Span Diagnostics Vs. Commissioner of Central Excise and

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-04-2001

Reported in : (2002)(145)ELT127Tri(Mum.)bai

Judge : J T J.H., G Srinivasan

Appellant : Span Diagnostics

Respondent : Commissioner of Central Excise and

Judgement :

1. M/s. Span Diagnostics Ltd. were manufacturing goods falling under Chapters 30, 35, & 38 of the CETA 1985. They filed a Classification List on 9.3.93 for various products. Two groups of products were claimed to fall under Heading 3002.00. The text of the Tariff entry read as follows: "Antisera and other blood factions; vaccines, toxins, cultures of micro-organism (including ferments but excluding yeasts) and similar products." 2. On 4.1.1994 a Notice was issued to the Assessee proposing re-classification of the products. The products listed in Annexure-A to the notice were proposed to be classified under heading 3005.90. The products listed in Annexure-B to the Show Cause Notice were proposed to be classified under Heading 3822.00.

3. The Assessee filed detailed submissions. It was claimed that the majority of the products listed in Annexure-A were antisera, etc. It was claimed that there was a clear distinction between blood grouping sera and blood grouping reagents although both could be used in blood grouping. In this respect certificate dated

21.1.94 from the Institute of Immuno Hematology was referred to.

4. In the show cause notice reliance was placed on Note 3(d) to Chapter 30 whereby diagnostic reagents designed to be administered to the patient, were to be classified under Heading 3005 which covered "Pharmaceutical goods not elsewhere specified", and the allegation was made that the contested products were to classifiable. In the reply it was claimed that the substances having been purified from cultures of micro-organisms were rightly classifiable under Heading 3002. It was further claimed that the diagnostic reagents referred to in the said note should relate to Opacifying preparations, etc. and would not cover the present products.

5. As regards the products shown in Annexure-B to the Notice, it was claimed that the products being used for diagnosis of different diseases and being known in the market as test reagents, they would merit classification under Heading 3822.00 which reads as under: "Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents whether or not on a backing, other than those of Chapter 30." 6. In the reply it was claimed that since the contested products were not chemical products their classification under Chapter 38 was not warranted. It was claimed that the products were made from human blood and sera and the origin was not from chemicals.

7. Apart from the arguments on merits several arguments on legal grounds were also made. It was claimed that products falling under both the Annexures were 'drugs', 'bulk drugs', etc. capable of benefiting from Notification 31/88-C.E. dated 1.3.88. An earlier order was cited where the department had accepted this claim. The alternative plea was made for re-classification under Heading 3005.10.

8. The Jurisdictional Assistant Commissioner after hearing the Assessee passed order dated 13.5.94 finalising the classification list as proposed in the Show Cause Notice. He held that the various blood grouping sera being used for determination of blood grouping, were blood grouping reagents and would fall under Heading 3005.90 in terms of the abovementioned Chapter Note 3(e). He also referred to the HSN Explanatory Notes on page 441 whereby antisera used for determination of blood grouping merited classification as blood grouping reagent. In this belief he

classified all the antisera under heading 3005.90. The remaining products viz. PPB 5TU, PPD 10TU and Tuberculosis PPD were classified by him under Heading 3005. He acknowledged that these were of Micro-bacteria origin, but since these were directly injected on the patient he classified them thus. He relied upon chapter note 3(d) to Chapter 30, holding them as diagnostic reagent.

9. As regards the products in Annexure-B, the Assessee claimed that they were prepared from the fractions of human blood and therefore would merit classification under Heading 3002. He noted that some of the products were made from human blood, some were made from beef heart tissues. He found that reagent viz. 'Tood VDRL Buffer' constituted of chemical. He observed that in the market they were known as diagnostic reagents and therefore merited classification under Heading 38.22. He did not deal with the alternative plea of classification as bulk drugs.

10. Against this judgment the Assessee filed an appeal which was disposed of by the Commissioner (Appeals) vide Order No. NK(438)/SRT 86/96 dated 15.3.96. The same arguments, as were made before the lower authority, were advanced by Assessee.

