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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-26-2004

Reported in : (2004)(95)ECC339

Judge : A T V.K., P Chacko

Appellant : Sonic Electrochem Ltd.

Respondent : Cce

Judgement :

1. During the period August 1997 to March 1998, the appellants had manufactured a product and cleared the same under the brand-name "Jem Fresh". They had claimed classification of the product under Sub-heading 3808.10 of the CETA Schedule (vide Rule 173B declaration Nos. 2/97-98 dated 1.8.97 and 6/97-98 dated 27.1.98) and paid duty accordingly @ 8% ad valorem. The department did not accept their classification and proposed to classify the product under SH 3307.49 of the CETA Schedule (attracting Central Excise duty @ 18% ad valorem) and to recover the differential duty on the clearances for the aforesaid period. The department also proposed to penalize the party for the alleged evasion of duty. The show-cause notices issued in this behalf were contested by the party. The adjudicating authority confirmed the classification of the product as Air Purifier under SH 3307.49, and accordingly, confirmed the demands of duty totalling to Rs.4,81,904/- against the assessee. It also imposed a penalty of Rs. 45,000/- on them. The appeal preferred by the assessee to the Commissioner (Appeals) against the decision of the lower authority did not succeed.

Hence the present appeal.

2. Heard both sides. Ld. counsel for the appellants submitted that the product in question was composed of 99% para-dichlorobenzene (PDCB, for short) and 1% perfume and was used as a repellent against moths. By virtue of its moth-repellent property, the product was an insecticide classifiable under SH 3808.10. Ld. counsel relied on HSN Notes on Heading 38.08 and submitted that chemically defined products falling in Chapter 29, like PDCB, could be classified as disinfectants, insecticides etc. when put up in packings for retail sale. He also relied on Classification Decision No. 193 of the Harmonized System Committee of the World Customs Organisation and claimed that the said decision supported classification of the appellants' product under Heading 38.08. In this connection, counsel claimed that PDCB had an unpleasant odour and that the perfume was added to mask that odour.

Reference was also made to Howley's Condensed Chemical Dictionary (13th Edition) which mentioned odour and other physical properties of PDCB. Ld. counsel also relied on the Chemical Examiner's Test Report on the product in question, which inter alia, stated that PDCB could be used as a general insecticide. Counsel further submitted that the Tribunal's decision in the case of Shri Satya Sai Industries Vs. CCE, Indore, 2002-TAXINDIAONLINE-96-CESTAT-DEL, relied on by the lower appellate authority, was distinguishable on facts. On the other hand, Id SDR submitted that the classification issue was squarely covered in favour of the Revenue by the Tribunal's decision in Shri Satya Sai Industries (supra) wherein it had been held that the products viz. "Jet Fresh" and "Jem Fresh" of the said assessee were classifiable under SH 3307.49 and not under SH 3808.10. Referring to the description of the product as given on the product label, Id. SDR submitted that the appellants themselves had considered the goods as air purifier and introduced it in that way to their customers. The product was known as Air Purifier in the common parlance. Common parlance was also decisive in the classification of the goods, DR argued. According to Id. SDR, Classification Decision No. 193 of the Harmonized System Committee was of no aid to the appellants' case inasmuch as PDCB was not shown to have any unpleasant odour. In his rejoinder, Id. counsel contended that the product in

question was of a technical nature and, therefore, common parlance was irrelevant. In this connection, he relied on the Supreme Court's decision in *Bombay Chemical P. Ltd. Vs. CCE, Bombay* [1995 (77) ELT 3 (SC)]. Further, drawing support from the Tribunal's decision in *Peshawar Soap & Chem. Works Vs. CCE*, [2001 (138) ELT 855], Id. counsel contended that the product was known to be an insecticide in common parlance and, therefore, its classification under SH 3808.10 should be preferred.

3. The appellants have claimed the subject product to be classifiable under SH 3808.10 as an insecticide. The Heading and the Sub-heading read as under :-
38.08 Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulphurtreated bands, wicks and candles, and fly-papers).

