Cce Vs. Dabur India Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-28-2003

Reported in : (2002)LC599Tri(Delhi)

Judge : S Kang, a T V.K.

Appellant : Cce

Respondent : Dabur India Ltd.

Judgement :

1. In these two appeals, filed by the Revenue (Appeal No. E/808/2002-C) and by M/s. Precise Laboratories Ltd. (Appeal No. E/2788/2002-C, the common issue involved is whether "Lal Tail" is classifiable under Sub-heading No. 3003.30 of the Schedule to the Central Excise Tariff Act as an Ayurvedic Medicament or under Heading No. 33.04 as a preparation for care of skin.

2.1 Briefly stated the facts are that M/s. Dabur India Ltd. manufacture "Lal Tail" which is cleared by them under Sub-heading 3003.39 of the Tariff as an Ayurvedic Medicament; that a show cause notice dated 12.8.99 was issued to them for classifying the same under Heading 33.04 and for demanding differential duty; that the Assistant Commissioner, under Adjudication Order No. 95/96-2000 dated 2.5.2000 dropped the further proceedings; that Commissioner (Appeals) under Order-in-Appeal No. 547/2001 dated 3.12.2001 has upheld the Adjudication Order. Hence the Appeal by Revenue.

2.2 M/s. Precise Laboratories also classified their product "Dabur Lal Tail" under Heading 30.03; that the Commissioner, Central Excise, under Adjudication Order No. 23/Commr/Meerut/2002 dated 27.6.2002 has classified the product under Heading 33.04, confirmed the demand of Central Excise duty and imposed a penalty equivalent to duty holding that the impugned product is understood and used by people/consumers for massaging babies and infants without any medical prescription throughout the year and that the product is basically a massage oil for infants and babies and curative or prophylactic values, if any, might be only secondary or incidental. Hence the appeal by M/s. Precise Laboratories Ltd. 3.1 Shri R.C. Sankhla, learned SDR, submitted that "Lal Tail" is nothing but a massage oil; that therapeutic property, if any, is only subsidiary one; that the product has been described on the label as "baby massage oil" and that "it maintains the tone of chest muscle"; that the impugned product does not treat the ailment or prevent diseases and accordingly it does not have therapeutic or prophylactic use; that no medical prescription by medical practitioner is required; that dosage is not prescribed and the product is used throughout the year, not for limited time; that the product is for massage of skin of babies/infants to promote growth and development of a child; that the product label also mentions that "also useful for infantile rickets"; that the word "also" emphasizes that this characteristic of Lal Tail is subsidiary in nature; that thus the packing label and literature supplied alongwith the product clearly indicates that the impugned product is used popularly as a baby massage oil and not for its medical properties, if any; that thus in popular meaning "Lal Tail" is not known as a medicine. He, further, submitted that as per Note 2 to Chapter 30 of the Tariff, "medicament" means goods for therapeutic and prophylactic use; that accordingly therapeutic and prophylactic use should be the main use and not subsidiary.

3.2 The learned SDR also mentions that the Tribunal has considered that the classification of the impugned product in M/s. Dabur (Tndia)'s matter itself; that the Tribunal has held in Mis. Dabur (India) Ltd. v.CCE, Jamshedpur, Final Order No. A-6921KOL/2002 dated 26.6.2002 that "Lal Tail is not a medicine prescribed for treatment of infantile rickets. The product is basically a skin nourishing item. The claim itself is not that it is a remedy for infantile rickets. It is a half hearted also "useful for infantile rickets". Thus Lal Tail is not a medicine. He mentioned that the

Tribunal, after referring to Note 2 to Chapter 30, the judgment of the Supreme Court in Shree Baidyanath Ayurved Bhavan v. CCE, Nagpur, 2002 (82) ECC 460 (SC) : 1996 (83) ELT 492 (SC) and Note 1(d) to Chapter 30, has held that "In respect of Lal Tail, it is clear that it is only massage oil. Therefore, its classification under Chapter sub-heading 33.04 as preparations for the care of the skin other than medicaments is appropriate. Note 5 to Chapter 33 makes it amply clear that all kinds of "skin & skin tonics" are classifiable under that sub-heading."CCE, Allahabad v.Harbans Ram Bhagwan Das Ayurvedic Sansthan (P) Ltd., 2003 (85) ECC 545 (T) : Final Order No. 230/2002-C dated 8.10.2002 wherein Tel Rahat Roohu' has been classified under Heading 33.05 of the Central Excise Tariff. He also referred to Board's Circular No. 333/49/97-CX dated 10.9.97 wherein it has been clarified that the drug licence may be used as a guide for the classification of product but not as the determining factor and the classification of a product under Chapter 30 or Chapter 33 may be done as per the Rules of Interpretation of the Central Excise Tariff Act, 1985 read with Chapter Note 2 to Chapter 33 and various judgments. Finally he also mentioned that the Larger Bench of the Tribunal in the case of Baidyanath Ayurveda Bhavan v. CCE, Patna, 2002 (82) ECC 185 (LB) : 2002 (48) RLT 897 (CEGAT-LB) has classified 'Dant Manjan Lal' as a tooth powder under Heading 33.06 and not under Heading 30.03 as Ayurvedic medicaments.

