

Collector of Central Excise Vs. Sandoz (India) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-04-1985

Reported in : (1986)(6)LC206Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : Sandoz (India) Ltd.

Judgement :

1. The material facts leading to the present proceedings, briefly stated, are that M/s. Sandoz (India) Ltd., Bombay (hereinafter referred to as Sandoz) are engaged in the manufacture of two products, named : The Central Excise authorities classified the 1st product under Item No. 15AA ["Organic surface active agents (other than soap); surface active preparations and washing preparations whether or not containing soap"] of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as the C.E.T.). This classification was accepted by Sandoz who started paying duty on the said product. The 2nd product, which is stated to be nothing but a diluted form of the 1st product obtained by adding 55% water to it, was claimed by Sandoz as eligible for duty exemption in terms of Central Excise Notification No.101/66 dated 17-6-1966 on the ground that in its manufacture duty paid organic surface agent was being used. This claim was made in Classification List No. 21/79 dated 19-6-1979. It appears that the 1st product is not being cleared as such into the market, but only its diluted version in the form of the 2nd product. By an order dated 31st October, 1980, the Assistant Collector of Central Excise, Thane held that Sandoz was supposed to pay excise

duty on the 2nd product when it was cleared for removal and not at the earlier intermediate stage. He ordered that Sandogen NH Liquid be classified under Item No. 15AA C.E.T. without the benefit of the exemption claimed. Being aggrieved with this order, Sandoz filed an appeal before the Appellate Collector of Central Excise, Bombay. It was urged before him that Sandoz NH Cone, was itself an organic surface active agent dutiable under Item 15AA C.E.T. and that by its dilution with water, no new product came into existence and that the said dilution did not amount to "manufacture" within the meaning of the Central Excises and Salt Act, 1944.

Therefore, there could be no question of the 2nd product being excisable. Even if the 2nd product was held to be excisable, no duty was actually payable since it was eligible for duty exemption in terms of Notification No. 101/66. Another point urged was that the Assistant Collector had violated the principles of natural justice inasmuch as he denied Sandoz of an opportunity of being heard. However, this point was not pressed before the Appellate Collector who was requested by Sandoz to decide the appeal on merits. The Appellate Collector, by an order dated 4-3-1981, held that the process of diluting the concentrated stuff did not amount to "manufacture". In this view he considered that there was no need to go into the question of applicability of Notification No. 101/66. In the result, he allowed the appeal.

In exercise of the powers vested under Section 36(2) of the Central Excises and Salt Act, 1944, the Central Government examined the records of the case leading to the Order-in-Appeal with a view to satisfy themselves as to the propriety, legality and correctness of the order.

The Central Government formed a tentative view that the order was not proper, legal and correct. The basis on which this tentative view was arrived at was that Sandogen NH Cone, was apparently not marketable.

Sandoz was not marketing the product. In order to become "goods", the product must be something which could ordinarily come to the market to be bought and sold, applying the ratio of the Supreme Court decision in the Delhi Cloth & General Mills case reported in AIR 1963 S.C. 791. It, therefore, appeared to the Central

Government that Sandogen NH Cone, was not marketable and, therefore, not an organic surface active agent excisable under Tariff Item 15AA C.E.T. It also appeared to the Central Government that the facts of the present case were distinguishable from those in the case decided by the Bombay High Court - Sandoz (India) Ltd. v. Union of India and Ors.- 1980 E.L.T. 696 wherein the Court had held that Foron dyestuff in wet cake form was admittedly a marketable commodity and, therefore, excisable under Item No. 14-D, C.E.T., and that mere dilution to produce a liquid form did not result in a new excisable commodity and that the process of dilution was not 'manufacture'. The distinction was that, in the present case, the concentrated product was not marketable. Since the goods were marketed only in the diluted form, the diluted product, as finally cleared from the factory of Sandoz, should bear the burden of duty. In this view, the Central Government issued a notice on 1-10-1981 to Sandoz calling upon them to show cause why the Appellate Collector's order should not be set aside or why such order as deemed fit after consideration of the submissions of Sandoz should not be passed. By a letter dated 5-3-1982, Sandoz denied the allegations contained in the said notice.

The aforesaid proceedings initiated by the Central Government were pending as on the date of constitution of this Tribunal and, in terms of Section 35-P(2) of the Central Excises and Salt Act, 1944, they were transferred to it for disposal as if they were an appeal filed before the Tribunal.

2. We have heard Shri N.V. Raghavan Iyer for the Appellant -Collector and Shri R.K. Habbu, Advocate, for Sandoz. We have also perused the records of the case.

