

Collector of C. Ex. Vs. Indrol Lubricants and

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-30-1998

Reported in : (1998)LC98Tri(Delhi)

Appellant : Collector of C. Ex.

Respondent : indrol Lubricants and

Judgement :

1. This is a Revenue appeal against the order passed by Collector (Appeals), Bombay, who has allowed the assessee's appeal seeking re-classification of their product "Indrol TQ" under sub-heading 2710.60 of the CET along with benefit of Notification No. 120/84-C.E., dated 11-5-1984 as amended attracting 'nil' rate of duty.

2. The assessee had classified previously the product under sub-heading 2710.99 under the mistaken belief that the product is transmission fluid and not a lubricant in synchromesh gear box in the automotives.

Their CL List No. 10/88, dated 1-3-1988 had been approved under sub-heading 2710.99 at 15% Adv. In view of their changed belief, they filed a fresh classification list supported by expert opinion from the head of Chemical Engineering Department IIT (Bombay) and also end-use certificate from M/s. TELCO Ltd., M/s. Bajaj Tempo Ltd. and M/s. Godrej and Boyce Manufacturing Co. Ltd. and M/s. United Motors, in which it is stated that 'Indrol TQ' is ordinarily used for lubrication. The Assistant Collector on careful consideration of the technical

write up of the product held that the product ensures smooth gear changes and as a long service life even when subjected to tough working conditions.

Therefore, he held that it is quite clear that, the product is primarily intended to be used for the smooth functioning of the gear's to make it more endure. He held that the lubricating factor is only secondary in nature and hence the product cannot be classified under sub-heading 2710.60, as claimed by them. He also noted that IIT certificate relied by them bears testimonium to the fact that the oil is suitable for application on gears' and lubrication is mere secondary in nature. Hence he rejected their claim.

3. The learned Collector in the impugned order has examined the technical literature and the expert opinion relied by the appellants and on that basis held that the evidence produced is sufficient to show that the essential and the predominant function of the product is lubrication of synchromesh gear box systems in the motor vehicles and the end-use certificate proves that the product was used for lubrication only.

4. It is submitted by the Revenue that sub-heading 2710.60 covers lubricating oil which has its flash point below 94C. The test result of the product disclosed that the flash point was above 94C and contained more than 70% mineral oil. The Chief Examiner has also noted in his report that from the technical books available it is seen that gear lubricants consists wholly of refined mineral lubricating oils. It is contended by the Revenue the items no doubt have lubricating property, but it is the formulation and constituents of the resultant product going in the formulation which counts. It is also stated that the technical literature reveals that the product is formulated by carefully selecting high quality mineral oils including some special additive. Therefore, such speciality oil as per the claim of the appellants in the literature itself would fall under residuary sub-heading 2710.99 of the Tariff. It is also pointed from the literature that the appellants' claim that the produces a premium quantity automatic transmission fluid specially designed to meet the requirement of general motor specification type A suffix-A. It further recommends for automatic transmission and power steering of automobiles. It ensures smooth gear changes and has a long service life even when subjected to tough working

conditions. It is also pleaded by the Revenue that in commercial parlance the product is not marketed and sold as lubricating oil.

5. We have heard Shri S.R. Hassan, the learned SDR for the Revenue and Shri J.K. Cama, the learned Advocate for the Assessee.

6. Pointing out to the Tariff sub-heading 2710.60, the learned DR submits that lubricating oil having its flash point below 94C are excluded from this heading. It is his submission that the heading itself clarifies that 'lubricating oil' that is to say any oil which is ordinarily used for lubrication, excluding any hydrocarbon oil which has its flash point below 94C. He submits that even as per the appellants own claim the item is not a lubricating oil per se used ordinarily only for lubrication but the literature suggest clearly that it has other uses as well and, it is more expensive than ordinary lubricating oil. Being a speciality oil, the product is required to be classified only under the residuary entry 2710.99 as 'other'.

7. The learned Advocate submits that the Tariff sub-heading 2710.60 is not excluded as the entry excludes hydrocarbon oil which has its flash point below 94C. Even as per the test result, the flash point is above 94C and hence being a lubricating oil used ordinarily for lubrication in gear box of the automotives, the sub-heading claimed by them is not excluded. He relied on the certificate of Professor M.C. Dwivedi of ITT, Bombay and also the end-use certificates of various companies. He further submitted that the Notification does not cover only to lubricating oils, but it clearly exempts 'blended or compounded lubricating oils and greases, that is to say, lubricating oil and greases obtained by straight blending of mineral oils or by blending or compounding of mineral oils with any other ingredients, from whole of the duty of excise leviable thereon under Section 3 of CE & S Act, 1944'. He submitted that the Notification itself clarifies that exemption is available even to lubricating oil and greases obtained by straight blending of mineral oils or compounding of mineral oils with any other ingredients. Therefore, the contention of the Revenue is not sustainable. It is also pleaded that the department has unjustly denied the exemption.

