

Bakelite Hylam Ltd. Vs. Cce

Bakelite Hylam Ltd. Vs. Cce

SooperKanoon Citation : sooperkanoon.com/18086

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Hyderabad

Decided On : Apr-18-2000

Reported in : (2000)(93)LC145Tri(Hyd.)erabad

Judge : S Peeran, A T V.K.

Appellant : Bakelite Hylam Ltd.

Respondent : Cce

Judgement :

1. This appeal is against Order-in-Original No. 84/97 dt. 6.11.1997 passed by Commissioner of Central Excise wherein a duty demand of Rs. 17,41,328.65 under show cause notice dt. 24.11.1993 for period 1.6.1988 to 28.2.1993 was upheld and penalty of Rs. 10 lakhs imposed under Rules 9(2), 173Q & 226. The dispute is on classification of "Alkyd Resins" declared on CL i.e. whether under 3208.40 or under 3907.50. The former is adjudged by Revenue while the latter is claimed by appellants.

2. Heard Ms. Mythili, Ld. Advocate for appellants and Shri S. Kannan, Ld. DR. (i) They submitted a classification list claiming classification under 3907.50 from 31.3.1988 which was approved by department. A similar classification was also approved in 1989 and goods were cleared accordingly.

(iii) Composition of final product was known to department as inputs were declared under Modvat scheme.

(iv) Note 3 to chapter 32 lays down that only if solvents exceed 50% by weight, the resin can be under 3208.40. Since weight of solvents in these goods is less than 50%, classification under 3907.50 is correct.

(v) While the order-in-original concludes that classification would have to be in terms of end-use, Ld. Advocate stresses that in view of 1990 (41) ELT 343 : 1989 (23) ECR 548 (T) end use is not relevant.

(vi) Once the classification list was approved by proper officer, department cannot confirm demand of duty without first reopening the issue of classification itself. She cites: (vii) In 1993 they filed a classification list for the product under 3208.40 but they paid duty "under protest" and the department had not resorted to review of earlier approved classification lists under Section 35E. (viii) There was no case for suppression with fulfill intent as classification lists had been approved and cites a number of decisions including (ix) Since no clandestine removal is involved, nor any procedure was violated, no penalty is imposable. The penalty levied was also harsh as duty was paid even prior to issue of show cause notice and cites .

(x) The demand for a period beyond 5 years from date of show cause notice is totally illegal i.e. from June 1988 to Oct., 1988.

(b) He also draws a distinction between duty "short paid" and "short lived".

(c) Despite Note 3 to Chapter 32, which is an inclusive note, the interpretative Rule 3(Q) is more appropriate by virtue of which a specific heading would be preferable to a general one.

(d) In particular, he submits that appellants had suppressed that solvents were less than 50% and that the goods were marketed for use as insulating varnishes. Hence, extended period is correctly invoked and (e) that classification lists were never approved as per Order-in-Original.

5. We have carefully considered the rival submissions and records of the case and our findings are as under: (i) The findings of Ld. Commissioner that there is no evidence to show that classification lists of 1988 and 1989 were approved is erroneous, because vide their C.No. IV/16/SRP/11/88 VC I dated August, 1988,

the jurisdictional AC Viz. Hyderabad-II Division, at Sr. No. 2 of the table therein, has approved classification of Alkyd Resins under 3907.50, with reference to appellants consolidated classification list submitted vide letter CON CL/1988 dt. 3.3.1988 (page 45 of paper book). Similarly, vide letter C. No. IV/16/SR/44/89 VC dt 31.5.1989 (page 47 of paper book) the same AC has again approved their classification list submitted vide letter No. CON CL/1989 dt. 3.3.1989 including Alkyd Resins at Sr. No. 3 under 3907.50 NIL duty rate. As per records before us, these classification decisions were not sought to be changed by department till 1993, as neither appellants filed fresh classification lists nor the approval of classification lists noted above were reviewed by Commissioner under Section 35E etc. Merely because the AC has not approved them on the body of the classification list through the prescribed endorsement, but by these letters, it cannot follow that classification lists were not approved.

(ii) It was only in 1993 that appellants paid duty "under protest" vide classification list at page 48/49 of paper book.