3808.10 Insecticides, fungicides, herbicides, weedicides and pesticides." The Revenue has claimed the classification of the product under SH 3307.49. The requisite extracts from the Tariff Schedule are given below :-
33.07 Pre-shave, shaving or after-shave preparations (not containing substances specified in Note 1(c) to this Chapter), personal deodorants, bath preparations, depilatories and other perfumery, cosmetics or toilet preparations, not elsewhere specified or included; prepared room, deodorizers, whether or not perfumed or having disinfectant properties.

3307.39 Preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites: 3307.41 Agarbatti; 'Dhoop' and similar preparations, in whatever form The Revenue has treated the product as a "preparation for perfuming or deodorizing rooms", while the assessee has claimed it to be an "insecticide". On a perusal of the description of the goods given on the product label, we find that the appellants had wanted their customers to treat it principally as Air Purifier. The label description reads as under :- To use-Remove full inner wrapper and hang the pack in the Room, Toilet, Bathroom, Wardrobe or shoerack. Net Wt. 100 Gms. 99% Para Di-chloro Benzene Insecticide It is clear from the above description that the appellants had projected the product as "air

purifier" in the market and that the insect-repellent property of the goods was only intended to be subsidiary. The product was, admittedly, composed of 99% PDCB and 1% perfume. Going by the above label description of the product, one could find that the goods was intended to be used in the room, toilet, bathroom, wardrobe, or shoerack. It is also noteworthy that the label did not prescribe any safeguards for buyers of the product or restrict its use to any limited duration of time. We note that the products considered by the Tribunal in the case of Shri Satya Sai Industries (supra) were also composed of 99% PDCB and used in rooms, toilet, bathrooms, wardrobes, shoeracks etc. and, after noting the fact that the products were continuously used unlike insecticides which could be used only for a short duration, the Tribunal held that the products despite their PDCB content were room fresheners or deodorizers which merited classification under SH 3307.49. Id. counsel has argued that, as the decision in Shri Satya Sai Industries (supra) was rendered without taking into account any chemical test report, it could not be correctly followed in the instant case. We are not persuaded by this argument inasmuch as the test report available in the instant case does not in any manner advance the appellants' case. The Chemical Examiner's test report on samples of the subject goods reads thus : "Each of the three samples is in the form of crystallised cake in unit packing. Each has characteristics of p-Dichlorobenzene. p-Dichlorobenzene finds use as a general insecticide." This test report only said that the sample had the characteristics of PDCB. It did not take into account the 1% perfume contained in the sample and comment on its effect on the properties of PDCB. The observation contained in the test report that para-dichlorobezene finds use as a general insecticide is only one which reckons the chemical as a chemically defined product and not as a chemical in admixture with another chemical or ingredient, like the product in question. It cannot be employed in respect of a mixture of PDCB and perfume to say that the mixture is also an insecticide. The test report makes no difference vis-a-vis Shri Satya Sai Industries. Therefore, we are unable to distinguish the case of Shri Satya Sai Industries from the instant case in the way Id. counsel has sought to do. The conclusion reached by the Tribunal in Sri Satya Sai Industries (supra) is squarely applicable to the instant case, unaffected by the test report referred to by Id. counsel.

4. Counsel has also relied on the Classification Decision No. 193 of the Harmonized System Committee. The said decision is extracted below :-

DESCRIPTION OF GOODS	HS HEADINGS	CLASSIFICATION	CLASSIFICATION OF GOODS UNDER DECISION	RATIONALE AND CONSIDERATION OBSERVATIONS
Preparations put up for retail sale in 30-ml aerosol containers, containing anti-fungal agents (1.2% by weight), perfume, kerosene, ethyl alcohol and isobutene (propellant) and, in some preparations, diethyl phthalate. Used in hospitals, surgical theatres, offices, schools, sick rooms, etc., to safeguard against the propagation of fungi (C.O. 3808.20/1) (File 2718)	33.07/38.08			Due to the presence of anti-fungal agents, as active ingredients, it was agreed that the preparations in question had fungicide or microbiocide properties. The key question was then whether the added perfume rendered these products 'prepared room deodorizers' or simply masked the unpleasant odours imparted by other ingredients. The HSC favored the latter point and therefore decided to classify the products in sub-heading 3808.20 Application of GIR 1 Ld. counsel has argued that the perfume was added to mask the 'unpleasant odour' of PDCB and, therefore, the classification of the subject goods should be held under Heading 38.08, following the decision of the Harmonized system Committee. This submission of the counsel is based on the erroneous premise that PDCB has an unpleasant odour. He has, in this connection, referred to the Condensed Chemical Dictionary which mentions various physical properties of PDCB. According to the Dictionary, PDCB has a 'penetrating odour', which Ld. counsel has, obviously, misunderstood as unpleasant odour. Both pleasant and unpleasant odours, with enough intensity, can penetrate one's nostrils.

