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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-14-1998

Reported in : (1999)(114)ELT260TriDel

Appellant : Fermentapharma Biotech Ltd.

Respondent : C.C.E. and C.

Judgement :

1. In the above case, a demand of duty of Rs. 3,36,18,021/- has been confirmed on the product Penicillin G Amidase (PGA for short) Biocatalyst manufactured by the applicants herein during the period from February, 1990 to March, 1996, as a result of revision of classification from CET sub-heading 3002.00 as "cultures of Micro organism" (attracting nil rate of duty) to CET sub-heading 3507.00 (attracting 15% rate of duty) as "Enzymes".

2. The classification claimed by the applicant's has been changed on the basis inter alia of the opinion dated 16-3-1995 and 4-12-1996 of the Chief Chemist, Central Revenues Control Laboratory, Technical Material in the form of an Article written by S/Shri J.G. Shewale and H. Shivraman "Penicillin acylases" Enzymes production and its application in the manufacture of Six APA and the fact that another assessee viz. Max India Ltd. was manufacturing the same item and classifying it under CET sub-heading 3507 and the fact that other companies specially Ranbaxy Laboratory and Morepan Laboratories were importing the very item and getting it classified under CET sub-heading 3507.00 as Enzymes.

3. Shri C. Chidambaram, learned Consultant submits that prior to the issue of the first show cause notice dated 11-2-1995, the Department itself was of the view that the product in dispute was in the form of yeasts under Chapter 29 while in the show cause notice, the Department proposed classification under CET sub-heading 29.41 or 35.07 alternatively. The applicants submit that the report dated 16-3-1995 of the Chemical Examiner only states that the sample of the disputed product is other than penicillin and does not further the case of the Department regarding classification under Chapter sub-heading 3507. In response to the article referred to herein above, the applicants obtained comments from National Chemical Laboratory and from Dr.

Shewale of Hindustan Antibiotics both of whom confirmed that the product in question manufactured by the applicants does not fall under the category of immobilised enzyme. After receipt of these two opinions, the Revenue obtained a further opinion from the Chief Chemist whose second report is dated 4-12-1996, in which he has stated that PGA is a enzyme and it can be considered as a crude enzymatic preparation and that its classification under CET sub-heading 35.07 or 30.02 is not free from doubt, since the product is not a pure isolated enzyme. The applicants submit that the second report was forwarded to the National Chemical Laboratory and Hindustan Antibiotics who both once again stated that PGA is an immobilised whole cell catalyst and does not fall under the category of immobilised enzymes. The applicants have also referred to the HSN Explanatory notes to Heading 3507 which sets out that enzymes are organic substances produced by living cells, while PGA manufactured by them has been opined by the Chief Chemist, in the report dated 4-12-1996, to consist of immobilised or dead intact, single cell organism.

4. The applicants further submit that the adjudicating authority has factually erred in his conclusion in para 28 of the impugned order that Max India is manufacturing PGA bio-catalysts classifying it under CET sub-heading 3507.00 as the said company has certified on 15-4-1998 that enzymes produced by them is technically different from the PGA bio-catalysts produced by Max India is a extra cellular enzymes produced by Bacillus species whereas the PGA produced by the applicants is another intercellular biocatalyst produced by E. Coli. The applicants

therefore, submit that classification under CET sub-heading 3507.00 is prima facie erroneous. The next contention of the applicants is that the demand for the period from February, 1990 to July, 1994, covered by show cause notice dated 24-2-1995 involving duty amount of Rs. 1,47,93,521/- is barred by limitation, since the classification lists for the above mentioned period were approved on the basis of the technical write up furnished by the applicants and further the Department itself had doubts about the correct classification of the PGA bio-catalysts and in such a situation, it cannot be said that the applicants were guilty of any suppression or mis-statement with intent to evade payment of duty, so as to make available to the Department the extended period of limitation under the proviso to Section 11A of the Central Excise Act, 1944. Lastly, the applicants plead financial hardship referring to a certificate dated 25th March, 1998 from the Chartered Accountant which reflects a short term liquidity crunch of Rs. 266.63 lakhs. For all the above reasons, the applicants prayed that the requirement of pre-deposit of duty may be waived and its recovery stayed pending the appeal.

