

Plastipeel Chemicals and Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-07-1999

Reported in : (2000)LC395Tri(Mum.)bai

Appellant : Plastipeel Chemicals and

Respondent : C.C.E.

Judgement :

1. Applicant M/s Plastipeel Chemicals & Plastics Pvt. Ltd. have sought for the grant of unconditional stay of the operation of the order of the Commissioner of Central Excise, Mumbai-VI, dated 18-1-1999 under which Central Excise duty of Rs. 30,80,132/- is confirmed under Section 11A(2) of the Central Excise Act and equal amount of penalty imposed under Rule 173Q read with Section 11 AC of the Central Excise Act on the applicant and to dispense with the pre-deposit of the duty and penalty as above.

2. The case of the applicant is that a differential duty in respect of clearances for the period 1-7-1992 to 30-6-1997 is demanded alleging suppression of facts on the ground that they had declared the products falling under Heading 34.03, but not declared anti rust chemicals in their rusguard series, contained more than 70% of the mineral oil. The finding of suppression of facts and malafides in the impugned order is patently wrong. The very fact that the product containing more than 70% of the mineral oil is not sufficient to exclude from the Heading 34.03.

The previously approved classification is correct. The applicant is in financial difficulties to make any pre-deposit. The goods involved is anti corrosion preparations (rust preventives) S.H. 3403. The demand is time barred. There is no explanation how after the samples are tested by the Dy. Chemist in 1992, and the classification list finally approved on the basis of the test report, the charge of suppression of facts regarding the chemical composition of the products can be made for the demands from 1992 to 1997. The Central Excise Tariff under Heading 34.03 is identical with the HSN notes.

3. According to the memorandum of appeal, the product Rusguard series consists of different products named P-203, P-204, P-206, P-210, P-211, P-212, P-213, P-214, P-220, P-225, P-230, P-242, P-250. The classification list No. 4/86 dated 1-4-1986 classifying the above grades under sub-heading 3403.00 has been finally approved. So also the classification lists for the subsequent years. On the request of the Central Excise authorities the applicant by their letter dated 2-8-1989 replied to the Assistant Collector of Central Excise giving the ingredients, process of manufacture and use. Thereafter he has approved the classification list w.e.f. 1-4-1989 also. Classification list 5/92-93, dated 5-3-1992 was provisionally approved with the remarks subject to the receipt of Dy. Chemists test report. The samples are drawn on 27-3-1992, 22-5-1992, and 29-5-1992 for sending to the department's Chemical Examiner. The gist of the report of the Chemical Examiner on the products was given to the applicant by the Range Superintendent under the letters dated 8-7-1992 and 23-12-1992. The classification lists dated 4-3-1993, 1-4-1993 and 7-3-1994 have been finally approved classifying the products under sub-heading 3403.00.

The notification 287/86-C.E., dated 5-5-1986 issued under Rule 8(1) of the Central Excise Rules "speciality oils" falling under sub-heading 2710.99 or 3403.00 were exempted from the duty leviable in excess of 12% ad valorem which is amended by the Notification No. 127/88-C.E., dated 1-3-1988 increasing the duty to 15%. The duty was fully exempted under the Notification No. 8/92-C.E., dated 1-3-1992 on the speciality oils. The exemption Notification No. 287/86-C.E. is rescinded from 1-3-1994, and the approval on classification list is done away w.e.f.

16-5-1995 after the classification lists dated 1-3-1993 and 1-3-1994 have been finally approved w.e.f. those dates. The definition of the term "speciality oils" is given in the explanation clause in the said notification.

4. The show cause notices dated 30-9-1995, 10-1-1996, 2-2-1996, 5-6-1996, 27-7-1996, 28-11-1996, 3-3-1997 and 4-6-1997 were issued by the Range Superintendent demanding total duty amount of Rs. 40,96,088/- and also another notice dated 4-8-1997 demanding duty of Rs. 30,80,132/- for the period from 11-7-1992 to 30-6-1997 alleging that the applicant has deliberately, wrongly classified the product, P-203, P-204, P-210, P-214, P-214SF contain more than 70% of mineral oil by weight, they merits classification under chapter Heading 3811.00 and not under sub-heading 3403 and wrongly claimed partial or full exemption under the Notification 287/86-C.E., dated 5-5-1986. Rs. 2,14,607/- differential duty was demanded for the period 1-4-1995 to 30-6-1995 under the notice dated 30-9-1995 without the allegation of suppression or mala fide, and the penalty provisions were not invoked.

Rs. 5,07,256/- differential duty was demanded for the period 1-3-1995 to 31-12-1995 under the show cause notice dated 2-2-1996 and the penalty provision was invoked. The applicant filed replies to above notices on 20-10-1995, 29-1-1996, and 25-2-1996, to the Assistant Collector of Central Excise. After the filing of reply on 15-9-1997 to the show cause notice dated 4-8-1997, the Assistant Collector of Central Excise, Thane enclosed 13 test reports to the letter dated 13-11-1997 received by the applicant. The said reports pertaining to the product Rusguard P-203 showed no additives, but it was only mineral oil, contrary to the earlier test reports, for which the applicant sought for the re-test vide letter dated 15-11-1997. After hearing the parties, the impugned order is passed by the Commissioner of Central Excise.