4.1 Shri V. Lakshmikumaran, learned Advocate, submitted that "Lal Tail" is a medicated oil meant for external application for infants and babies; that the main ingredients are Urad, Shankapushpi, Karpur, Deodaru Shar and Seasame oil which are mentioned in the authoritative books of Ayurveda, namely, Bhava Prakasha mentioned in the first schedule to the Drugs & Cosmetics Act; that Lal Tail is useful in Sookha Rog (Ricket) among the children and also helps in providing strength to the muscles of the babies. He relied upon the decision of the Larger Bench of the Tribunal in the case of Himtaj Ayurvedic Udyog Kendra v. CCE, Allahabad, 2003 (85) ECC 649 (LB) : 2002 (139) ELT 610 (T) wherein it has been held that the products "having ingredients exclusively mentioned in the authoritative books, but manufactured in accordance with the formulation of the manufacturer" would be classifiable as Ayurvedic medicament; that as the impugned product contains the ingredients mentioned in the authoritative text books, the same is classifiable under Sub-Heading No. 3003.39. He mentioned that Lal Tail is not a product falling under Chapter 33 as a beauty preparation; that the pungent smell of Turpentine oil will discourage people from using it as a beauty aid; that since the oil is for external application, the question of prescribing dosage does not at all arise; that in respect of ayurvedic medicament, on account of their time tested nature, no medical prescription is required; that the literature of the product prescribes the manner of use and the time; that care of the skin by mere application on surface which is the quality of a cosmetic item is not at all a relevant criteria; that on the other hand because of the use of Til oil, the medicinal effect is to be imparted by allowing same to penetrate the 7 layers of the skin; that this quality cannot at all be attributed to a cosmetic item; that as toning of the muscle is the main purpose of applying the impugned Lal Tail, it is nothing but a medicament.

4.2 He further submitted that for application of Note 1(d) to Chapter 30, it is necessary to first establish that the product is a preparation falling under Chapter 33; that the classification under Chapter 33 is to be with reference to the Heading and Chapter Notes; that it is also necessary to examine the accommodation of the impugned product under Chapter 30 before trying to exclude it from the purview of Chapter 30 by drawing reference to Chapter 33; that as per Note 2 to Chapter 30, "Medicaments" means goods which are products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; that the impugned product comprises two or more constituents which have been mixed for therapeutic or prophylactic uses; that Til Oil is used as a vehicle for taking the ingredients through the skin of the baby. He relied upon the decision of the Supreme Court in BPL Pharmaceuticals Ltd. v. CCE, Vadodara, 1975 (77) ELT 485 (SC). He also contended that the impugned product is not meant for use on skin; that the product is not for beauty purposes nor it promotes care of skin; that all the items covered by Heading 33.04 as mentioned in Note 5 to Chapter 33, are applied only on the surface of the skin and as such Lal Tail is not covered under the said Heading as it is applied by the process of massaging into the skin of the baby for curing a specific disease; that the finding of the Tribunal in Dabur India Ltd. case that the product is for nourishment and care of skin and healthy growth of babies is without any basis; that further the reasoning that this is not prescribed by a medical practitioner does not take away from the category of medicine as hundreds of medicines are sold over the counter without any prescription; that the Tribunal has classified Lal Tail under Heading 33.04 as it is only a massage oil; that there are many massage oil which are sold by institutions like Kottakal Arya Vaidya Sala for curing various diseases.

