

Surgichem Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-13-2000

Reported in : (2000)(117)ELT564TriDel

Appellant : Surgichem

Respondent : Collector of Central Excise

Judgement :

1. The issue involved in these appeals is the correct classification under the old Central Excise Tariff of adhesive plaster described as Porofix Adhesive Plaster BPC/USP, plaster of paris bandages, Johnson plast adhesive type USP (all sizes) and economy pack etc. The matter has come before this Larger Bench upon reference by Division Benches vide Misc. Orders No. 86 to 91/91-C dated 5/2/91 and misc. order No.161/99. The reference is in view of the conflict between two decisions of the Tribunal, i.e., in the case of J.L. Morison, Son & Jones (India) Ltd. Bombay v. Collector of Central Excise, Bombay reported in 1984 (15) E.L.T. 251 (T) and in the case of Collector of Central Excise, Rajkot v. Surgichem reported in 1987 (27) E.L.T. 548 (T). The first decision held that zinc Oxide adhesive plasters B.P.C. are classifiable under tariff item 14E while the second decision held that adhesive plaster B.P.C. tapes are classifiable under tariff item 68 of Central Excise Tariff and not under tariff items 14E or tariff item 60 of the said tariff. The relevant tariff headings may be reproduced below for ease of reference :- "14E. Twelve and a half per cent ad valorem - Patent or proprietary medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotics other than those

medicines which are exclusively Ayurvedic, Unani, Sidha or Homoeopathic.

Explanation I - 'Patent or Proprietary Medicines' means any drug or medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in human beings or animals which bears either on itself or on its container or both, a name which is not specified in a monograph in a pharmacopoeia, formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person, having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person.

Explanation II - 'Alcohol', 'Opium', 'Indian Hemp', 'Narcotic Drugs' and 'Narcotics' have the meanings respectively assigned to them in Section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955.

60. Fifteen per cent ad valorem. - Adhesive tapes, all sorts, not elsewhere specified including cellulose adhesive tapes and paper backed adhesive tapes, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power.

68. Ten per cent ad valorem. - All other goods, not elsewhere specified, but excluding - (a) alcohol, all sorts, including alcoholic liquors for human consumption.

(c) dutiable goods as defined in Section 2(c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).

Explanation - For the purposes of this Item, goods which are referred to in any preceding Item in this Schedule for the purpose of excluding such goods from the description of goods in that Item (whether such exclusion is by means of an

Explanation to such Item or by words of deemed to be goods not specified in that Item." 2. The products in question are surgical dressings and are used for protecting and keeping secure affected parts and immobilising affected areas. These are manufactured under drugs licence and according to specifications under British and American pharmacopoeia. The counsel for the appellants has submitted during hearing that it is clear from the specifications indicated in the pharmacopoeia that these items, though manufactured according to the specifications laid down in pharmacopoeia, they have no therapeutic or curative properties. The curing takes place of its own. The body cures itself by its natural healing abilities. The plaster only protects the affected area or immobilises the affected part of the body so that the broken bones are kept in their proper place/alignment so that they heal in course of time. The bandages do not take part in healing as such. The learned Counsel referred us in particular to British Pharmaceutical Codex 1968 Page 977 in regard to 'Surgical Dressings' which is reproduced below :- "The monographs in this section provide standards for a number of surgical dressings, and for fibres and fabrics used in their preparation. Information is given on uses, packaging, labelling and sterilisation. The monographs are arranged in the following groups: Bandages, page 978 Rayon. Where "rayon" is specified in the following monographs, it refers to Regenerated Cellulose or Delustred Regenerated Cellulose.

Medicated dressings. Those surgical dressings that are permitted or required in a particular monograph to contain a suitable antiseptic shall be impregnated so as to contain about 0.1 per cent of either aminacrine hydrochloride or chlorhexidine hydrochloride (or an equivalent amount of the gluconate) or about 0.15 per cent of either domiphen bromide or euflavine.

