Synbiotics Ltd. Vs. Commissioner of C. Ex. and Cus.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-02-2000

Reported in : (2000)LC867Tri(Mum.)bai

Appellant : Synbiotics Ltd.

Respondent : Commissioner of C. Ex. and Cus.

Judgement :

1. These four applications relate to four appeals arising out of the two orders made by the same adjudicating authority where the appellants are the same and the issue is also the same. These four applications are, therefore, being disposed of in this common order.

2. These four applications were earlier disposed of vide order No.CII/2416/WZB/1998, dated 29-10-1998. In terms of the direction of the orders of the High Court of Gujarat, dated 9-12-1998 in Special Civil Application Nos. 10117,10412,10461 & 10492 of 1998, these applications were heard by us today for disposal. The applicants are manufacturers of bulk drugs. The process involves growth of certain micro-organisms.

For this growth, the applicants prepare a food media or broth. The raw materials were several including tapioca, cottonseed flour, certain chemicals, corn oil etc. The allegation was made in several show cause notices that this media was excisable and dutiable goods classifiable under sub-heading 3821.00 as "prepared culture media for development of micro-organisms". The assessee contested this allegation. They produced before the Commissioner substantial case laws to the effect that the mere existence of a product in the Tariff would not make it dutiable but that for attracting duty the products must be useable, moveable, saleable and marketable. They filed affidavits of two scientists well-versed in the product technology to the effect that the media manufactured by the present applicants could not be termed as prepared culture and the affidavit of a trader was also filed bringing out the distinction. The Commissioner in his order cited some other case laws.

He also cited in support of his presumption as to the marketability, opinion given by the Chemical Examiner G. I who had studied the process in the assessee's factory. On his holding that the media was dutiable and having confirmed the duty and imposed penalty, the appeals were filed and the present applications.

3. We have heard Shri Hidayatullah, Sr. Counsel appearing along with Shri Prakash Shah and Shri J. Verma, Advocates for the applicants. The revenue was represented by Shri Ramtake, JDR.4. We have examined the affidavits and the opinion of the Chemical Examiner and also have seen the relevant case laws including the judgment of the Supreme Court in the case of Union of India v. Delhi Cloth & General Mills Co. Ltd.CCE v.Citurgia Bio-Chemicals Ltd. 1996 (87) E.L.T. 267 (Tri). This judgment deals with broth made out of molasses used as a growth media for the micro-organism which ultimately resulted in the production of citric acid. In this judgment, the Tribunal observed that the media was unstable product, that it was liable to decomposition that it had short shelf life. Relying upon the Supreme Court decision in the case of Bhor Industries Ltd. the Tribunal found that the media so prepared was not a dutiable product capable of being marketed. This judgment was also relied upon in these proceedings.

6. We observe that the law is well settled and that is, for duty to be attracted it is not enough that it exists in the Tariff but that the commodity must be marketable. The Supreme Court in the case of Delhi Cloth & General Mills Co. Ltd. judgment referred to above had also observed that merely because such commodity after processing can be made marketable, does not make it marketable at the stage at which is prepared. On reading the process of manufacture and the use to which

the media is put, it appears to us that the case law cited had due application.

7. Whether a particular product is stable and therefore is marketable or not is an essential question of fact. The question is answered in the affidavits filed by the assessee's two experts in the field. The ld. Commissioner has dealt with a part of one of die two opinions and does not touch upon the other opinion. He has not taken cognisance of the dealer's opinion either. He has relied upon the opinion of the departmental Chemical experts. The chemical examiner's opinion as reproduced in paragraph 11 of his order, dated 30-12-1997 was that if the ingredients of the culture medium are packed in dehydrated and sterile condition, it can be marketed as stable product. This opinion does not make the product itself as excisable. Keeping the caution in mind given by the Supreme Court in the Delhi Cloth & General Mills Co.

Ltd. case that a commodity that may be made marketable after processing cannot be held to be marketable before the processing is done. We find the reliance of the Commissioner on the chemical examiner's opinion as not supporting the case. We find that Dr. V.V. Modi in his affidavit at paragraph 6 has brought out the distinction of the prepared culture media as it is available in the market and that prepared by the present applicant on the criteria of marketability, stability and pharmacopoeial standard. He opined that the contested goods fell below the standard of prepared culture media. He observed that the contested goods were highly susceptible to contamination. Both the experts had categorically opined after a detailed study in the assessee factory the instability of the contested goods.

8. Thus on merits, we find that a prima facie case has been made out by the assessee in support of their plea that the goods were unstable and therefore not marketable and therefore not dutiable. The various case laws will have to be discussed at length at the time of final hearing.

At present we waive the requirement of pre-deposit of the duty amounting to Rs. 5,37,74,598.51 and penalty of Rs. 6 lakhs and stay the recovery thereof pending disposal of the appeals.