

Bonanzo Engineering and Vs. Cce

Bonanzo Engineering and Vs. Cce

SooperKanoon Citation : sooperkanoon.com/16493

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-13-1999

Reported in : (2000)(89)LC113Tri(Delhi)

Judge : S Kang, a T V.K.

Appellant : Bonanzo Engineering and

Respondent : Cce

Judgement :

1. The issue involved in the present appeal filed by M/s. Bonanzo Engineering & Chemicals P. Ltd. is whether the impugned product manufactured by them is classifiable under sub heading 3214.00 as claimed by them or under sub heading 3200.90 of the schedule to the Central Excise Tariff Act as approved by the Assistant Collector and confirmed by the Collector (Appeals).

2. Shri Rajendra Dutt, Ld. Advocate submitted that the appellants had filed a classification list effective from 2.4.1993 in which impugned product at serial No. 9 was described as Paints and varnishes, classifiable under sub Heading No. 3209.90 of C.E.T.A.; that again on 21.4.1993, they filed a revised Classification List in which the impugned product was described as 'non-refractory' preparations for facades and inside walls falling under sub heading 3214.00. The Assistant Collector, under order dt. 13.12.1993, classified the product under sub heading 3209.90, relying upon the report of the Chemical Examiner and imposed a penalty of Rs. 2000/- and under order dated 30.11.1993 confirmed the demand of duty

amounting to Rs. 91,160.69 and imposed another penalty of Rs. 2,000/-. On appeal, the Collector (Appeals), under order No. 165 and 166/94 dt. 23.3.1994, remanded the matter to the Assistant Collector as Chemical Examiner's report was not disclosed to the Appellants. On readjudication, the Assistant Collector again classified the product under sub heading 3209.90 and imposed the penalty of Rs. 2000/- relying on the Test Report and also holding that the Appellants' contention that their product is a Pasty mass and alkaline in nature is not enough to keep the product outside the scope of sub heading 3209.90 which covers the preparation in an aqueous medium blended with pigments. On Appeal, the Collector (Appeals) upheld the adjudication order.

3. The Ld. Advocate, further, submitted that as the show cause notice did not place any reliance on any test report, the same should not have been relied upon by the Assistant Collector for the purposes of the proceedings; that notice did not give any other grounds or state any other reasons for classifying the product under 3209.90 and as such notice had no evidentiary basis and even the legal basis; that it wanted to change the classification without stating any reasons as to why the proposed classification was more appropriate; that the notice was required to disclose some evidentiary basis in the form of commercial enquiry or test reports to justify the proposed classification and as such the notice was non-speaking and totally vague. He also contended that the Collector (Appeals), in first order in appeal, directed the Assistant Collector to adjudicate de novo after proper examination of the Test report of the chemical examiner and also giving proper opportunity to the Appellants to put forth their case; that the direction did not imply that the Assistant Collector was not required to look into the question of admissibility of the test report; that the present order is vitiated being based on evidence subsequently introduced. He, further, contended that the Chemical Examiner has, in respect of samples, stated that the samples had the characteristic properties of distemper and as such the product should have been classified under sub heading 3210.90 and not 3209.90; that nowhere chemical examiner had stated that the impugned products were paints and varnishes based on synthetic polymers etc. He stated that the impugned products are a thick pasty mass and are applied for like gravel and cement when used for plastering and are not recognised in the trade as paints and varnishes or distemper; that paints and

varnishes have homogeneous properties with solid/solvent ratio duly controlled to give smooth tack free coating and are marketed in maximum 4/10 kg.

containers and not in 35 kg. containers unlike their products, that glue was not present in impugned products. He also referred to the Explanatory Notes of HSN (Page 402 and 403) below heading 32.08 and 32.09 wherein it is mentioned that the headings do not cover "surfacing preparations for walls, floor, etc. based on plastic with the addition of a high proportion of fillers and which, like conventional, plastics are applied with a spatula, trowel, etc. (heading 32.14)." The Ld.

Advocate relied upon the decision in the Haveacrum Rubber (P) Ltd. v. Superintendent of Central Excise 1983 ELT 1685 (Ker) : 1983 ECR 1121D (Ker) to emphasise that it is for the Department to allege and substantiate prima facie as to why a particular tariff item is taxable under a particular tariff entry and since the assessee is entitled to know the basis on which the Revenue proceeds to assess a particular product, the opportunity given to him, must be real and effective and not illusory and a make believe. He also referred to the definition of paint in a dictionary according to which paint is a uniformly dispersed mixture having a viscosity ranging from a thin liquid to a semi liquid paste and consisting of (1) a drying oil, Synthetic resin, or other film forming component, called the Binder, (2) a solvent or thinner and (3) an organic or inorganic pigment. He also gave distinguishing features of both Emulsion paints and varnish and paints on one side and Mourtex Texturised coatings non refractory surface preparations to show that both are different products and the impugned product does not merit classification under sub heading 3209.90 of the Tariff. He finally referred to the decision of Rajasthan High Court in Swastik Metals v. U.O.I. wherein it was held that when there is an uncertainty to determine the nature of product on the basis of dimensions, classification should be on the basis of the Mill in which it is manufactured.

4. Countering the argument, Shri Sumit K. Das, Ld. D.R., submitted that the Assistant Collector had relied upon the report of the Chemical Examiner to reach the conclusion that the impugned product merits classification under sub heading 3209.90 of C.E.T.A.; that he has rightly relied upon the test report in view of the

directions contained in the Collector (Appeals) order directing the Assistant Collector to readjudicate the matter after proper examination of the Chemical Examiner's report. The Ld. D.R. also mentioned that the Appellants did not request for retest of the samples.

5. We have considered the submissions of both the sides. We observe that the Collector (Appeals), in his first order, accepted the Appellants' contention that there was violation of principles of natural justice as they were not told about the Chemical Examiner's report and the same was never disclosed to them and they were not given any opportunity to put forth their case. He, therefore, remanded the matter to the Assistant Collector "for de novo adjudication after proper examination of the Chemical Examiner's report and proper opportunity to the Appellants to put forth their case." A copy of the Test Report was given to the Appellants on 12.4.1994 and after hearing them, he passed the Adjudication order dt. 14.6.1994. He has thus passed the order in pursuance of the direction contained in the order in appeal. There is no force in the submission of the Appellants that the test report cannot be relied upon, in view of the direction contained in first order passed by the Collector (Appeals). The Collector (Appeals) in the impugned order has rightly concluded that the order has been passed within the parameter of the directions. It is seen from the test report that the same is in the form of pasty mass composed of pigment glue, inorganic fillers and volatile solvents. It has the characteristic property of distemper. The Appellants have not requested for retest by the Chief Chemist after receipt of the reports from the department in absence of which the test report cannot be disregarded. The Appellants have submitted an advice dt. 30.3.1993 from one Shri V.R. Ranganathan, who is a Consultant (Customs and Excise).

His advice is not an expert opinion given by technical man and it cannot be preferred over the test report given by a Chemical Examiner.

This is nothing but a legal advice. The Assistant Collector has disclosed in detail in the adjudication order as to why the impugned product is classifiable under sub heading 3209.90 of C.E.T.A. The Appellants have not substantiated their contention that their impugned products fall under Heading 32.14 of the Tariff. In

view of this, we do not find any reason to interfere with the orders of the lower authorities regarding classification of the products. We also observe that this is not a case warranting imposition of penalty as the issue involved was the classification of a product. We, therefore, set aside the penalty imposed on them.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com