Collector of Central Excise Vs. Surgichem

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-27-1986

Reported in : (1987)(11)ECC74

Appellant : Collector of Central Excise

Respondent : Surgichem

Judgement :

1. The Collector of Central Excise, Rajkot has filed an appeal being aggrieved from Order-in-Appeal No. E-l1460-1461/AHD-76-77/83 dated 30th August, 1983 passed by the Collector of Central Excise (Appeals), Bombay.

2. Briefly the facts of the case are that the assessee manufactures 'Adhesive Plaster B.P.C.' and declared the same as non-excisable in classification list dated 8-12-1970 which was approved on 19-12-1971 by the then Assistant Collector of Central Excise, Jamnagar. While filing the classification list dated 2nd January, 1983 the same product was also declared as non-excisable by the assessee but the Assistant Collector, Central Excise, Jamnagar approved the same under Item No. 60 of Central Excise Tariff as Adhesive Tapes all sorts. The assessee had filed an appeal before the Collector of Central Excise (Appeals), Bombay and the said case was remanded back for denovo adjudication.

Meanwhile the said manufacturer had also challenged the said classification before Honourable Civil Judge, Rajkot by filing Civil, Suit which was dismissed in January, 1976. Thereafter, the Superintendent, Central Excise Rajkot issued two

Show Cause Notices for recovery of duty on two products namely Adhesive Tapes (i.e. Adhesive Plaster B.P.C.) and Corn Tapes vide Show Cause Notices No.V.60/Case/1/76 dated 3-4-1976 and No. V.14E/ Case-1/76 respectively for the period from 19-5-71 to 31-1-1976 and 26-3-1971 to 31-1-1976. The Assistant Collector of Central Excise, Jamnagar confirmed the demands under his order dated 19-10-76. Being aggrieved from the aforesaid order the assessee had filed an appeal before the Appellate Collector of Central Excise, Bombay. The same was rejected vide order dated 17-12-76. Being aggrieved from the aforesaid order the assessee filed a revision application which was also rejected by the Government of India vide order dated 31-3-78. Thereafter the assessee filed a Special Civil Application in the High Court of Gujarat and Government's order was set aside on the question of applicability of rule 9(2) of the Central Excise Rules, 1944. The Government of India filed S.L.P. before the Supreme Court and the case was remanded to the Gujarat High Court for consideration of applicability of rule 10A. It was in this context while deciding Special Civil Application No. 899/78, the Order-in-Appeal No. 2097/76 dated 23-11-76 was remanded for denovo consideration. The assessee did not challenge validity of rule 10A on account of decision given on classification of identical product under Tariff Item 68 by the Central Board of Excise and Customs vide Order No. 29/81 dated. 31-8-1981. The appeal bearing No. V-2(60)-1017/83 was filed by the assessee as per observations of the High Court of Gujarat.

The learned Appellate Collector of Central Excise had held that Adhesive Plaster manufactured by the respondents are drugs as per the Drug Control Act and these were manufactured according to the Pharmacopoeia! specifications under the licence granted by the Drug Control Authority. The Collector of Central Excise (Appeals) Bombay therefore, held that Adhesive Plaster Porofix B.P.C. & U.S.P.manufactured by the assessee were classifiable under Item No. 68 of the Central Excise Tariff. Being aggrieved from the aforesaid order the revenue has come in appeal before the Tribunal.

3. Shri A.S. Sundar Rajan, the. learned J.D.R. has appeared on behalf of the appellants. He has reiterated the facts. He has pleaded that the products manufactured by the respondents falls under Tariff Item 60 (Adhesive Tapes all

sorts not elsewhere specified. Shri Sundar Rajan states that the respondent's claim is that the same falls under Tariff Item 68. He also argued that he does not propose that the product in dispute falls under Tariff Item 14E. Shri Sundar Rajan states that Tariff Item 60 is very specific and relates to Adhesive Tapes, all sorts, not elsewhere specified, including cellulose adhesive tape, and paper bag adhesive tapes, in relation to the manufacture of which any process is ordinarily carried on with the aid of power. Shri Sundar Rajan placed his reliance on an earlier judgment of the Tribunal in the case of J.L. Morison, Son & Jones (India) Ltd., Bombay reported in 1984 (15) E.L.T. 251 wherein the Tribunal had held that "Zinc Oxide Adhesive Plasters B.P.C. & Elastoplast Electric Adhesive Bandages B.P.C. were not classifiable under Item 60 but under Item 14E of Central Excise Tariff. Shri Sundar Rajan states that the Tribunal has got a wide jurisdiction and there is no bar for the Tribunal to come to a different conclusion. Shri Sundar Rajan has pleaded that in view of the earlier judgment of the Tribunal the appeal filed by the revenue should be accepted.

