benzoate Application I.P. Composi --do-- 500 ml.

tion: Benzyl Benzoate I.P. 25% W/V
4. Merbromin Solution NF XII Composition: --do-- 100 ml.

Merbromin NF XII 2% W/V in aqueous
5. Sulphacetamide Eye Drops B.P.C. 20% con --do-- 14 ml.

tains: Sulphacetamide Sodium I.P. 20%
6. Tetracycline Eye Ointment I.P. 1% Each --do-- 3.5 gm.

gram contains: Tetracycline Hydrochloride 20. The Assistant Collector of Central Excise filed an application in Form EA-2 before Collector (Appeals) for seeking revision of the approved classification under Section 35(E)4. The grounds made were that the item is cleared as a 'Medicine Kit' for ICDS Scheme in corrugated boxes along with medicaments. In view of Chapter note 3(g) to Chapter 30 of the CETA, 1985, it was pleaded that the First Aid Boxes and Kits are specifically classifiable under Chapter heading No.3005.90 and chargeable to duty at 15% adv. It was stated that the products in question even though being pharmacopoeial product but since packed in medicine kits are correctly classifiable under sub-

heading No. 3005.90 and chargeable to duty at 15% Basic duty and 5% Special Excise duty. It was specifically pleaded before the Collector by the assessee that the Note 3(G) to Chapter 30 relates to 'First Aid Boxes and Kits' and that their item is not so and hence it cannot be classified under sub-heading No. 3005.20. By a very brief order the Collector has held that: After careful study of Chapter Note 3 on Chapter 30 it will be clear that heading No. 30.05, applies to the product at Sr. No. (a) to (h) which are to be classified in that heading only and in no other heading of this schedule product at Sr. No. (g) is First Aid boxes and Kits. It does not speak of any dutia-bility or otherwise of the product inside. Since the respondents have been packing and clearing the above products in "Medicine Kits" (as clarified above) to Government in corrugated boxes along with other medicaments, these products are appropriately classifiable under heading No. 3005.90 of CETA, 85, and chargeable to duty at 15% Adv. As such I set aside the order-in-original passed by Assistant Collector of Central Excise, Division K. II, and allow the appeal filed by the Department.

21. The Revenue's ground is that this item is a 'Medicine Kit' and should be considered for classification under sub-heading No. 3005.90 as 'other' although it is admitted that it is a pharmacopoeial product.

There is no specific claim that the item is a 'first aid boxes and kits'. There is also no specific finding by Collector (Appeals) that it is a 'First aid boxes and kits'. The Revenue admits the item to be a pharmacopoeial product but as it is packed in a 'Medicine Kit', they require it to be considered as a residuary item under sub-heading 3005.90. For this purpose the aid of note 3(G), which applies to "First Aid Boxes and Kits" is pressed. The Revenue has not averred or any finding arrived as stated that the item is a "First aid box and a kit' and hence, the invocation of Note 3(G) is totally misplaced. The item admittedly being a pharmacopoeial medicament, it can be treated as a 'First aid box and a kit'. Moreover, the definition of this term is quite clear that 'First aid' refers to immediate care given to a victim of an accident, sudden illness, or other medical emergency as per Medical Encyclopaedia at page 344. The Lexicon Webster Dictionary Vol.

I also defines as 'Emergency Aid or treatment given to the victim of an accident or sudden illness before regular medical services can be given. Similar definition is also formed in other authorities, which are quoted in the order of Member (J). The contents of this 'First aid boxes and kits' are (a) Bandages (b) Antiseptic lotion (c) tissues (d) scissors (e) safety pins and (f) tweezers. Therefore, the note 3 (g) of Chapter 30 cannot be applied to medicaments kept in a medical kit which are pharmacopoeial medicines, to be prescribed by doctors to patients.

22. The Government intended to supply these items to primary health centres to enable doctors to utilise it to patients suffering from ailments and its treatment. They are not in the nature of a 'First Aid Boxes and Kits' and neither it is the case of the Revenue that it is so. They merely take the aid of the note 3(G) to have it classified under residuary of 'Pharmaceutical goods', which are in the nature of 'chemical contraceptives' (3005.10) Dental Cements and other dental filings (3005.20) and what do not fall in these two categories but are similar and akin to it will go in the residuary as (3005.90). The HSN Explanatory Note under this sub-heading at page 440 suggests items like "Sterile surgical catgut, similar sterile suture materials and sterile tissue adhesives for surgical wound closure, sterile laminaria and sterile laminaria tents, sterile absorbable surgical or dental haemostatics, Blood-grouping reagents, Opacifying preparations for X-ray examinations and diagnostic reagents designed to be administered to the patient. The HSN Explanatory Notes at page 442 pertaining to 'First aid boxes and kits' states as follows: These contain small quantities of a few common medicaments (hydrogen peroxide, tincture of iodine, mercurochrome, tincture of arnica, etc.), a few dressings, bandages, plasters, etc., and, optionally, a few instruments such as scissors, tweezers, etc.

The heading does not cover the more elaborate medical kits as used by doctors.

23. Thus, the item in question does not either come within the understanding and definition of 'First aid boxes and kits' nor in the type of items listed in the heading 30.05 as 'pharmaceutical goods not elsewhere specified'. Admittedly, the goods being pharmacopoeial medicaments, having specific chapter heading No. 3003.20, hence the classification adopted by Assistant Collector while approving

the classification list is required to be confirmed by setting aside the claim of the Revenue as upheld by Collector. I, therefore, agree with the proposed order of Leaned Member (). I am unable to agree with the understanding of 'First aid boxes and kits' as emphasised by Learned Vice-President as the said understanding is not supported by the Revenue's pleading or with Technical literature or Trade parlance test or by HSN Explanatory Notes.

24. The appeal papers be placed before original bench for passing a majority order.

25. in view of the manority opinion, the impugned order is set aside and the appeal is allowed with cosequential relief if any due to the appellants i accordance with law.

(Jyoti Balasundaram) (S.K. Bhatnagar) Member (J) Vice-President

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