11. The Commissioner, apart from examining the evidence produced by the Assessee, also relied upon the opinion of the Dy. Chief Chemist in examining the classification of the disputed products. The Commissioner accepted that the products listed at Sr.No. 1 to 34 of the Annexure-A to the Show Cause Notice were antisera used for blood grouping but he chose to term them as 'blood grouping reagents". In doing so he relied upon Chapter note 3(d). He stressed that the sales literature also termed these products as diagnostic reagents.

12. As regards the products at Sr. No. 35 to 37 of Annexure-A of the SCN, the Commissioner noted the finding of the Assistant Commissioner.

The Assistant Commissioner had classified them under Heading 30.05 because they were diagnostic reagents administered to the patient. The Commissioner referred to the opinion of the Dy.C.C. as regards these products, who opined that since these products were cultures of micro-organisms, they would continue to fall

under Heading 30.02. He also referred to the sub-note explaining these products whereby diagnostic reagents were administered to the patients were excluded wherefrom. He therefore classified the substance under Heading 30.02.

13. Dealing with the products listed in Annexure-B to the Notice, he separated item at Sr.No. 4 viz. "Freunds Adjuvant". He held against lower classification under 38.22 on the ground that they were admittedly preparations of blood groupings. He held that they were more appropriately classifiable under heading 30.02 than Chapter 38. He held that since essential ingredients were made out of blood fractions and toxins, they were classifiable under Heading 30.02. In doing so he relied upon the opinion of the Dy.C.C. As regards Freunds Adjuvant, once again referring to the Dy.C.C. opinion he upheld classification under Heading 38.22.

14. Immediately after the order in classification of the Assistant Commissioner dated 13.5.94 was issued, Show Cause Notice dated 19.8.94 was issued demanding differential duty amounting to Rs. 56,97,721/- on account of re-classification. The Assistant Commissioner after hearing the Assessee passed Order dated 11.1.95. Before him the Assessee claimed for permissible reductions and also for Modvat on inputs. The Assistant Commissioner did not accept either argument. He also did not accept the claim that the goods were bulk drugs holding that the certificate of the Drug Controller did not cover the entire period of Show Cause Notice but was dated mid-way. On his confirming the duty the assessee filed another appeal. The Commissioner (Appeals) disposed of this appeal vide Order No. NK 384/STR/96. He referred to his order of the same date modifying the classification adopted by the lower authority. He held that the demand would be prospective in nature and new duty was claimable from 1.3.93 when the provisional assessment was ordered. He accepted the claim that the price should be taken as inclusive of duty. He also accepted the plea of availment of Modvat. As regards the claim that goods were to be treated as bulk drugs, he observed that the lower authority was to consider this request. He remanded these proceedings for denovo consideration.

15. Against these judgments the assessees have filed appeal bearing No.E/1401/R/1996-Bom.

16. In the Appeal Memo the prayer is made for classification of all products under Heading 3002.

18. In the first appeal, the challenge is made of re-classification of products at Sr. Nos. 35 to 37 of the Annexure-A and all products except at Sr.No. 4 of the Annexure-B to the Show Cause Notice. It is claimed that the Dy. C.C. opinion should not have been placed above the dictates of the Chapter Notes etc. The Assessees have filed Cross-Objection against these Appeal bearing No. E/CO/30/R/97. The Revenue have also filed Appeal being No. E/1544/R/96 against the second order of the Commissioner quantifying the differential duty. It was claimed that reduction of duty was not warranted. His order that the assessment should be effective from the date of provisional assessment is also challenged. Assessees have filed Cross-Objection bearing No.52/R/97.

19. There is one peculiarity in this set of appeals. After hearing the assessees the Commissioner (Appeals) obtained the advice of the Dy.

Chief Chemist on the technical matters before him. In making the order he heavily relied thereupon. Admittedly the appellants were not aware of the opinion. However, in the appeal memorandum contest is not made on this count. Counsel Shri Patil on specifically being asked, stated that he was not challenging the reliance placed on the said opinion by the Commissioner (Appeals).

20. Since the issues the common, the Appeals as well as the Cross-objections 21. To determine the classification of the contested products, it is necessary to understand the origin and utilisation of the contested products.

