Collector of C. Ex. Vs. Shiv Dye Stuff and Intermediate

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-08-1998

Reported in : (1999)(106)ELT265TriDel

Appellant : Collector of C. Ex.

Respondent : Shiv Dye Stuff and Intermediate

Judgement :

1. The issue involved in this appeal filed by Revenue is whether the product "Copper Phthalocyanine Crude (CPC), manufactured by M/s. Shiv Dye Stuff & Intermediate Industries is classifiable under sub-heading 3204.19 as claimed by the Respondents and confirmed by the Commissioner (Appeals) or sub-heading 3204.11 of the Schedule to Central Excise Tariff Act, as suggested by the Revenue.

2. The Respondents manufacture CPC which was classified by them in their Classification List No. 61/91-92 effective from 1-4-1991 under sub-heading 3204.19 of the Tariff. As it appeared that the impugned product was not ready for use, the Assistant Commissioner classified the product under subheading 3204.11 under Order-in-Original No.243/91, dated 26-11-1991. On appeal, Commissioner (Appeals) vide Order No. KVV-408/92/BRD, dated 14-8-1992 remanded the matter with the direction to get the disputed product tested by the Chemical Examiner and also to find out whether the disputed product could be said to be ready for use as such and whether that was used in fact as such. The Chief Chemist, New Delhi in his letter dated 15-2-1993, opined that "Copper Phthalocyanine pigment of purity

95% (+ 1% subject to moisture content) and the most of which passes through the sieve size of 100 - 125 micron may be, in my opinion, considered to be standardised ready to use form." As the Chief Chemist reported that the sample of Respondent's product was having only 89.6% purity and residue left on 125 micron sieve was 18.8% the Assistant Commissioner, in his order dated 30-8-1993, clarified the product under sub-heading No. 3204.11 and confirmed the demand of Central Excise Duty amounting to Rs. 12,76,831.17 for the period from April, 1991 to December, 1991.

3. On Appeal filed by the assessee, the Commissioner (Appeals) under the impugned order dated 27-1-1994, set aside the Assistant Commissioner's order observing that there were two other test reports of the Chemists of the Department which were in favour of the assessee; that these samples were drawn on 11-4-1992 and 12-4-1992 and the test reports are dated 5-5-1993; that due importance has to be given to the test report of the Chief Chemist in respect of samples drawn on 12-4-1993 (sic), which was forwarded to the assessee on 28-10-1993 mentioning the purity of the impugned product to be 94.88% and residue left on the micron sieve to be 0.02%; that predominance of evidence was in favour of the assessee. Hence the present appeal.

4. Shri H.K. Jain, the ld. SDR submitted that sub-heading 3204.11 refers to pigments and preparations based thereon in unformulated or unstandardised or unprepared forms, not ready for use; that Commissioner (Appeals) clubbed various test reports and came to conclusion that more test reports were in favour of the respondents; that the Assistant Chemical Examiner, Baroda had himself stated that the laboratory was not equipped to ascertain whether the sample of the impugned product was in crude form or pure form; that accordingly no reliance could be placed on the test reports given by the Assistant Chemical Examiner. He, further, submitted that the Chief Chemist's Test Report dated 18-10-1993 should not be relied upon as it was in respect of sample drawn on 18-4-1993 which is a period much after the period in question i.e., April, 1991 to December, 1991. The Report dated 18-2-1993 of the Chief Chemist should be relied upon as it was in respect of the sample drawn before September, 1992 i.e., even before his visit to the factory in November, 1992. According to the test report the purity of the

product was 89.6% and residue left on 125 micron sieve was 18.8% and accordingly the product was not in a ready to use form. The Respondents themselves describe their product as crude and their customers only make the impugned product ready for use. The Respondents had not produced any evidence to show that their goods were ready for use and were used as such by their customers. On visit, one of their customer, Assistant Commissioner found that the impugned product was subjected to a process known as "acid pasting" in the main reactor wherein the product was treated with concentrated Sulphuric Acid and some emulsifiers and brightening agents were added; the material so obtained was fed into a diluent tank, press filter, Hydro extractor, over direr and ball mill and as a result of which molecular alignment of CPC was changed and CPC Alpha Blue was obtained.

