Collector of Central Excise Vs. Excel India

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-30-1999

Reported in : (1999)(65)ECC159

Appellant : Collector of Central Excise

Respondent : Excel India

Judgement :

1. The Revenue filed these appeals against the impugned orders passed by the Collector of Central Excise (Appeals), Bombay.

2. Brief facts of the case are that the respondents are engaged in the manufacture of aluminium phosphide, zinc phosphide and phosphorous pentasulphide and filed a classification list. In the classification list, the appellant claimed the classification of aluminium phosphide and zinc phosphide under Chapter sub-heading 3808.10 of the Central Excise Tariff in respect of phosphorous pentasulphide claimed classification under Chapter Heading 2813.00 and claimed the benefit of Notification No. 43/88, dated 1-3-1988. A show cause notice was issued to the appellant stating therein that the aluminium phosphide and zinc phosphite is classifiable under sub-heading 3808.90 of the Central Excise Tariff. It is also alleged in the show cause notice that phosphorous pentasulphide is not entitled for the benefit of Notification No. 43/88 as it is being used for the manufacture of goods falling under sub-heading 3808.90.

3. After adjudication, the adjudicating authority held that aluminium phosphide and zinc phosphide are classifiable under 3808.90 of the Central Excise Tariff and denied the benefit of Notification No. 43/88 in respect of phosphorous pentasulphide.

4. The appellant filed appeal and the Collector (Appeals) vide impugned order held that aluminium phosphite is classifiable under heading 3808.10 as insecticides.

5. In respect of classifiation of zinc phosphide, the order of the adjudicating authority was set aside with the direction to decide the classification issued de novo.

6. In respect of the benefit of Notification No. 43/88, the Collector passed the following order: "The order of the Assistant Collector denying the benefit of Notification No. 43/88 to phosphorous pentasulphide manufactured by the appellant is set aside. It is, however, to be noticed that this applies only in respect of phosphorous pentasulphide which is sought to be removed under the provisions of Chapter X of the Central Excises and Salt Act, 1944 to those manufacturers who are in possession of valid L-6 licence for the manufacture of final product under the notification." 7. Now the revenue filed these appeals challenging the impugned order regarding classification of aluminium phosphide and the grant of benefit in respect of phosphorous pentasulphide which was removed under provisions of Chapter X of Central Excises and Salt Act, 1944.

8. The respondents also filed cross-objections challenging the impugned order in respect of classification of zinc phosphide and also claimed the benefit of Notification No. 43/88 in respect of phosphorous pentasulphide.

9. Ld. JDR appearing on behalf of the revenue submits that the tariff sub-heading 3808.10 describes insecticides, fungicides, herbicides, weedicides and pesticides. He submits that the respondents are manufacturing aluminium phosphide which is a chemical used to kill rats. He submits that the tariff entry 3808.90 covers other rodenticides. He submits that the product, in question, is neither the insecticides nor a fungicides, herbicides or weedicides or pesticides.

Therefore, it does not fall under the entry 3808.10 of the Central Excise Tariff. He submits that the adjudicating authority relied upon the decision in the case of C.C.E. v. Bombay Chemicals Pvt. Ltd. reported in 1986 (24) E.L.T. 373 and submits that the Tribunal in this case held that the term 'pesticide' does not cover insecticides, weedicides and fungicides. He, therefore, submits that rodenticides fails under 3808.90 of the Central Excise Tariff. He, further, submits that when the aluminium phosphide is classifiable under 3808.90 and therefore, the phosphorous pentasulphide, which is used in the manufacture of aluminium phosphide classifiable under 3808.90, is not entitled for the benefit of Notification No. 43/88 as this notification only gives benefit to the goods used in the manufacture of goods falling under sub-heading 3808.10 of the Central Excise Tariff. He, therefore, prays that the appeal be allowed.

10. Ld. Counsel appearing on behalf of the respondents submits that the appeal of the revenue is based on the decision of the Tribunal in the case of C.C.E., Bombay v. Bombay Chemicals Pvt. Ltd., Bombay reported in 1986 (24) E.L.T. 373 (Tribunal), which was set aside by the Supreme Court in the case of Bombay Chemicals Pvt. Ltd. v. C.C.E. reported in 1995 (77) E.L.T. 3. He submits that the Hon'ble Supreme Court in its judgment held that pesticides also include any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, insect, rodent, etc. He submits that in view of this finding of the Supreme Court, the product manufactured by the respondents, which are well-known chemicals used to kill rats, which are pests, therefore, the product, aluminium phosphide and zinc phosphide are classifiable under Central Excise Tariff Heading 3808.10.

He, further, submits that phosphorous pentasulphide is being used in the manufacture of aluminium phosphide and zinc phosphide which are classifiable under Heading 3808.10 of the Central Excise Tariff and, therefore, is entitled for the benefit of Notification No. 43/88. He, therefore, prays that the appeal filed by the Revenue be dismissed and the cross-objections filed by the respondents be allowed.