Sterilisation. Methods suitable for the sterilisation of surgical dressings are given in Appendix 27. Any other method of sterilisation may be used, provided that the sterilised dressing complies with the test for sterility of surgical dressings given in Appendix 26 and with all the other requirements of the standard, except that a sterilised dressing may be slightly less white than an unsterilised dressing.

Standards and testing. In the absence of specific directions in the monographs, the methods described in Appendix 26 are used in the examination of surgical dressings for adhesiveness, area per unit weight, ash, elasticity, extensibility, foreign matter, tensile strength, threads per stated length, water-soluble extractive, water-vapour permeability, waterproofness, weight per unit area, weight of fabric, weight of film, weight of adhesive mass, content of antiseptic and sterility." He also referred to page 1007 of the same Codex which deals with 'Zinc Oxide Plastic Self-Adhesive Plaster' which is also reproduced below :- Zinc Oxide Elastic Self-adhesive Plaster consists of elastic cloth which stretches in the direction of the warp, spread evenly with a self-adhesive plaster mass containing zinc oxide.

Description. Elastic cloth spread with a self-adhesive plaster mass, containing zinc oxide, which does not off-set when unwound; it is spread evenly, except that the mass may be made porous or permeable to air. The elastic cloth is in one continuous length containing no joins, clean, and reasonably free from weaving defects, cotton leaf and shell; it may be tinted flesh colour with a suitable dye.

Content of zinc oxide in the adhesive mass. Not less than 10.0 per cent, calculated as ZnO, determined by the method for Zinc Oxide Self-adhesive Plaster. Uses. Zinc Oxide elastic self-adhesive plaster is used to secure dressings and appliances, to cover sites of infection, and for general support bandaging.

Zinc Oxide Self-adhesive Plaster consists of a suitable cloth spread evenly with a self-adhesive plaster mass containing zinc oxide.

Content of zinc oxide in the adhesive mass. Not less than 10.0 percent, calculated as ZnO, determined by the following method : Heat gently about 1 g of the plaster, accurately weighed, with 10ml of nitric acid in a long-necked round-bottomed flask of about 30-ml capacity until the plaster has disintegrated; cool, dilute with 10 ml of water, decant the liquid on to a Buchner funnel, and wash the residue in the flask and on the filter with warm water until the washings are free from nitrate; make the combined filtrate and washings neutral to litmus paper with dilute ammonia solution, and dilute to 140 ml with water, add 10 ml of 2M sodium acetate and 5g of ammonium chloride, warm on a water-bath and add, dropwise with constant stirring, 10 ml of ammonium phosphate solution; heat on a water-bath for 2 hours,

transfer the precipitate to a sintered-glass crucible, wash with 150 ml of water, followed by 5 ml of alcohol (95 percent), and dry to constant weight at 105; each g of residue is equivalent to 0.4561 g of ZnO. The weight of adhesive mass taken in the determination is calculated as described in Appendix 26 under "Weight of adhesive mass".

Uses. Zinc oxide self-adhesive plaster is used to secure dressings and to immobilise small areas.

The learned counsel also referred to the United States Pharmacopeia at page 761 which dealt with 'Adhesive Tape' which is also reproduced below :- Adhesive tape consists of fabric and/or film evenly coated on one side with a pressure-sensitive, adhesive mixture. Its length is not less than 98.0 percent of that declared on the label, and its average width is not less than 95.0 percent of the declared width.

If Adhesive Tape has been rendered sterile, it is protected from contamination by appropriate packaging.

3. The learned counsel pointed out that it is clear from these texts that various surgical bandages are not prepared for any therapeutic purpose. Therefore, they cannot be treated as medicines. They are only drugs/pharmaceutical products of non-therapeutic quality. Their antiseptic or astringent properties do not make them medicines.