3. The salient submissions of the learned Departmental Representative may be summarised thus : (i) Sandogen NH Cone, were not "goods" in the commercial sense of the term because they were not marketed nor were they marketable.

Since Sandoz used the product within their own factory for manufacture of the diluted product, it was for Sandoz to show that the goods were marketable and, therefore, excisable. In reply to the Government's show cause notice, it was stated by Sandoz that Sandogen NH Cone, was a marketable product and known as such as organic surface active agent in the trade by those who dealt with it and

were conversant with it and that Sandoz would produce proof in this behalf at the time of the personal hearing. The product was a branded product and its exact chemical composition and nature had not been disclosed nor were known to the Department. Yet another feature was that since the product was not marketed, its value could not be determined with reference to known parameters.

(ii) If Sandogen NH Cone, was a marketable product, as contended by Sandoz, the question would arise whether the 2nd product which was a diluted version of the 1st product was eligible for the exemption claimed. If Sandoz was claiming exemption in terms of Notification No. 101/66, they should have declared in the classification list all particulars necessary to enable the department to come to a conclusion on the applicability of the notification. Sandoz had not declared in the classification list the heading in the Table appended to the notification under which they were claiming exemption. The literature produced by Sandoz also did not indicate whether it was an emulsifier or wetting-out agent or softner or other-like preparation as contemplated in the notification. In fact, even the manufacturing process had not been declared. Given these circumstances, the Appellate Collector should have asked himself the question whether the 2nd product was the result of "manufacture". He misdirected himself when he asked the question whether the 1st product was the result of "manufacture".

(iii) Since an exemption was being claimed, the onus was on Sandoz to show that they were eligible for the exemption.

(iv) The Bombay High Court decision in 1980 E.L.T. 696 would not apply to the present case. The totality of all the manufacturing and processing activities undertaken by Sandoz would have to be taken into account in arriving at an answer to the question whether, in the present case, dilution of the 1st product amounted to "manufacture". The Tariff Item 15AA included not only organic surface active agents, but also surface active preparations. A preparation could be the result even of addition of water.

(v) Concluding, Shri Raghavan Iyer submitted that if the Bench came to the conclusion that Sandogen NH Cone, was not "goods", the impugned order should be reversed. If, on the other hand, it is held to be not "goods", the matter might be

remanded to the original authority to decide the applicability of exemption Notification No. 101/66 with reference to the conditions set out therein.

4. The submissions of the learned, Counsel for Sandoz may be summarised thus:
(i) Classification lists similar to No. 21/79 dated 19-6-1979 were being filed for several years by Sandoz and they were paying duty on Sandogen NH Cone, under Item ISA A C.E.T. All this time, Sandoz was not required to pay duty on the diluted product Sandogen NH liquid/dermagen PR liquid by virtue of Notification No. 101/66. The Collector of Central Excise, Bombay had issued a Trade Notice No. 151 (M.P.)/Surface active agents 2)/1966 dated 27-9-1966 on the subject of surface active agents and surface active preparations.

The notice clarified the question whether a composite unit manufacturing surface active agents and diluting them in the same premises into preparations or processing them further into emulsifiers, wettingout agents, softners, etc. was entitled to pay duty on the surface active agents and clearing the diluted preparations/emulsifiers, wetting-out agents, softners, etc. free of duty in terms of Serial Nos. 3 and 4 respectively of Notification No. 101/66. Sandoz's claim was with reference to Serial No. 4. The notice clarified with reference to the said Serial No. that the intention was to confine the charge to duty to the surface active agents and to exempt the finished emulsifiers, wetting-out agents, softners, etc. made out of duty-paid surface agents whether or not such emulsifiers, etc. were made by textile mills for (heir own use or by a unit which purchased duty-paid surface agents or by a composite unit which manufactured both the surface active agents as well as the emulsifiers, etc. in the same premises.

(ii) During the period 1973 to 1979, Sandoz was selling the concentrated product and the preparation. In evidence, a classification list of May 1973 was produced in which the concentrated product was classified under Item No. 15AA and Sandoz had declared that they wanted to sell the product urgently and, therefore, they were clearing it on payment of duty at 10% ad valorem under Item No. 15AA. This classification list was approved by the Central Excise authorities. It was not, therefore, correct to say that Sandogen NH Cone, was not marketable or was not marketed.

(iii) In his letter dated 15-12-1973, the Supdt. of Central Excise, Thane had informed Sandoz that the Deputy Chief Chemist, Bombay, on test of a sample of Sandogen NH liquid, had reported that the sample came within the scope of the type of preparations mentioned at Serial No. 4 of Notification No. 101/66.