22. Blood is the fluid of life. An adult human has about 5 ltrs. of blood in his body. Blood consists of cells in a liquid called plasma.

Plasma accounts for about 60% of the total volume of blood. 90% of Plasma is water. The other 10% contains various body buildings and defensive proteins, waste products and hormones. The cells are of 3 kinds: the red blood cells carry oxygen to body tissues and remove carbon dioxide. They mainly consist of Hemoglobin and protein which carry oxygen as also enzymes. White blood cells

are the soldiers fighting injection. They combat with the infecting bacteria in two ways. Some kind of white cells surround bacteria and digest it. Other kind of white cells understand the composition of the invaders and produce substances called antibodies, which neutralise the bacteria.

The 3^rd variety of cells are called 'Platelets'. Their job is to block any puncture of blood vessels and prevent bleeding. They also release certain chemicals which react with fibrinogen which is a protein in the plasma thereby forming blood clots.

23. The fluid part of the blood that is left after the formation of clot is called serum. The difference between serum and plasma is that the later contains fibrinogen which the former does not have. The fibrinogen is the causative substance in the blood clot. The other substances such as glucose, fat, etc. are still present in the serum.

The study of serum is called serology and any tests using sera are called serological tests.

24. We have mentioned earlier that the white cells produce antibodies which are also parts of serum. Serum containing antibodies is called antiserum. Sera is the plural of Serum.

The heading covers, inter alia, the following products derived from blood: "normal" sera, human normal immunoglobudin, plasma, fibrinogen, fibrin, blood globulins, serum globulins and haemoglobin. The heading also includes blood albumin (e.g., human albumin obtained by fractionating the plasma of whole human blood), prepared for therapeutic or prophylactic uses.

Antisera are obtained from the blood of humans or of animals which are immune or have been immunised against diseases or ailment, whether these are caused by pathogenic bacteria and viruses, toxins or allergic phenomena, etc. Antisera are used against diphtheria, dysentery, gangrene, meningitis, pneumonia, tetanus, staphylococcal or streptococcal infections, snake bite, vegetable poisoning, allergic diseases, etc. Antisera are also used for diagnostic purposes, including in vitro tests. Specific immunoglobulins are purified preparations of antisera." A

healthy human or animal is injected with a toxic substance. The body produces antibodies. The blood is drawn and subject to clotting. The remittance clear Liquid Serum.

26. Where a person loses blood due to accident or where he suffering from a disease like cancer, blood transfusion becomes necessary.

However, there are certain prescriptions to be followed before the transfusion is made. It is to be seen whether the donor and recipient are compatible or not. This is done by verifying the blood groups.

27. There are a number of methods by which blood grouping is made. The most widely used method is 'ABO' grouping.

28. A red blood cell is a flat disk with a thin membrane around. The cell contains on its surface proteins called antigens. The antigens are of types as 'A' or 'B', The Plasma in which the blood cells live would have antibodies which would combat antigens of a type different from that carried by the blood cells in the plasma. Thus 'A' group blood would have blood cells having antigen 'A' and the plasma would contain Anti-B antibodies. 'B' group blood would have 'B' antigen cells and the plasma would contain anti - A antibodies. Some red cells would have both antigens 'A' & 'B' and in that case the plasma would have neither Anti A nor Anti B antibodies. This is called 'AB' blood group. Where these cells have neither antigens and where the plasma contains both Anti A and Anti B antibodies the blood group is 'O'.

29. Thus Nature has provided several kinds of antigens in the cells with antibodies in the plasm to contest the antigen of the other cells.

Where an antigen and an antibody come face to face a very interesting reaction takes place called clumping or agglutination.

30. If a person's blood type is 'A' his blood would have anti 'B' antibodies in his plasma. If blood type 'B' is given to him, the antibodies in the plasma will try to match antigens in the incoming blood cells. This would cause clumping of the blood creating clots, complications and even causing death. Therefore before

transfusion it is necessary to verify the blood grouping.

31. Another major blood grouping system is based on the 'Rh' factor.

One group of antigen is called 'Rh'. The person whose red cells have these antigens are called 'Rh+' group. Where this antigen is absent the person is called 'Rh-' If the Rh- person receives Rh+ blood, the antibodies of the recipient blood may develop an anti Rh antibody.