4. The counsel also referred to the various Circulars issued by the Governmental authorities and stated that the governmental authorities were not treating the adhesive plaster and other surgical bandages etc.

as medicines. Letter No. 102/13/74-CX.3, dated 28-4-1974 clarifies that zinc oxide adhesive plaster P.B.C. tape is not liable to central excise duty under Item 14E as it has no therapeutic properties and is used essentially as a supportive to hold dressings. The trade notice of Chandigarh Collectorate No. 52/74, dated 23/11/74 clarified as under :- "Surgical dressings comprising bandages, gauze, lints, plasters etc.

are considered "drugs" for the purpose of Drugs & Cosmetics Act and manufacturers of surgical dressings to take out a licence for their manufacture from the State Drugs Controller under the above Act.

These "dressings" can be either medicated or non-medicated.

"Medicated dressing having therapeutic properties" can be considered as medicinal properties for the purpose of levy of Central Excise Duty".

Madras Collectorate Trade Notice No. 256/79, dated 15/12/79 clarifies that "absorbent cotton wool, gauzes and bandages and plaster of paris, being non-medicated and without any medicinal or therapeutic properties, would fall outside the purview of Tariff Item 14E as "Patent or Proprietary Medicines". However, 'Medicated dressing' having therapeutic properties are 'medicinal preparations' covered by Item 14E of Central Excise Tariff." Letter F.No. 102/26/79-CX. 3, dated 11th March, 1980 of the Department of Revenue relating to classification and rate of duty on absorbant cotton wool gauzes and bandages and plaster of paris reads as under :- "Sub : MEDICINES - Absorbant cotton wool Gauzes and Bandages and Plaster of Paris-Classification of under Item 14E or Item 68 Question regarding.

I am directed to refer to your letter D.O.C. No. V/60/30/24/78-CX.2, dated 18th December, 1979 on the above subject.

2. In this connection your attention is invited to Tariff Advice, dated 27th November, 1979, issued in respect of Absorbent cotton wool, Gauzes and Bandages and Plaster of Paris issued from Board's F.No. 102/26/79-CX.3. As per this Tariff Advice Absorbent Cotton Wool, Gauzes and Bandages and Plaster of Paris, being non-medicated and without any medicinal or therapeutic properties, would fall outside the purview of Tariff Item 14E as "Patent or Proprietary Medicines". The doubt raised by you in para 3 of your letter mentioned above is that as these products have been held to fall outside the purview of Tariff Item 14E because they are not medicated and do not have therapeutic value on the same analogy it would appear that these products would not qualify for exemption under Notification No. 55/75-C.E. (as amended) issued under Tariff Item 68. In this

connection your attention is invited to Supreme Court judgment according to which those products are covered under the definition of drugs within the meaning of Section 3(b) of the Drugs Act which is reproduced below :- "(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals other than medicines and substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani Systems of Medicines; and (ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermins of insects which cause disease in human beings or animals as may be specified from time to time by the Central Government by notification in the official gazette.

The definition of drugs given above is comprehensive taking into account not only medicines but also substances intended to be used for in the treatment of diseases of human beings or animals. The expression 'substances' appearing in the Drugs Act covers things other than medicines and the Court is of the view that these products are substances used for in the treatment within the meaning of Section 3(b) of the Act.

The point at issue is whether articles such as surgical cotton gauzes and bandages and Plaster of Paris etc. are covered by entry in Sr.No. 19 of Notification No. 55/75-C.E., dated 1-3-1975. This entry has a comprehensive coverage inasmuch as it includes all drugs, medicines, pharmaceuticals and drug intermediates not elsewhere specified. In the absence of a specified definition of the terminology used in the notification, we may have to place reliance on the definition as interpreted by the Supreme Court covers substances such as surgical cotton which are used for or in the treatment of human beings or animals.