12. In this case, the issue is in respect of classification of the product aluminium phosphide and zinc phosphide which are chemicals used to kill rodents. The claim of the appellant is that these are classifiable under tariff sub-heading 3808.10 and the contention of the revenue is that these are classifiable under tariff heading 3808.90 as other rodenticides. The relevant entries are reproduced below :-"38.08 Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products.3808.10 - Insecticides, fungicides, herbicides, weedicides and pesticides 13. Revenue in the grounds of appeal, relied upon the decision of the Tribunal in the case of C.C.E. v. Bombay Chemicals Pvt. Ltd. (supra).

We find that the decision of the Tribunal in the case of C.C.E. v.Bombay Chemicals Pvt. Ltd. is set aside by the Hon'ble Supreme Court in the case of Bombay Chemicals Pvt. Ltd. v. C.C.E. reported in 1995 (77) E.L.T. 3. In this case the Hon'ble Supreme Court, while defining pesticides held as under : " 'Pesticide' has been defined in Butterworths Medical Dictionary, Second Edition, as 'a comprehensive word to include substances that will kill any form of pest, e.g., insects, rodents and bacteria' The (sic) pesticide' includes a large variety of compounds of diverse chemical nature and biological activity grouped together usually on the basis of what pests they are used to destroy or eliminate. Under the US Federal Environment Pesticide Control Act, the term 'pesticide' has been defined to include (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, insect, rodent, nematode, fungus, weed, other forms of terrestrial or aquatic plants or other forms of animal life e.g., viruses, bacteria, or other micro-organisms, which the administrator declares to be a pest and (2) any substance or mixture of substances intended for use a plant regulator, defoliant or desiccant (Pesticides in the Indian Environment, by P.R. Gupta p.

2)" 14. From the above decision of the Supreme Court it is clear that pesticide includes any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest, insect, rodent, etc. Therefore, the goods produced by the respondents, which are chemicals used to kill rats, are classifiable under tariff sub-heading 3808.10. Therefore, we uphold the impugned order in respect of aluminium phosphide.

15. In respect of zinc phosphide in the impugned order, the issue was remanded to the adjudicating authority for de novo adjudication. The literature produced by the appellant in respect of zinc phosphide shows that it is also a chemical used to kill rodents.

16. Therefore, in view of the decision of the Hon'ble Supreme Court in the case of Bombay Chemicals Pvt. Ltd. (supra), zinc phosphide is also classifiable under tariff sub-heading 3808.10. of Central Excise Tariff.

17. In respect of phosphorous pentasulphide, the respondents claimed the benefit of Notification No. 43/88. Notification No. 43/88 provides exemption to the specified goods falling under Chapter 28 or 29 of the Schedule to Central Excise Tariff used in the manufacture of goods falling under sub-heading 3808.10 of the Central Excise Tariff. Revenue is not disputing the classification of phosphorous pentasulphide under Chapter Heading 2830 of the Central Excise Tariff. The Revenue is also not denying the use of this product in the manufacture of aluminium and zinc phosphide. In this situation, when aluminium phosphide and zinc phosphide are classifiable under sub-heading 3808.10 of the Tariff the product phosphorous pentasulphide is eligible for the benefit of Notification 43/88-C.E.18. In view of the above discussion, the appeals filed by the Revenue are dismissed and cross-objections filed by the respondents are allowed.

19. I would like to add and clarify that the main Heading 38.08 includes rodenticides; It also includes insecticidies, fungicides, herbicides and similar products. Since out of the two subheadings namely, 3808.10 and 3808.90, the former does not specifically or explicitly include rodenticides, that is why the Department has been contending that it would fall under the latter sub-heading 3808.90 which covers 'others'.

20. The Department's contention is not without logic and at first sight appears to be in accordance with the normal Rules of Interpretation but what is missed is that Heading 3808.10 includes 'pesticides' as well.

The term "pesticide" is not therein the main heading but it is there in this sub-headings; the rest of the terms, insecticides, fungicides, herebicides, weedicides of this sub-heading are there in the main heading. Therefore, the word 'pesticide' is to include other similar products. In this connection, it is noteworthy that pesticide is a generic term and rodenticide is relatively more specific; And since rodents like rats etc. are pests, the rodenticides are included in 'pesticides'.

21. The sub-heading 3808.90 'others' is intended to cover other products of the main Heading which are not similar to or are distinguishable from the items covered by sub-heading 3808.10 by their nature, composition, mode of action and function or use.

22. Hon'ble Supreme Court's judgment cited above has already settled the issue and, therefore, the appeals are required to be dismissed and the cross-objections accepted as already announced in the open court.