5. The learned Counsel also mentioned that the decision of the Supreme Court in Shree Baidyanath Ayurved Bhawan v. CCE, 2002 (82) ECC 460 (SC) : 1996 (83) ELT 492 (SC) was rendered in the context of Tariff Item 14E of the old Central Excise Tariff which did not contain a definition of the term medicament; that the test of common parlance applied in the said judgment will have no application in the context of definiton provided in Note 2 to Chapter 30. The learned Advocate also referred to Board's Circular dated 10.9.1997 wherein it has been mentioned that Drug Licence is indicative of the product being a medicine; that they possess Ayurvedic Drug Licence and as such the impugned product is an Ayurvedic medicament. In reply, the learned SDR mentioned that even the medicines available over the counter are used for limited period and are not used continuously.

6. We have considered the submissions of both sides. From the definition of the term, "medicament" as given in Note 2 to Chapter 30 of the Tariff, we observe that a product to be considered as "medicament" must have therapeutic or prophylactic uses. These uses should be the main use of the product. Mere fact that some ingredients contained in the product are mentioned in the authoritative text books on Ayurveda, would not make the product a "medicament". This view finds support from Note l(d) to Chapter 30 which provides that Chapter 30 does not cover "preparations of Chapter 33 even if they have therapeutic or prophylactic properties." Further Note 2 to Chapter 33 retains the products under Chapter 33 even if "they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value." This was the view of the Larger Bench of the Tribunal in Baidyanath Ayurved Bhavan v. CCE, Patna, 2002 (82) ECC 185 (LB) : 2002 (48) RLT 897 (CEGAT-LB). In the said matter it was submitted on behalf of the Appellants therein that "Dant Manjan Lal" comprised of several ingredients mixed for therapeutic/prophylactic use and was

manufactured under Drugs Licence issued by the competent authority. The Larger Bench of the Tribunal classified the product Dant Manjan Lal" under Heading 33.06 of the Tariff after observing that except two certificates, "the appellants had not produced any acceptable evidence that the product is prescribed by Medical Practitioner as a medicine for any disease or condition. On the other hand, it is admitted fact that the "Dant Manjan Lal" is for daily use." In the present matter also no evidence has been brought on record to prove the product's therapeutic or prophylactic properties.

The learned SDR has pointed out that the product on the label is described as under: As per product literature "Dabur Lal Tail is an ayurvedic baby massage oil that strengthens muscle and helps maintain suppleness of the baby's tender skin". We agree with the learned SDR that this is the main use of the impugned product. They also claim that the product corrects flabby dry skin in the region of hips and wrinkle on hands and legs occurring during rickets. This at the most is a subsidiary use which will not make the product a medicament.

7. We also observe that this Tribunal has already considered the classification of Lal Tail in the case of M/s. Dabur India Ltd. only [Final Order No. A692/KOL/2002 dated 26.6.2002]. The Tribunal has held therein that "The statement on packet regarding usfulness in infantile rickets does not also change the situation. Lal Tail is not a medicine prescribed for treatment of infantile rickets. The product is basically a skin nourishing item. As has been emphasised by the learned Counsel for the revenue, the scheme of the Central Excise Tariff is to assess only medicines which cure or prevent ailment as medicines. Incidental medicinal properties would not take cosmetics out of their natural home and put them in the unnatural company of medicines." The ratio of the decision of Larger Bench in Himtaj Ayurvedic Udyog Kendra, supra, is not applicable to the facts of the present matter. In the said matter, the Tribunal observed that "there are sufficient materials to support the contention of the appellants that its product is known as Ayurvedic 'medicament' in common parlance". One of such materials was the chief chemist Report to the effect that the product is an Ayurvedic medicament and moreover the Allahabad High Court has held 'Himtaj oil' as a medicament oil in Sales Tax matter. No such material has been brought on record in the present matter. The

Board's Circular No.333/49/97-CX dated 10.9.1997 also does not advance the case of the Assessees. Para 9 (c) of the Circular mentions that the drug licence may be used as a guide for the classification of product but not as the determining factor. The classification of a product under Chapter 30 or Chapter 33 may be done as per the Rules of Interpretation of the Central Excise Tariff Act read with Chapter Note l(d) to Chapter 33 and various judgments mentioned in the Circular. We thus held that the impugned product is not classifiable under Sub-Heading 3003-39 of the Central Excise Tariff as Ayurvedic Medicament. Thus we allow the Appeal No. E/808/2002-C filed by the Revenue. This is not fit case for imposition of penalty equivalent to the amount of duty as has been done in the impugned order No. 23/2002 dated 27.6.2002. We reduce the penalty to Rs. 25,000 only. But for this modification, the Appeal No.2788/2002-C filed by M/s. Precise Laboratories Ltd. is rejected. The stay petition also stands disposed of.