(iii) that since show cause notice was issued on 24.11.1993, even if the extended period of 5 years could be invoked, the order-in-original erred in confirming duty for the period from June 1988 to June 23.11.1988 as this period extends beyond the five years period.

(iv) However, we are not in a position to accept Ld. Advocate's submissions that the show cause notice is bad in law because the department has therein demanded differential duty on a new classification without first deciding the classification. This is because the facts on record show that department started investigations in November 1992, and while these investigations were still in progress, the appellants filed a classification list in early 1993 reclassifying the Alkyd Resins under 3208.40 and started paying duty. We find that though there is a remark on this classification list that duty is paid 'under protest', yet that protest does not change the position that the change in classification from 3907.50 to 3208.40 in 1993 was as a result of a classification list filed by the appellants. This was followed by a letter dated 4.9.1993 informing a voluntary payment of duty on this product for the period June 1988 to Feb. 1993. What was the necessity to

disturb settled classification; just because an investigation was continuing, let alone to voluntarily pay the duty for the entire period? There is no answer to this either in the grounds of appeal or in Ld. Advocate's submissions. Since the department's investigations were still going on (not completed), it is only logical to conclude that this revised classification was not on their directions. Also, there is no evidence on record to this effect. Thus, it is clear, that when the subject show cause notice was issued a few months later, the ruling classification list was of 1993 as noted above, and the ruling classification was under 3907.50. This being so, there was no need for Revenue to issue a show cause notice proposing change of classification from 3907.50 to 3208.40 as the classification already stood changed on appellants initiative. Therefore, this argument does not hold water and the citations submitted by Ld. Advocate, including Madhumillan Syntex stand distinguished on facts.

(v) On the question of merits of the classification upheld, we find that appellants have not controverted the following facts either in grounds of appeal or in Ld. Advocate's submissions: (a) that Alkyd Resins manufactured by them were always with prefixes 003 or 073 as per their letter dated 16.11.1992.

(b) Their grounds of appeal do not contain any evidence to controvert the charge in para 10(i) of show cause notice that in the grades 003-1010 FC & 073-1979 etc. the total quantity of solvents would be less than 50% of the resin content.

(c) that statements of Shri Basha admitting legitimacy of brew log sheets as well as technical data sheets were authentic.

(d) that the declared end use was as insulation varnish for various electrical appliances.

Therefore, we do not find any serious infirmity in the order impugned, particularly, because once it is seen that in certain grades solvents were less than 50% and all grades were marketed as insulating varnish, then their classification as Alkyd Resins was obviously incorrect. When we also find that Shri Basha had admitted that Resins of other genre than Allyd e.g. Phenolic or melamine were also added as is evident from the brew log sheets, then the end product becomes a mixture of

various resins and not pure Alkyd Resin. In that situation, the specific entry in the tariff for insulating varnish would certainly prevail over Note 3 to Chapter 32 in cases where the solvent was more than 50%. Where it was less than 50%, the appellants case is still worse on merits.

(vi) In view of the aforesaid findings on merits, it clearly comes out that the appellants suppressed the following information in their approved classification lists of 1988 and 1989: (a) that the products cleared were often a mixture of resins of another family than Alkyd Resins alone and therefore they were not pure Alkyd Resins; (b) that there were grades where the solvents were less than 50% of resin content; and (c) that all grades were clearly marketed as insulation varnishes and not as pure Alkyd Resins. Since these facts were ferreted out by the investigations launched by department, and were relevant towards correct classification of the product misdeclared as "Alkyd Resin", which alone carried "NIL" rate of duty, therefore suppression is also clearly proved. The case laws cited by Ld. Advocate on suppression not involved in approved classification lists do not anywhere lay down that when such classification lists contain misdeclarations on relevant factors to avail of "nil" duty rate, then also suppression with intent would not be involved. Therefore, they stand distinguished on facts involved.

(vii) In view of wilful evasion of duty, liability to penalty is also established and the case laws cited thereon stand distinguished on facts.

6. In view of the aforesaid analysis and findings, we are of the considered view that except for the duty demand confirmed for the period exceeding five years from date of issue of show cause notice, there is no other infirmity in the order impugned. Accordingly, the demand for this period in excess of 5 years from date of show cause notice is quashed, while the rest of the order impugned is upheld. The appeal is allowed only partially as per above.

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