Therefore when the next time that person gets a transfusion of Rh+ blood clumping will occur where the Rh antibodies created in the plasma will clump with Rh antigen in the transfused blood.

32. Therefore it is necessary to test the human blood to ascertain its grouping and this job is done by using 'Sera' and 'Antisera'.

34. We have annexed the Annexure-A & B of the Show Cause Notices to this Order.

35. The first part of the contest is the classification of the products at Sr. Nos. 1 to 34 in Annexure-A. As the description of the items itself shows, these are Sera containing various antibodies. for a very long time the assessee claimed classification under Heading 3002 which was accepted by the department. The Appellants assessees continue to claim this classification.

36. The Revenue supported the classification under Heading 3005 as 'Blood Grouping Reagent'. The claim made by the Appellant assessees is that Heading 3002 is specific whereas Heading 3005 is generic. It is claimed that blood grouping antisera are not blood grouping reagents.

It is claimed that reagents produce chemical reaction is another substance where as there is no chemical reaction in agglutination. It is claimed that the agglutination is not a chemical reaction but a immunological reaction. It is claimed that irrespective of their uses antisera would continue to fall under Heading 3002 and that the classification of Therapeutic Prophylactic antisera under Heading 3002 and antisera used for blood grouping under Heading 3005 are wrong. It is claimed

that in the scientific and commercial parlance also these are called antisera. Very special emphasize was placed by the learned counsel for the assessee on the Tribunal Judgment reported in [1997 (89) ELT 545] (Inter Care Ltd. v. CC). In this judgment the Tribunal held that antisera used for detection of pregnancy was agglutinating sera eligible for benefit of notification No. 208/81-Cus. and classifiable under Heading 3002 in preference to Heading 3822.

37. The Revenue on the other hand supported the classification adopted by the Commissioner (Appeals). It is claimed that Serological reaction also involves chemical reaction. It is therefore claimed that antisera used for determination of blood grouping are reagents. The manufacturers in their on literature have described the goods as reagents. Chapter noted 3(e) to Chapter 30 is quoted to bring out the inevitability of coverage of such products under Heading 3005.

38. We have earlier cited the entry under Heading 3002. The entry 3005 reads as under: The entry 3005 is a residuary entry of which Sub-heading 3005.90 itself is residuary. Chapter note 3 have been referred by both sides. The relevant entry reads as under: "Heading No. 30.05 applies only to the following, which are to be classified in that heading and in no other heading of the Nomenclature: (d) Opacifying preparations for X-ray examinations and diagnostic reagents designed to be administered to the patient, being unmixed products put up in measured doses or products consisting of two or more ingredients which have been mixed together for such uses; 39. Sera and Antisera and covered under Heading 3002. These two substances have a number of uses. The Antisera apart from being used for blood grouping are also used as specific remedies in the case of snake bites, vabic, dog bites, etc. The structure of Chapter 30 is such as to group antisera as per their specific uses. Thus the antisera used for combating diseases would fall under Heading 3002. The Antisera used for producing immunity could also fall under this Heading. But where such antisera are used for blood grouping, then they would cease to fall under Heading 3002 and would fall under the residuary heading 3005.

40. Considerable energy was spent by Shri Patil, learned counsel in defining the phrase 'reagents'. It was claimed that reagents are substances which produce a

chemical reaction and that serological reaction cannot be called chemical reaction.

41. Shri Deepak Kumar arguing for the revenue said that serological reaction involves chemical reaction in as much as in the process antibodies conjugates to the antigens which gives non-covalent reaction and chemical energy is released from free energy.

42. We find that it would be an error to define the phrase 'reagent' used in note (3) to Chapter 30 as defined in the general English dictionary. There are a number of methods by which blood grouping is made. Apart from the 'ABO' and 'Rh' systems cited above, there are other systems like KEL, Lu, K, Le, MNS, and P systems. Without exception all of them use antisera leading to serological reaction. No chemical is used in blood grouping. Therefore it is futile to say that antisera cannot be called 'reagents'. Therefore, the dictionary definition of 'reagents' cannot be allowed to qualify or moderate the term 'blood-grouping reagents'.

