

Softesule Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-19-2002

Reported in : (2002)LC103Tri(Mum.)bai

Judge : J Balasundaram, S T S.S.

Appellant : Softesule Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. The appellants are manufacturer of various medicines and pharmaceutical preparations. The classification of certain products under Chapter Heading 3003.10 as patent and proprietary medicaments other than those medicaments which are exclusively ayurvedic, unani, sidha, homeopathic or bio-chemic as approved, was challenged by issue of notices. The entities consist of mixtures of vitamins and minerals or/are only capsules/tablets of vitamins being manufactured, after obtaining proper FDA approvals. The show cause notices were issued proposing to change the classifications from Heading 3003.10 to 2108.99 as 'edible preparations not elsewhere specified or included'. The dispute in the appeal relates to the period July, 1996 to March, 2000.

2. The Commissioner (Appeals) upheld the order of classification under Heading 2108.99 except for 'Karvol Plus' on the following findings : "On going through the labels of the products, I find most of them have ingredients Vitamin and Minerals, which the appellant claim to be medicines under Chapter 30. In this regard, I find

that adjudicating's authority arguments that Vitamins and Minerals Salts play a part in nutrition of human body. Therefore, excluded from Chapter 30. This cannot be said to be incorrect as the H.S.N. Notes of Chapter 30 exclude inter alia food supplement containing vitamins and minerals. Further, from the labels I find that the said products are for retail sale for actual user such as private person and do not indicate diseases on which it is effective, method of use, doses etc. mere selling the product through druggist and chemist does not qualify it to be the medicines. As regard the appellant's contention that, as per explanatory note 16 of Heading 21.06, food supplement based on extract from plants, fruits concentrate, honey fructose etc., and containing added vitamin and minerals intended for prevention and or treatment of the disease or ailments are excluded from Chapter 21 and are classified under Chapter 30 is not tenable as the product of the appellant are not based on extracts from plant, fruit concentrate but contains pure vitamins and minerals having chemicals base, i.e. made out of mixture of chemicals and salts and moreover do not indicate to have intention to prevent or treat disease/ailments, but maintain only general good health or well being in human being. Thus those will rightly fall under Heading 2108.99.

Appellants has relied on case laws, viz, C.C.E., Bangalore v. Juggat Pharma Ltd. 1999 (114) ELT 707 (T) in their defense. It is found that the ratio of the said judgment cannot be made applicable in their case as, I find that the appellant's Products do not seem to have therapeutic ingredients mentioned in the above referred case law to qualify it to be classified under C.S.H 3003.10. Going by their submissions I find that, they claim Vitamins (A & E) to have therapeutic value in itself. Notwithstanding the above fact, the appellant in their submission have not pinpointed the ingredient in their products which allies with the description of the ingredients stated in the Hon'ble CEGAT's Order thus making it to qualify to merit classification under C.S.H. 3003.10.

As regards granting of natural justice to the appellant by the adjudicating authority while passing the impugned O-I-O, I find that the adjudicating authority has specifically mentioned in the order that, similar matter was adjudicated by him earlier. Besides, the appellant had mentioned in their submission before him that, they did not wish to be heard in person. Therefore, passing of the O-I-O by the

adjudicating authority without grant of hearing is justifiable.

Regarding the product, 'Karvol plus', I find that, it is correctly classifiable under C.S.H 3003.10. As per the literature on the label, the ingredients are not vitamins and minerals as in the case of other products, but contain ingredients that are effective against common cold to clear stuffy nose, therefore the adjudicating authority's classifying it under Heading 2108.00 is incorrect." (a) The words 'food supplements' is nowhere defined nor has Commissioner (Appeals) formulated his own definition. The Dy.