8. We have carefully considered the submissions made by both the sides.

What is excluded from the sub-heading 2710.60 is hydrocarbon oil which has its flash point below 94C. The lubricating oil having flash point below 94C alone is to be included in this heading as claimed by the Learned DR is not a correct reading of the Tariff entry. The ground taken by the Revenue is that the oil is a speciality oil and hence it would not be included in this sub-heading. This reading of the Revenue is also not correct. The heading covers lubricating oil merely because the lubricating oil has been blended other compounds to make it more suitable for lubricating purpose in the gear box power transmission and other trivological functions by itself will not exclude the item as a lubricating oil. The function of the oil as a lubricating oil has not changed. As per the experts' evidence the oil has continued to remain as a light lubricating oil with high viscosity. The mere fact of claim made in the product literature of its premium quality by itself will not take out from the category of lubricating oil. The Revenue has not produced any evidence to rebut the evidence produced by the assessee to show that the oil is not a lubricating oil as known by the users. In that view of the matter, there is no reason to exclude the product from the category of lubricating oil in terms of sub-heading 2710.60 of the Tariff.

9. As regards the claim of the benefit of Notification No. 120/84-C.E.dated 15-4-1984 the Notification grants to blended or compounded lubricating oils and greases obtained by straight blending of mineral oils or by blending or compounding of mineral oils with any other ingredients. In view of the Notification covering blended lubricating oil as well the benefit has been rightly granted by the Collector (Appeals). In that view of the matter, there is no merit in this appeal and hence the same is rejected.

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

11. The relevant tariff headings/sub-headings as they stood during the relevant period read as follows:"27.10 - Petroleum oils and oils obtained from bituminous materials, other than crude; - Motor spirit, that is to say, any hydrocarbon oil (excluding crude mineral oil) which has 2710.60 - Lubricating oil, that is to say, any oil as is ordinarily used for lubrication, excluding 12. The basic issue boils down to

determining whether the item was correctly classifiable as lubricating oil under 2710.60 or as a transmission fluid under 2710.99.

13. In this respect, I notice that there is a difference between lubricating oils and lubricants as evident from the following extract from HSN which describes 'lubricants' as follows : "Lubricants consisting of mixtures of lubricating oils with widely varying quantities of other products (e.g., products for improving their lubricating properties (such as vegetable oils and fats), anti-oxidants, rust preventives, anti-foam agents such as silicones). These lubricants include compounded oils, oils for heavy duty work, oils blended with graphite (graphite suspensions in petroleum oils or in oils obtained from bituminous minerals) upper cylinder lubricants, textile oils, and solid lubricants (greases) composed of a lubricating oil with about 10 to 15% of soaps of aluminium, calcium, lithium, etc."

14. HSN Heading 27.10 includes (A) spindle oils, and lubricating oils and similar oils and the oils described in (A) & (B) of the Inclusion Clause to which various substances have been added to run them suitably for particular uses, provided the products contain by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals as a basis and they are not covered by a more specific heading in the Nomenclature. Examples of such products referred to above include lubricants.

15. It is significant that this heading does not include preparations containing petroleum oils or oils obtained from bituminous minerals in any proportion (even exceeding 70% by weight) covered by a more specific heading in the Nomenclature or based on products other than petroleum oils or oils obtained from bituminous minerals and the examples include anti-rust preparations of Heading 34.03, composite solvents and other preparations falling under sub-heading of Chapter 34 or under Chapter 38.

16. In the present case, the whole issue centres around the appropriateness of sub-heading 60 Vs.99. The later being a double dash residuary entry, is invocable if the product was not classifiable under any of the previous sub-headings. The HSN Heading 27.10 does not contain any sub-headings but is still helpful to the extent that it categorises lubricant as different and distinguishable from lubricating

oils on one hand and from transformer oils and other similar oils on the other.

17. The appellants have admitted that they had initially themselves declared their product as transmission fluid and not as a lubricant or a lubricating oil. The question is whether it was a bonafide error or whether there was no error in reality and the item was really a transmission fluid and not a lubricant or lubricating oil. In this respect, it is observed that the question as to whether it was a speciality oil gains significance.