43. The person associate with blood themselves describe such goods as reagents. In a book entitled as "INTRODUCTION TO TRANSFUSION MEDICINE" by Shri. Zarin Bharucha and Shri. D.M. Chauhan (D.K. Publishers, Wadia Baug, Mumbai - 33), there is a Chapter devoted to Laboratory Reagents.

The Chapter begins with the following: "Blood banking reagents from one of the major areas, which should be monitored carefully to ensure effective and correct functioning of a blood bank laboratory. Simple solutions like saline, buffers, copper sulphate are prepared in-house, while some reagents like antisera are procured commercially." 44. The sub-notes to heading 30.06 given in the HSN are also relevant here. Although in the appeal memorandum it is claimed that HSN should not be followed inasmuch as the chapter is not fully integrated. We find that this sub-heading in the HSN is fully reflected in the Chapter Note 3 of the HSN and in Chapter Note 5 of the CETA. The sub-notes speaks of the various blood grouping systems and uses the word "reagents" for the preparation containing sera for use in such blood typing.

45. In holding so we have taken the cognizance of Tribunal Judgment in the case of Inter Care Ltd. (Supra) which was repeatedly referred to by Shri Patil. The issue

before the Tribunal in the said case was whether the pregnancy detection and diagnostic kit imported by the Appellants in that case would qualify for the benefit of entry at Sr.No. 216 of the Schedule to the Notification No. 208/81-Cus. which read as "Agglutinating Sera". As we have shown above, any sera or antisera which causes serological reaction would qualify for this phrase. The tribunal found that the imported product contained antibodies capable of producing serological reaction. The Tribunal was dealing with the grounds for denial given by the revenue in that case and was not dealing with the classification of the products. In fact there was no dispute no classification in the finding impugned before the Tribunal.

This is apparent from the contents of para 9 of the said judgment. For the benefit of notification it was not necessary to decide on the classification. In holding the contested goods as falling under Heading 3002, the Tribunal had not examined the technical literature which is before us and which we have examined. If the products had been identical, we would have differed from the Tribunal judgment in the case. But since in the present dispute the products are not similar we hold that the judgment does not give guidelines to the classification of the contested products before us.

46. We hold that antisera used for the purpose of blood grouping would not fall under Sub-heading 3002, but would fall under Sub-heading 3005; and therefore, that the products at Sr.No. 1 to 34 of Annexure-A to the Show Cause Notice are classifiable under Heading 3005.

47. The second set of disputed articles occurs at serial No. 35 to 37 of Annexure A to the show cause notice. These are Purified Protein Derivatives (PPD) obtained from tuberculosis bacteria grown in special medium and then further processed. The Assistant Collector held that although these products were of micro bacterium origin they would merit classification under heading 30.05 in terms of Chapter Note 3(d) because they were intra-dermally injected into a patient. The Commissioner (Appeals) classified the product under 30.03. In doing so he relied upon the opinion of the Dy. Chief Chemist to the effect that intra-dermal administration of the PPD did not amount to "administration to the patient". The Dy. Chief Chemist

also opined that the product was not a measured dose but that the package showed it to be a multiple dose container. The Commissioner (Appeals) held that heading 30.02, was specific that the PPD were not designed to be administrated to the patient and therefore set aside their classification under heading 35.05. The appellant assessees support this finding. The Revenue contest it. The claim made is that since these products are injected into a patient the phrase "designed to be administered to the patient" is satisfied. It is claimed that the distinction between intra-dermal and subcutaneous was unwarranted. It is claimed that the phrase 'measured doses' would cover multiple doses also.

48. We have considered the rival contentions. Cultures of microorganism are covered under heading 30.02. Culture is defined in McGraw Hill Technical Dictionary of Scientific and Technical Terms, Third Edition, as a growth of living cells or microorganisms in a controlled artificial environment. The method and process of manufacture of the PPD is on record in the cross-objection E/CO-30-R/96. The process shows that the PPD is derived from the tuberculism culture after a complex process of steaming, filtration, perspective with THC, dissolution in pressure solution, sterilisation and filtration. Thus for manufacture of PPD the microbiological culture is just the commencing point. The end result falls way beyond the scope of heading 30.02.