Commissioner in his finding has concluded the entities to be 'food supplements' on the following finding : "... The symptoms in body or mind that would fall in the ambit of the conditions which may be described as "disease" could be caused by a bacterial or viral infection, malfunctioning of certain organs on account of certain physiological factors, e.g., aging or even an imbalance in diet caused by deficiency of one or important nutrient or ingredient of foods such vitamins, mineral salts etc. which may cause malfunctioning of one or other-organ of the body resulting in a disease. The disease of the last category have to be prevented/cured by proper administration of the particular ingredient/ingredients in which the food has been deficient. In other words the food taken by the con-cerned persons has to be supplemented by taking such food-supplement as containing the missing dietary ingredients which could be one or several of the vitamins, mineral salts, extracts of certain herbs, etc. Logically such preparations have to be looked upon as food supplements, a view that, as referred herein before., is amply sup-ported by the Explanatory Notes to the HSN".

We cannot find any reason to come to agree to this definition of 'food supplement'. Interpretation of a term, especially for classification purposes, when such term is not defined, has to be resorted to by the common understanding of the term by the persons who deal with the entities in the trade, manufacture of the same. In commercial understanding the entities under dispute are understood as drugs pharmaceutical and their manufacture and trade is controlled by the Drug Control Authorities. Rule 124B of Drugs & Cosmetics Rules, 1945 prescribe standards for patent and proprietary medicines containing vitamin. The entities are sold on

prescription and are to be administered in prescribed dosages. Vitamins are commonly understood to be medicaments required to be taken under a Medical Practitioner. A common man does not understand them to be 'food supplements/part of food' like 'Bournvita' or like products.

We would also not consider them to be food supplements.

(b) Considering Explanatory Notes No. 16 to Heading 21.06 of HSN (page 172) we find the entry to be "(16) Preparation, often referred to as food supplements, based on extracts from plants, fruit, concentrates, honey, fructose, etc., and containing added vitamins....." Therefore to fall under Heading 21.06, the entity has to be, a preparation of an extract from plants, fruit concentrates, honey, fructose, etc., which may contain vitamins/minerals added to it. The primary base is stated to be a preparation of extract of plant/fruit/honey, etc., and to that the vitamins or and minerals could be added as secondary items. In the entities herein, this primary base is lacking. We have already found that they are not and cannot be referred to as 'food supplements' in any case. Therefore, the HSN notes do not approve of classification under Chapter Heading 21.06.

(c) When we find, that the entities herein do not fall within the term 'food supplements containing vitamins and/or minerals' but are only 'vitamins' and concentration of vitamin and minerals, we find no reason to exclude them from the purview of Chapter 30 by Note 1(a) thereof which reads as under: (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters) (Section IV)." To be hit by this exclusion Clause the entity has to be first a food. We find therefore, no reason to exclude them from Chapter 30 on the grounds arrived at by the learned Commissioner (Appeals).

(d) There is no material available to consider the entities herein as 'food supplements or/and food preparation'. If the entity is not "food" itself or/and "food preparations" then they would not be covered under Section IV. Consequently cannot be classified under any of the Chapters 16 to 24 of the tariff.

(e) The Commissioner (Appeals) ground for rejecting the reliance on the case law CCE v. Juggat Pharma Ltd. - 1999 (114) E.L.T. 707 after accepting the vitamins to

be having a therapeutic value in itself, only on the ground of not having been printed the ingredients in the entities impugned herein is not approved. It may be a reason for not accepting the classification under Sub-heading 3003.10, it cannot be a ground to arrive at and approve the classification under Sub-heading 2108.99.

(f) We also do not approve the finding of the learned Commissioner (Appeals) that there is no violation of ground of natural justice to the appellants by the adjudicating authority, since they had been heard on similar matters earlier they need not be heard in this matter. Natural justice is not a grant, but is a right of the assessee. Right of hearing is sine qua non proceedings continued by violating this right cannot be upheld on account of any reason, except that of public expediency where post decisional hearing should be granted. The present orders passed by denying the right of hearing are to be set aside only on that account.

(g) When we find on merits there are no reason to uphold the present orders of classification under Sub-heading 2108.99 of CETA, 1985 and the orders are passed by depriving the right to natural justice, they are required to be set aside.

4. In view of our findings, the orders classifying the entities under Sub-heading 2108.99 are set aside.

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