The matter was also referred to Drugs Controller, Director General of Health Services, New Delhi who have confirmed that Surgical Cotton (Absorbent Cotton Wool), Gauzes, Bandages and other non-medicated surgical dressings are 'drugs' within the meaning of the definition of the term 'drug' given in Section 3(b)(I) of the Drugs and Cosmetics Act. In view of the clear opinion by the Drugs Controllers that these are drugs, I am directed to clarify that they would rightly be entitled to

exemption under Notification No. 55/75-C.E. vide Sr.No. 19 of the said Notification." 5. Based on the above pharmacopoeial standards and the clarifications issued by the Government and other tax authorities, the learned counsel submitted that the items in question are not medicated and are therefore not classifiable under tariff item 14E as 'Patent and Proprietary Medicines', (or as 'Adhesive Tapes All Sorts'). Therefore, their correct classification would be under tariff item 68 after it was incorporated in the old tariff and before that, they would not be excisable at all. In this connection, the learned counsel has drawn our attention to the decision of the Supreme Court in Paper Products Ltd. v. Commissioner of Central Excise reported in 1999 (112) E.L.T. 765 (S.C) wherein the Apex Court ruled that the departmental authorities are bound by Circulars issued by C.B.E. & C. and cannot take a contrary stand. The learned counsel for the assessee submitted that in view of the aforesaid Circulars, the Revenue authorities are bound to treat the subject goods as covered by Tariff Item 68 and not Tariff Item 14E .

6. As against the aforesaid submissions on behalf of the appellants, the learned DR has submitted that the difficulty in the present case has arisen because of the conflicting decisions rendered by the CEGAT. He submitted that as the circulars relied upon by the counsel of the appellants were issued prior to the decision of the Tribunal in J.L.

Morison, Son & Jones (India) Ltd. 's case and as the Circulars are not binding on the Tribunal, the correct course would be to follow the decision in J.L. Morison, Son & Jones (India) Ltd. case and the circulars to the contrary have no effect once the correct classification of the products has been decided by the Tribunal to be under tariff item 14E.7. We have perused the records and have considered the submissions made by both the sides. We find that Tariff Item 60 remains ruled out for the classification of this item by the decisions of the Tribunal in both J.L. Morison, Son & Jones (India) Ltd. case and Surgichem case.

Therefore, the difference that survives is with regard to whether the correct classification is under Tariff Item 14E or under Tariff Item 68. We observe from the various Circulars issued by the Government that it had been the consistent view of

the Government that therapeutical property is essential in a substance to bring it within the scope of Patent & Proprietary medicine i.e. Tariff Item 14E. In respect of zinc oxide adhesive plaster, it has been clarified specifically that it does not have any therapeutic properties. The Pharmacopoeia texts also show that products involved in these appeals are not made to therapeutic or curative specifications. Antiseptic or astringent qualities are not therapeutic or curative properties.

Further, in view of the Apex Court's ruling that the departmental authorities cannot contradict the clarifications issued by C.B.E. & C., the Central Excise Collectors cannot seek a classification contrary to the classification advised in the Government/CBEC Circulars. Viewed from that point of view also, the correct classification of these unmedicated adhesive plaster, plaster of paris bandages and adhesive tape would be under Tariff Item 68. Therefore, we hold that the items covered in all these appeals would be classifiable under Tariff Item 68 with concessional assessment as applicable to drugs and medicines under various notifications.

8. M/s. Surgichem have also filed a miscellaneous application submitting that their case remains specifically covered by the decision of the CEGAT in Order No. 727/1986-C, dated 27-11-1986 reported in 1987 (27) E.L.T. 548 (T). They have submitted that that order of the Tribunal having become final as no appeal had been filed by the Revenue, consequential relief should be granted to them pursuant to that order and the Revenue's appeal dismissed as not tenable. There can be no doubting of the appellants' position, since the Tribunal's order has become final. It is not open to the Revenue to question its implementation at a later stage. The order impugned in the appeal before the Tribunal, having got merged with the Tribunal's order, has also become final subject to the findings in the Tribunal's order. The Revenue cannot be questioning the relief due pursuant to such order.

Accordingly, the miscellaneous application is ordered in favour of the assesseees. However, refund will be subject to the provisions relating to unjust enrichment.

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