49. Heading 30.05 would cover diagnostic reagents designed to be administered to the patient - to be put in measured doses. We have already brought above that the terms reagent is not an anathema to products falling under Chapter 30. As regards the "administration", we find that an unnecessary controversy has been created by discussions on intra-dermal administration and subcutaneous administration. The new Shorter Oxford English Dictionary define 'administer' as 'furnish, supply, give (something beneficial to)'. The tariff acknowledges administration of a substance to a patient and does not go into the issue of the method in which the administration is made. The Commissioner was on a wrong path in following the Dy. Chief Chemist opinion here.

50. As regards the measured doses also we find that the Dy. Chief Chemist entered into unnecessary semantics. He observed that whereas prescribed dose

was 0.1 ml., the vile containing 5 ml. would not be called as a measured dose but multiple doses. The Commissioner adopted this logic. To our mind the phrase multiple doses is not devoid of measurement. The vial as it existed did contain pre-determined quantity and the measurement of the dose was prescribed thereupon.

51. We observe that the contested products here are used to produce reactions which are measurable. We thus find that the tuberculosim PPD satisfies both the conditions prescribe din the aforesaid Chapter Notes. These products would therefore rightly fall for classification under heading 3005.90.

52. The third set of disputed articles are covered under serial numbers 1 to 3 and 5 to 15 of Annexure 'B' to the show cause notice. The assessees had sought coverage under heading 30.02 on the ground that they were blood fractions and toxin preparations. The show cause notice alleged that the classification warranted was under heading 38.22 inasmuch as they were miscellaneous chemical preparations. The Assistant Collector observed that the various preparations were prepared from fractionated human blood and by separating certain active proteins and other fractions such as gamma globulin therefrom. Such prepared proteins, etc. were bounded on polyesterine latex particles.

He observed that some of the proteins such as autragen latex were in the kit form containing three components each. He held that such goods satisfy the definition given in heading 38.22 as "composite diagnostic or laboratory reagents other than those of Chapter 30". He observed that the products were known as laboratory reagents.

53. The Commissioner in his order observed that for qualifying under Chapter 38 the products have to be miscellaneous chemical products.

Referring to the definition he held that just because they were diagnostic reagents, they could not categorically fall under heading 38.22. Quoting from the opinion of the Dy. Chief Chemist, he held that the polyesterine latex particle were merely carries and the material factors were the proteins and other derivatives of blood fractions. He therefore opted for classification under 30.02.

54. Revenue in the appeal memorandum stresses the word "composite" in suggesting classification under heading 38.22 on the ground these are composites or blood fractions and polystyrene.

55. We have examined the alternate classification. We find that the principal factors in the combination are the derivatives of human or animal blood or toxins. Thus the astrogin latex valitates of human sera. The R.A. test kit consists of two parts of sear and one blood fractions. The test kits compare the reaction between the patient's blood and the reaction in the standards placed along side. As such these are also laboratory reagents. These are therefore appropriately covered under heading 3005. If parts of the composition are to be taken into account on account of the presence of polyestyrine the product would fall under Chapter 39 and not under Chapter 38! 56. The last contested product is "Freunds Adjuvant". The Assistant Collector did not dwell on this item separately. The Commissioner (Appeals), however, classified it in heading 38.22 on the advice of the Dy. Chief Chemist.

57. It is described as an antigen in saline along with an emulsifier with mico bacteria. A plain statement is made that it is not covered under Chapter 38.22, without given any reasoning. In this compound also the antigen and the mico bacteria are clearly principle elements and therefore applying the logic above this substance would also merit classification under heading 30.05.

58. We have thus, not upheld the claim of the assessee that all the contested goods would merit classification under sub-heading 3002.02.

We have upheld the classification as made by the Assistant Commissioner of the various product falling under Appendix A annexed herewith. The classification of the products falling under Annexuture B made by us is entirely different from that claimed by both sides.