4. Shri M.A. Hidayatullah Adv. with Miss Radha Rangaswamy has appeared on behalf of the respondents. Shri Hidayatullah, the learned advocate states that the respondent manufactures Adhesive Tapes B.P.C. Tariff Item 60 relates to Adhesive Tapes of all types and after 1st March, 1975 it falls under Tariff Item 68. He has referred to the British Pharmaceutical Codex 11th Edition and on page 633 which describes Zinc Oxide Self-adhesive Plaster; Synonyms Zinc Oxide Plaster; Adhesive Plaster. Zinc Oxide self-adhesive plaster is used to secure dressings and to immobilise small areas. He further argued that it does not possess any medicinal or therapeutic properties. He has referred to Tariff Advice No. C.B.E. & C F.No. 12/59/68-CX.II/I dated 17-4-1969 - Circular letter Medicine No. 3/69 where it is said that Zinc. Oxide Plaster B.P.C. has no therapeutic properties and is used mainly as a supportive for holding dressings. Shri Hidayatullah has referred to extract from the Hon'ble Finance Minister's speech made in the Parliament on 29th May, 1971. He has stated that excise levy was to be on medical Adhesive Tapes. Shri Hidayatullah states that the product manufactured by the respondent is a surgical dressing and as such the same is not covered by Tariff Item 60 of the Central Excise Tariff. He has also referred to a judgment of the Central Board of Excise and Customs in the case of Leukoplast (India) Private Limited, Ponda, Goa

(Order No. 29/81 of 1981 dated 31st August, 1981) where the Board had accepted that the 'Leukoplast' manufactured by M/s. Jonson & Johnson was a Surgical Dressing and was not Adhesive Tape. He has pleaded that the Order of the Board is not binding on the Tribunal but it carries its pursuasive value. He further argued that in the case of J.L.

Morison, Son & Jones (India) Ltd., Bombay reported in 1984 (15) E.L.T.251 the Tribunal had come to the conclusion that Zinc Oxide Adhesive Plasters B.P.C. are classifiable under Item 14E of Central Excise Tariff on the basis of the concession. The learned Advocate in that case had conceded on behalf of the appellant that the same may be classified under Tariff Item 14E. He argued that where a judgment is given by a Court on the basis of a concession it does not become a precedent.

5. Mrs. J.K. Chander, the learned J.D.R. in reply to the arguments of the respondent states that the product manufactured by the respondent is Adhesive Tape and not Surgical Dressing. Tariff Advices issued by the Board or Collectorate are not binding on the Tribunal. She has further pleaded that the decisions of the Central Board of Excise and Customs has got only a pursuasive value. She also argued that in J.L.

Morison, Son and Jones (India) Ltd's case the Tribunal had come to the conclusion after going through the facts of the case and has given its detailed observations in Para No. 21 of its order. She has pleaded for the acceptance of the appeal. We have heard both the sides and have gone through the facts and circumstances of the case. For the proper classification we feel that reproduction of Tariff Item 60 is very essential.---Tariff Description of Goods Rate of dutyItem No.---60 ADHESIVE TAPES, all sorts, not elsewhere and paper backed adhesive tapes, in or 15% ad valorem in relation to the manufacture of which any A simple perusal of Tariff Item 60 shows that it relates to adhesive tapes. The product manufactured by respondent is adhesive plaster B.P.C. In common parlance it is surgical dressing.

The learned advocate' had referred to the tariff advices issued by the Board and also a judgment of the Board in the case of Leukoplast India Pvt. Ltd. We are in full agreement with the order passed by the Central Board of Excise and Customs (Order No. 29/81 dated 31st August, 1981). We are not inclined to follow the earlier judgment of the Tribunal in the case of J.L. Morison, Son and Jones (India) Ltd., Bombay reported in 1984 (15) E.L.T. 251 in which case the Tribunal had ordered the classification, of Adhesive Plaster B.P.C. under Item 14E. The judgment was based on the statement of Shri D.B. Engineer Advocate. It was in the nature of the concession. In 'Salmond on Jurisprudence' Twelfth Edition Section 27 page 153 it is opined that "A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub-silentio".

"A good illustration is Gerard v Worth of Paries, Ltd. (K). There, a discharged employee of a company, who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of the priority of the claimant's debt, and, on this argument being heard, the Court of Appeal granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in the subsequent case before the Court of Appeal (1), the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R.said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. We went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed.

The rule that a precedent sub-silentio is not authoritative goes back at least to 1661 (m), when counsel said: "An hundred precedents sub-silentio are not material"; and Twisden, j., agreed: "Precedents sub-silentio and without argument are of no moment". In view of the above discussion we are not inclined to follow the earlier judgment of the Tribunal in the case of J.L. Morison, Son and Jones Pvt. Ltd. Shri Sundar Rajan during the course of arguments had also argued that the revenue does not press its classification under Tariff Item 14E of the Central Excise Tariff and he leaves it to the Bench. The Adhesive Plastic B.P.C. Tape does not possess any medicinal or therapeutic properties. It is a surgical dressing in Pharmaceutical and commercial parlance. Accordingly we hold that the adhesive plastic B.P.C.manufactured by the respondents falls under Tariff Item 68. In the result the appeal filed by the revenue fails.