He has also overlooked the fundamental fact that PDCB belongs to the family of aromatic compounds which generally have pleasant or agreeable odour. The burden is on the appellants to show that PDCB has an unpleasant odour. They have not come anywhere near discharging this burden and, therefore, the ratio of Classification Decision No. 193 of the Harmonized System Committee is of no assistance to them in the instant case.

5. Ld. counsel has also relied on the HSN Notes on Heading No. 38.08.

The HSN Notes, inter alia, state that products intended to repel pests are also classified under the Heading. To our mind, this means that products which are exclusively meant for pest-repellent purpose are to be classified under the Heading. The goods in question was principally intended for use as air purifier and would not fall to be classified under the said Heading. The Notes further say that disinfectants, insecticides etc. when put up in packings for retail sale may or may not be mixtures and further that the unmixed products are mainly chemically defined products which would otherwise fall in Chapter 29, e.g. naphthalene or 1, 4 dichlorobenzene. This does not necessarily mean that a mixture containing 1, 4 dichlorobenzene (same as para-dichlorobenzene) is to be classified under the Heading. Neither is the subject goods any chemically defined product nor was it sold by retail as disinfectant, insecticide or the like. The product was, in fact, sold as air purifier. The appellants have not been able to substantiate their claim with reference to the above HSN notes. Their counsel has argued that the subject goods is known as "insecticide" in common parlance. In our view, Id. counsel cannot be heard to argue so on behalf of a party who themselves introduced their product as "air purifier" to the commoners/consumers. For this very reason, we are not impressed with the Id. counsel's reliance on the Tribunal's decision in Peshawar Soaps & Chemical Works (supra).

6. We shall also consult the relevant HSN Notes on Heading 33.07, which read :
(IV) Preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites.

(1) Preparations for perfuming rooms and odoriferous preparations used during religious rites. They usually operate by evaporation or burning, e.g., "Agarbatti", and may be put up as liquids, powers, cones, impregnated papers, etc. Certain of these preparations may be used for masking an odour.

(2) Prepared room deodorizers, whether or not perfumed or having disinfectant properties.

Prepared room deodorizers consist essentially of substances (such as lauryl methacrylate) which act chemically on the odours to be overcome or other substances designed to physically absorb odours by, for example, van der waal's

bonds. When for retail sale they are generally put up in aerosol cans.

Products, such as activated carbon, put up in packings for retail sale as deodorizers for refrigerators, cars, etc. are also classified in this heading.

The product in question would easily fit into the characteristics of "preparation for perfuming or deodorizing rooms" inasmuch as PDCB contained in the product is volatile (vide Condensed Chemical Dictionary) and is a space odorant (vide CCD) and as (admittedly) the product also contains a perfume. We have also noticed that the CCE mentions "Santochlor" a trademark under which PDCB is used for space deodorants. The actual use of the subject goods, as prescribed on its label, is also, noticeably, in rooms only. Therefore, we find hardly any reason to disturb the classification of the goods under Heading 33.07.

7. In the light of our findings and in view of the decision in Shri Satya Sai Industries, 2002-TAXINDIAONLINE-96-CESTAT-DEL, we hold that the product in question is classifiable under SH 3307.49 as held by the lower authorities. The demand of duty, consequently, gets confirmed. As we do not find any reason to interfere with the quantum of penalty, the same also gets affirmed. In the result, the appeal fails.

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