5. Strongly opposing the prayer, Shri Lakhinder Singh, learned JCDR refers to the Chief Chemist's report dated 4-12-1996 which clearly states that PGA is an enzyme and therefore, PGA Bio catalyst manufactured by the applicants is a crude enzymatic preparation. He also referred to the HSN Explanatory Notes at page 499 to support his argument that the product in question is a "prepared enzyme not elsewhere specified or included", and to the HSN Explanatory Notes at page 501 to show that cultures of Micro-organisms of Heading 30.02 are excluded from 3507. He draws our attention to paragraphs 12 to 27 of the impugned order which contain detailed findings on the classification, with reference to the rival entries in the Central Excise Tariff, the Chief Chemist's report, HSN Explanatory Notes Standard literature and expert opinion and contends that in view of in-depth analysis of the classification, the applicants have not made out a strong prima facie case for waiver on the merits of the matter.

On the time bar issue, he reiterates the findings contained in paragraphs 29 and 30 of the impugned order in which the Commissioner has upheld the charge of deliberate mis-statement due to non-disclosure of the correct nature of the product in the various classification lists. On the argument of financial hardship, the

learned JCDR states that in the absence of any document showing that the applicant company is suffering serious losses, such plea is unsubstantiated and it will not cause the applicants any hardship if they are directed to deposit the entire amount of duty.

6. We have carefully considered the rival submissions. The applicants herein who are manufacturing drugs intermediates in addition to PGA catalyst had been filing classification lists throughout the period in dispute declaring the classification of drug intermediate, 7 AADCA and 6 APA under sub-heading 2942 and PGA under CET sub-heading 3002.00. The classification lists have been approved throughout.

7. The Department was of the view that the classification of PGA was not free from doubt in view of the language of rival sub-headings and was of the view that the product would be in the nature of yeast, as seen from the flow chart of the manufacturing process of PGAB. Further the applicants vide their letter dated 27-1-1993 intimated that PGA is not an edible preparation and is widely used in the manufacture of drug intermediates and subsequently for manufacture of antibiotics. The Department then revised the proposed for classification of PGAB as yeast and was of the view that classification would be under CET sub-heading 35.07 which covered at the material time, Enzymes, prepared enzymes not elsewhere specified or included would be attracted. It is only after the issue of show cause notices dated 11-2-1995, 20-2-1995 and 24-2-1995 that the opinion of the Chief Chemist was obtained, which indicated CET sub-heading 29.41 was not applicable to the product. The above facts clearly go to show that the classification of the product was in doubt and the Department itself was not certain as to whether Chapter 29 or Chapter 35 would be correct classification. It is a case of change of opinion from the earlier approved classification.

Therefore, prima facie, the appellants cannot be charged with mis-statement or suppression with intent to evade payment of duty. We therefore, prima facie hold that the demand for the period February, 1990 to July, 1994 is barred by limitation having been raised on 24-2-1995 which is beyond the period of six months from the relevant date. The rest of the demands have been raised within the normal

period of limitation. As far as these are concerned, we are of the view that the matter requires detailed scrutiny with reference to the technical and scientific material and expert opinion and HSN and this is not the appropriate stage to undertake such detailed examination which will be done only when the appeals are taken up for hearing. Having regard to the overall facts and circumstances of the case and noting in particular the Chartered Accountant's certificate on financial difficulty, we direct the applicants to deposit a sum of Rs. 25 lakhs towards the duty demand within a period of 8 weeks from to-day and on such payment, the requirement of pre-deposit of the balance duty shall stand dispensed with and its recovery stayed during the pendency of the above appeals. Failure to comply with the above direction shall result in vacation of stay and dismissal of appeals without further notice.

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