59. A similar situation had occurred in a judgment given by the Supreme Court in the case of Warner Hindustan Ltd. v. C.C.Ex., Hyderabad [1999 (113) ELT 24]. The Tribunal had in their judgment [1999 (43) ELT 33] classified Halls lcemint Tablets as confectionery falling under Chapter 17, where as the dispute before the

Tribunal was contesting entires under sub-headings 3003.19 and 3003.30. In this situation, the Supreme Court held that the Tribunal could not build up a new case at the appellate stage. What was appropriate was for the Tribunal to permit the authorities and the assessee to settle the issue.

60. As far as the products covered under Annexture A is concerned,we have upheld the classification made by the Assistant Collector. In the case of products covered under Annexture B. However, the issue will have to travel back to the Assistant Commissioner for denovo consideration.

61. We now come to the dispute regarding quantification of the duty payable raised in Revenue's Appeal No. E/1544/R/96-Bom. No doubt that the quantification would have to be done again as a consequence to the reclassification of the products. Even then certain basic issues raised in the Revenue appeal will have to be discussed and settled.

62. The classification list was filed on 9/3/93. The differential duty is calculated from that day, even when the Show Cause Notice was issued on 19/8/94, subsequent to the finalisation of the classification on 13/5/94. Before the Commissioner (Appeals), the assessees claimed that charging of differential duty from 9/3/93 was bad in law and that the duty should be calculated only from 27/8/93, on which date the provisional assessment was directed to be made. Although the order is little unclear, it appears that this argument was accepted by the Commissioner (Appeals). Revenue have cited the Supreme Court's orders in the case of Elson Machines Pvt. Ltd. v. CCE [1988 (38) ELT 571] and in the case of Plasmac Machine Mfg. Pvt. v. CCE [1991 (51) ELT 161] to negate this belief of the Commissioner. The assessees in thier crossobjections relied upon the Tribunal's majority order cited in [1991 (57) ELT 110]. In the judgment it was held that revision in classification could not be retrospective. It was claimed that the citation made in the Revenue appeal did not cover the present issue. It was claimed that the earlier classification list should be deemed to be in force until by an order it was revised.

63. Apart from the citation made by both sides, there is considerable case- law on the issue. Some Benches have held that only where the appropriate bonds are

filed, the assessment can be termed as provisional during the period of filing of the classification list and its approval. Some Benches had held that in the absence of such Bonds also, the assessments become provisional. The issue was settled by the Larger Bench of the Tribunal in the judgment reported in [2000 (118) ELT 687]. Unfortunately, in the present proceedings the records do not show whether the requisite bonds under Rule 9B were filed or not. For this purpose, this issue will also have to be reconsidered by the Assistant Commissioner.

64. The second dispute is on the directions of the Commissioner that the price should be treated as Cum-duty-price. The Revenue cites Supreme Court judgment in the case of Bata India Ltd. [1996 (84) ELT 164]. In this judgment, the Supreme Court held that where no tax was payable, but where the price was inflated by any amount by way of tax, the deduction was not available. The assessees say that bata India Ltd. judgment would not apply. They say that in case the duty is held later to be payable, the price would become Cum-duty-price. This issue is also settled by the Larger Bench of the Tribunal in the case of Srichakra Tyres Ltd. v. CCE, Madras [1999 (108) ELT 361]. In this judgment, it was held that where any duty was attracted subsequent to the sale of the goods, the goods would burdened with "duty payable" and would make the such price Cum-duty-price. On this ground, therefore, the orders of the Commissioner (Appeals) sustain.

65. On the other observations and directions made by the Commissioner as to the goods being capable of description "Bank Drugs" as also on the availability of Modvat credit, no contest has been made by the Revenue.

66. We, thus, uphold the directions of the Commissioner (Appeals) in remanding the issues back to the Assistant Commissioner, with the stipulation that he should examine the attendant circumstances in extending the ratio of judgment of the Larger Bench in the case of Rajiv Mardia v. Commissioner of Central & Customs, Indore [2000 (118) ELT 627] cited supra.

Name of the products which will fall under chapter sub-heading 3005.90----------Sr. Code No.Item Pkg.----------Sr. Code No. Item Pkg.No.