5. Contering the arguments, Shri Bhaskar P. Tanna, Senior Counsel, for the Respondents submitted that it is apparent from the first order-in-appeal dated 14-8-1992 (under which the matter was remanded to the Assistant Commissioner) that no sample of the impugned product was drawn during the relevant period. In case the Test Reports for samples drawn on 12-4-1993 (sic) are proposed to be ignored as the relevant period is up to December, 1991, then for the very same reason, the report dated 18-2-1993 must also be pushed aside because this sample was also drawn much after the relevant period. Further, the said sample was drawn by the Chief Chemist in a wholesale manner in respect of 20 manufacturers without following the prescribed procedure for drawal of samples. There was every likelihood of mix up as these were two units with the similar name which is apparent from Appendix to Report dated 18-2-1993; SI. No. 12 refers to Shiv Industries, Nam Desari and SI. No.16 is in respect of Shiv Dye Stuff (P) Ltd., Ankleshwar. The ld.Counsel, further mentioned that subsequent two reports of Chemical Examiner and report dated 18-10-1993 of Chief Chemist are more reliable and authentic for reason that the samples were drawn after following the statutory procedures and the very drawal of samples was a legal consequence of the remand order dated 14-8-1992. The correctness of these reports has not at all been disputed or challenged. The Commissioner (Appeals) was, therefore, legally right in evaluating the various test reports independently on merits. The ld. Counsel further submitted that the sub-headings 3204.11 and 3204.19 do not

suggest the criteria of purity; the criteria according to tariff is whether the product is unformu-lated, unstandarised or unprepared and whether or not ready to use. The impugned product is a standarised product and is considered always to have undergone purification by acid and/or alkali treatment. Their product is pulverised and dried powder and it was, therefore, ready for use as such, without being required to be subjected to any process or further formulation or standardisation or preparation. The ld. Counsel referred to para 29 of their reply dated 7-7-1993 (page 109 of the cross-objection) in which it was mentioned that "Looking to the practical aspects of use of CPC directly as colouring matter, lot of research is continuing and as late as 1987-88 research has been going on for using the said product directly as pigment. There are lot of many instances and references which indicate use of CPC directly as pigments." He also mentioned that word "crude" is used in the description of the product as the product will mix up with the material. The ld. Counsel finally submitted that the predominance of evidence is in the favour of the Respondents and the impugned product is rightly classifiable under sub-heading 3204.19.

6. We have considered the submissions of both sides. It is not in dispute that no sample of the impugned product was drawn during the relevant period. All the samples of the impugned product for the purpose of test were drawn during the period subsequent to the relevant period during which the classification of the product was in dispute.

The Chief Chemist after discussing the process of manufacture of CPC and its use, opined that to qualify for being a standard ready to use product, the pigment should be of desird purity and particle size; that if purity of the pigment is 95% (1%) and most of the material passes through the sieve of size 100 -125 micron it may qualify to be treated as standardised ready to use pigment. We observe that the department has relied upon one Test Report in which the product was found to be on test having 89.6% purity and residue left on 125 micron sieve was 18.8% and thus held that the ipugned product was not ready for use and is to be classified under sub-heading 3204.11. The Respondents, on the other hand has claimed that the Assistant Chemical Examiner, Baroda in his two reports both dated 5-5-1993 had reported that the sample is in the form of blue coloured

powder. It is copper phthalocyanine blue pigment having purity in one case 96.5% and residue left on 125 micron sieve was 0.85% and in case of second sample purity was 96.2% and residue was 0.84%. The first sample was drawn on 11-4-1992 and second sample was drawn on 12-4-1993 (sic). Again the Chief Chemist in his test report dated 18-10-1993 has reported that the purity by weight was 94.86% and the residue left on 125 micron sieve was 0.02%. It has also been observed by the Assistant Commissioner in the order dated 30-8-1993 that the machinery, raw material, methodology and technology had remained the same for the manufacture of CPC for the period from April, 1991 to till drawal of sample in the month of April, 1992. One of the sample, which was tested by the Assistant Chemical Examiner and the report given oh 5-5-1993 was drawn on 11-4-1992. There is substantial force in the submission of the Respondents that the reports given by the Assistant Chemical Examiner which had been endorsed by the Chief Chemist under report dated 18-10-1993 cannot be brushed aside. In view of these facts and circumstances and particularly in view of availability of various test reports about the same product we do not find that Commissioner (Appeals) was not justified in giving the due importance to the test report dated 18-10-1993. There is no reason that only the report favourable to the department should be relied upon to decide the classification. It is well-settled in law that in case of doubt, benefit must go to the assessee. We, therefore, do not find any infirmiy in the impugned order which is based on predominance of evidence. Accordingly we reject the appeal filed the Revenue.