18. In the hearing before us also, the appellants have themselves mentioned that their product was a 'lubricant' used for lubrication of gear box and the learned Collector (Appeals) has noted the expert opinion to the effect that its pre-dominant function is the lubrication of gear system. In fact, the pamphlet filed as Exhibit 'C describes the product 'Indrol TQ' as follows :- A premium quality automatic transmission fluid specially designed to meet the requirements of General Motors specification Type A. It is recommended for automatic transmission and power steering of automobiles. It ensures gear changes and has a long service life even when subjected to tough working conditions. It is formulated from carefully selected high quality minerals and incorporates a special additive package.

* Protection against corrosion even when vehicle is not in use.

Performance levels Indrol TQ exceeds the requirements of General Motors ATF-Type A Suffix A and Darnier Benz's DBZ-6623-10 specifications." 19. This shows that the product is not a lubricating oil simplicitor but a lubricant as described in the HSN. I also find that transmission oil has been described as "A 'lubricant' especially compounded for automobile transmissions" in the McGraw Hill Dictionary of Scientific and Technical Terms Fifth Edition. I, therefore, consider that there was no error whatsoever in the appellants' originally describing their product as 'transmission fluid' or subsequently as a 'lubricant' but in view of the tariff nomenclature and the above discussion, it is apparent that sub-heading 60 covered only lubricating oils and not lubricants whereas the appellants' product was even on their own admission a lubricant; and lubricants were not covered by 2710.60. No other specific sub-heading has been claimed or otherwise appears to be applicable and therefore, the Department was correct in classifying it under

sub-heading 2710.99.

20. The letter of Department of Chemical Engineering IIT Bombay dated 29-1-1990 filed by the appellants also supports the above conclusions in view of the following observations of the Expert: "Physico-chemical characteristics - sp. gravity 0.876, kinematic viscosity at 40C - 39.5 centistokes, indicate it as a light lubricating oil stock. High viscosity Index-160 indicates exceptionally good viscosity temperature characteristics, and heavy dose of VI improver Additive.

The additives used as mentioned in your letter are HITEC E-676, LZ-6280 and Plexol-150 An oil with the above physico-chemical characteristics and additive package would be suitable for light duty gear box and power transmission applications. Concentration of EP additive will basically make a difference in application for gear box power transmission and other trivological functions. Synthromesh Gear box is one such application. Therefore, the said oil will suit this purpose." However, Prof. Dwivedi's conclusion that in view of the above factors, the product is gear 'lubricating oil' is not acceptable. For central excise purposes, we are governed by our tariff and are required to be guided by the HSN which distinguishes between lubricating oil and lubricant. The fact that some of their customers also use it as a lubricant is significant although it is possible that users may or may not be concerned with the difference and so may not distinguish between lubricating oils and other lubricants whereas for excise purposes, this distinction is important. It is also significant that the Expert Prof.

Dwivedi has also indicated that in view of physico-chemical characteristics and additive package, an oil would be suitable for light duty gear box and power transmission applications. Therefore, his description as 'transmission fluid' was quite apt and I do not know why the appellants are interested in reselling from this position. The chemical test report of the Department is not of much use as it does not answer the basic question whether the sample is a preparation of petroleum oils or oils obtained from bituminous materials other than crude, on the ground that it cannot be answered by their lab test.

However, the problem could be resolved by reference to the material placed before us including the product composition and uses or benefits indicated by the

appellants themselves and the above cited material from the HSN and on the basis of the above discussion, I hold that the appellants' product was not a lubricating oil simplicitor but a lubricant not covered by sub-heading 2710.60 and it was classifiable under sub-heading 2710.99.

21. Insofar as Notification No. 120/84 (as amended) is concerned, it exempts "blended or compounded lubricating oils and greases" that is to say, lubricating oils and greases obtained by straight blending of mineral oils or by blending or compounding of mineral oils with any other ingredient provided that such oils and greases are produced out of such mineral oils on which appropriate duty of excise has been paid.

22. From the material placed before us and discussion above, it is apparent that the product is a mixture of light lubricating oil stock of high viscosity and additives. The letter of the expert Dr. Dwivedi does not state whether he has himself analysed and found the characteristics or has based his opinion merely on the information provided by the appellants themselves. His opinion, therefore, has to be read in this context and with caution but since it has not been contradicted or shown to be wrong, its factual and technical aspects are required to be taken into account along with information published in the pamphlet and then considered in the light of HSN notes about lubricants noted above. Examining the matter in this way, we find that the product will be eligible to the benefit of the Notification No.120/84 (as amended) subject to fulfilment of the conditions mentioned therein. However, it is primarily for the appellants to show and for the authorities below to satisfy and for the appellants to consider whether the conditions have been fulfilled and to record their findings accordingly.