5. The learned Counsel for the applicant Shri R.J. Parakh has contended that when the products have been fully tested by the departments' Chemical Examiner and the reports mentioned that several of the product contained more than 70% by weight of mineral oils, holding the applicant guilty of suppression of facts is illogical. The reasoning is patently wrong and incomprehensible. On the question

of time bar the impugned order has to be set aside. The observation in para 22 in the said order is quite contrary to the previous test report. The entry in the tariff and HSN notes under Heading 34.03 is one and the same. It deals with products containing 70% or more by weight of petroleum products, etc., but only if such oils are basic constituents in the preparations. There is not a single word either in the show cause notice or in the impugned order or anywhere else that the due consideration has been given to the words of specific constituents.

There is no dispute that the products were anti rust and anti corrosion preparations. Annexure III the letter of Range Superintendent dated 23-12-1992 shows that Rusguard P-203 is based on mineral oil and additives which is contrary to the 1997 reports in which it is stated that they are not additives at all. It shows obvious error. The Commissioner of Central Excise ought to have got the sample re-tested, instead of refusing. Heading 34.03 includes anti rust and anti corrosion preparations and the declaration of the product is specific in that heading. When the classification list is approved after due test for several years, if the department wishes to change the classification, such a change could have only perspective effect. It is further contended by him that there could be no suppression, because the ingredients and nature of the products are all supplied and samples were drawn, and were tested by the department through Dy. Chief Chemist, and on the basis of the reports, the Superintendent has approved the classification list.

6. Shri A. Ashokan the learned Departmental Representative urged that in the previous test reports the Dy. Chief Chemist did not indicate clearly whether the speciality oils were or not. The earlier report was inconclusive. As per the test report and opinion of the Dy. Chief Chemist dated 7-3-1997 and 17-3-1997 it was found that Rusguard grades P-204, P-206, P-210, P-211, P-220, P-225, P-230, P-242, P-250 merited classification under chapter sub-heading 3823.00 and P-203 merited classification under sub-heading 2710.90 of CETA as these grades were not 'speciality oil' as these were not principally based on lubricants and composed of wetting agents and contains less than 70% of the weight of mineral oil. The grades P-212,213,214(SF) contain more than 70% by weight of petroleum oils obtained from bituminous minerals and so they merit classification under 3823.00,2710.90 of the Central Excise Tariff Act, 1985. The assessee classified

the products as lubricating preparations made by blending of mineral oils with other substances intended for use in industries such as textile mills, excluding preparations contained as basic constituents 70% or more by weight of petroleum oils obtained from bituminous minerals. By declaring the product as anti corrosion preparations RUSGUARD by blending of mineral oils with other substances and intended for industrial use in the classification gave the impression that these products were speciality oils and the lubrication function if any, was only secondary in nature, meriting description under sub-heading 3403.00 of CETA. The applicant was manufacturing products from 1992. They did not disclose to the department about the contents of the mineral oil in their product Rusguard, more than 70% by petroleum oils obtained from bituminous minerals percentage by weight and that these were not speciality oils, which came to be known from the report of the Dy. Chief Chemist. It shows willful suppression of crucial material facts by the applicant about the product rusguard which is misdeclared in their classification list of the product "Rusguard" about the contents of mineral oil by weight was more than 70%. It resulted in wrong approving of the classification list due to the suppression of correct material.

7. The applicant should have fully mentioned the description of the goods along with the constituents in the classification list, which would have helped the department in arriving at the right classification. The applicant was aware that the product was not speciality oil as these are not based on lubricants and were primarily composed of wetting agents. Thus he knowingly suppressed the correct description of the products and also the correct composition of the input. Applicant is under the self removal procedure under Chapter VILA of the Central Excise Rules. The assessee has not requested for re-testing within the 90 days period from the date of the test report under Rule 50(4) of the Central Excise Rules. It is further contended that applicant has no prima facie case either on the question of limitation or on merits.

8. Perused the stay application, appeal memorandum, impugned order, and the paper book containing the classification list, correspondence between the applicant and Central Excise authorities and classification, declaration, show cause notice and reply, and written submission and the Central Excise Tariff Act,

and HSN notes. From the above material, it is seen that the department has reopened the case of the approval of the classification of the product involved in this case on the basis of the drawing of samples and the testing of the same by the Dy. Chief Chemist in 1997, after the final approval of the classification list based on the earlier test report in 1992 to 1995 without any valid explanation which supports the case of the applicant.

As contended by the applicant when the classification list is approved finally after the test of the samples drawn by the departmental authorities, re-testing of the samples in 1997, and the failure in not re-testing of Rusguard P-203 samples despite the request by the applicant, supports the case of the applicant. The question whether there is a suppression of the fact and mis-declaration by the applicant regarding the product in the earlier classification list and description of the same with the constituents, hinges on the decision of the appeal; it is required to be considered, only while dealing with the appeal on the merits of the case. As pointed out by the applicant, the test reports of 1992 and 1997 are contradictory versions regarding the contents of the additives in the previous report as per Annexure-III. The challenge by the applicant is that the demand of duty on the change of classification of the product, after it is finalised, and approved should be prospective in nature and the demand should confine for the subsequent period, after the decision on the classification on the basis of 1997 test report. On this count, the quantum of the duty amount involved in this case is subject to variation. Looking into the facts and circumstances of the case, as considered above, the applicant has got a prima facie case on the merits of the case at this stage, as pointed by him. So under these circumstances the applicant is entitled to succeed on the stay application. Hence the following order : 9. For the reasons discussed above the stay application is allowed and the pre-deposit of the duty amount of Rs. 30,80,132/- and penalty of equal amount is waived and recovery stayed. So also the interest under Section 11AB of the Central Excise Act, which is to be quantified.