(iv) In the above background, Sandoz was under no obligation to prove anything in the matter in 1979 since the sample of the product had been tested earlier and the Department itself had declared it to be eligible for the exemption.

(v) Rule 9 and Rule 49 of the Central Excise Rules, 1944 made it very clear that intermediate excisable products should pay duty.

Sandoz were paying duty on Sandogen NH Cone., the intermediate product in the present case. As far as the diluted end-product was concerned, it was exempt.

(vi) The Bombay High Court decision in 1980 E.L.T. 696 applied squarely to the facts of the present case. In that case, as well as this case, the process was conversion of the solid form into liquid form by addition of solvent.

(vii) The show cause notice did not disclose any evidence on the point of marketability or otherwise of the concentrated product. The reviewing authority could not set up a new case different from what was before the lower authorities.

5. We have carefully considered the submissions of both sides. From the above classification list dated 28-5-1973 produced before us by the Counsel for Sandoz, it is clear that Sandogen NH Cone, was being marketed by Sandoz. The notation on the classification list reads thus : "Since we have to sell the product urgently, we are clearing on payment of duty at 10% ad valorem. In case the item is found non-excisable, the duty paid may kindly be refunded to us." It also bears a notation "manufactured for the first time". The fact that no invoices have been produced evidencing sale of the goods, as Shri Raghayan Iyer has pointed out, would not, in our view, take away from the evidentiary value of the approved classification list as to the marketability of the product. The review show cause notice dated 1-10-1981 issued by the Central Government does not disclose any evidence in support of the statement that Sandoz do not market Sandogen NH Cone. The notice states

that when the product is not marketable, it could not be considered as organic surface active agent excisable under Item No. 15AA C.ET. If this statement is taken as correct, the mere dilution of the concentrated product with water would not, by any process of reasoning, result in a preparation excisable under Item 15AA C.E.T. This shows up the contradictory nature of the Department's stand in the matter. The fact that, at the material time, Sandoz was not marketing the concentrated product, again, does not detract from the position accepted by the Department in the 1973 classification list that the product was being sought to be cleared on payment of duty because it was required to be urgently sold. In these circumstances, we are of the opinion that the Department has not established its case. On the other hand, Sandoz has adduced some evidence in support of its contention. We hold that Sandogen NH Cone, was a product excisable and dutiable under Item No. 15AA C.E.T.6. Coming to the diluted product, namely, Sandogen NH liquid, a sample of the product was tested by the Deputy Chief Chemist, Bombay, in 1973.

His report reads as under : It is composed of organic surface active agent. The difference between the surface tension of water and the solution of the sample determined as per Central Excise Notification No. 208/69, dated 27-8 69 at the same temperature is more than 20 dynes/cm.

The property of the sample comes within the scope of the type of preparation mentioned under S. No. 4, Column No. 2 of the Central Excise Notification No. 101/66, dated 17-6-66." This is as clear an evidence as any that the said preparation was covered by Serial No. 4 of Notification No. 101/66 which reads as follows : "Emulsifiers, wetting-out agents, softeners and other preparations prepared for any industrial process ancillary to the manufacture of any goods." The technical information leaflet on the product produced by Sandoz describes Sandogen NH liquid as a dyeing agent to cover barriness in the dyeing of polyamide filament material. It is thus clear that it is a preparation prepared for an industrial process connected with textile industry.

7. Notification No. 101/66 says against the aforesaid Serial No. that the goods covered by the Serial No. would be exempt from whole of the excise duty leviable

thereon if the goods are made out of duty-paid surface active agents or surface active preparations. In the present case, we have found that Sandogen NH Cone, is a product excisable and dutiable under Item No. 15AA C.E.T. The preparation made out of the duty paid concentrated product would be eligible for the benefit of exemption.

8. The claim of Sandoz that the process of conversion of Sandogen NH Cone, into Sandogen NH Liquid is not "manufacture" from the excise point of view, is inconsistent with and contradictory to its claim for the benefit of duty exemption in terms of Serial No. 4 of Notification No. 101/66. However, we do not consider it necessary to go into this aspect further in view of our finding that, firstly, Sandogen NH Cone, is excisable" and dutiable under Item No. 15AA C.E.T. and, secondly, that Sandogen NH Liquid is eligible for duty exemption in terms of Serial No. 4 of Notification No. 101/66.

9. In the result, we set aside the show cause notice and reject the appeal.

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