23. It is also observed that whereas the A.C. has, on one hand, considered the product as a lubricant, on the other, extended the benefit of Notification 287/88 treating it as a speciality oil without indicating the reasons. The Collector (Appeals) has not mentioned this notification at all possibly because he has extended the benefit of Notification 120/84 (as amended) but he has not indicated as to whether all the ingredients of the aforesaid notification and the parameters laid down have been duly satisfied. As he has not given reasons for his conclusions, the

Collector's order insofar as the aspect of notification is concerned, is a non-speaking order.

24. The officers have also not taken note of the Board's Letter No.89/1 /73-CX dated 23-8-1978 about speciality oils in which it is mentioned, inter alia, that "Speciality oils are generally treated as non-lubricants. Their primary function is other than lubrication and their lubricating function, if any, is only secondary." In other words, whereas the A.C. has not duly considered Notification No. 120/84 (as amended) and not given reasons for considering the product as speciality oil in spite of its lubricating properties, the Collector has not considered Notification No. 287/88 (without assigning any reasons for the same) and passed orders without indicating how the parameters of 120/84 (as amended) were satisfied.

25. In view of the above position, the impugned orders are required to be set aside and the matter is required to be remanded for re-consideration of the matter in the light of above observations and findings.

26. In view of difference of opinion between Hon'ble Member (Judicial) and the Vice President, the matter is submitted to Hon'ble President for referring it to a Third Member on the following point :- "Whether in view of the observations and findings of Hon'ble Member Judicial), the appeal is required to be rejected or in view of the observations and findings of the Vice-President, the matter is required to be remanded." Sd/- Sd/- (S.L. Peeran) (S.K. Bhatnagar) Member (J) Vice President
Dated : 29-12-1997 Dated: 16-12-1997

27. In view of the difference of opinion between the Hon'ble Vice President and Member (Judicial), the following point has been referred to me to express Third Member's opinion :- "Whether in view of the observations and findings of Hon'ble Member (Judicial), the appeal is required to be rejected; in view of the observations and findings of the Vice President, the matter is required to be remanded." 28. The Revenue was represented by Shri H.K. Jain, Id. SDR and the respondents were represented by Shri J.R. Cama, Advocate.

29. Heard both sides with reference to the difference of opinion.

Whether product Indrol TQ is classifiable under 2710.60 as claimed by the assessee or under 2710.99 as per the department is the issue to be considered in this case. The Id. Counsel appearing for the assessee justified the view taken by the Member (Judicial) and understandably the Id. DR supported the view taken by the Hon'ble Vice President and particularly he referred to paras 12, 13 and 14 of the order in support of his contention.

30. The respondents filed a revised classification list in respect of their product namely Indrol TQ classifying the same under sub-heading 2710.60 of Central Excise Tariff Act, 1985 attracting nil rate of duty under Notification No. 120/84 dated 11-5-1984 as amended. The Asstt.

Collector negated the contention of the party and approved the classification list of the product under Chapter Heading 2710.99 as Speciality Oil and extended benefit of Notification No. 287/88, dated 1-3-1988. On an appeal filed by th party before the Collector (Appeals), the Collector (Appeals) held that the product Indrol TQ is correctly classifiable under Chapter Heading 2710.60 read with Notification No. 120/84 dated 11-5-1984 attracting 'nil' rate of duty.

He has further opined that the essential and pre-dominant function of the product in question is lubrication of synchromesh gear box systems in the motor vehicles."2710.60- Lubricating oil, that is to say, any oil as is ordinarily used for lubrication, excluding any hydrocarbon oil which has its flash point below 94C.32. The tariff entries exclude hydrocarbon oil which has its flash point below 94C. According to the department, oil in question is a speciality oil and hence it would not be included in this sub-heading.

But on seeing the tariff entry, heading covers lubricating oil. Merely because the lubricating oil has been blended with other compounds to make it more suitable for lubricating purpose in the gear box power transmission and other triviological function by itself will not exclude the item as a lubricating oil as it was correctly analysed by my learned Brother Member (Judicial). I also agree with him that the Revenue has not produced any evidence to rebut the evidence produced by the assessee to show that the oil is not a lubricating oil as known by the users.

33. Accordingly the view expressed by the Member Oudicial) is concurred with in classifying the item under 2710.60 and to grant benefit in terms of Notification No. 120/84-C.E., dated 11-5-1984.

34. The case file is returned to the original Bench to pass an appropriate order.

35. In view of the majority opinion, the item is classifiable under heading 2710.60 and is entitled to the benefit of the Notification No.120/84-C.E. dated 11-5-1984*
sd/- sd/- (S.L. Peeran) (S.K. Bhatnagar) Member (J) Vice President Dated: 30-4-1998
Dated : 19-3-1998

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