Pasteur Laboratories (P) Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-11-1987

Reported in : (1987)(12)LC817Tri(Delhi)

Appellant : Pasteur Laboratories (P) Ltd.

Respondent : Collector of Central Excise

Judgement :
1. The present matter relates to dispute regarding correct classification of 5 products manufactured by the appellants which are marketed as : 2. On 13th May, 1985 a show cause notice was issued to the appellant company by the department stating that these items, which were hitherto classified under Tariff Item 14-E as Patent or Proprietary medicines, would be classifiable with effect from 17th March, 1985 under revised Tariff Item No. 14-F(i) of the Central Excise Tariff. The show cause notice referred to Explanation II in the revised Tariff Item No. 14-F, according to which the said Tariff Item is inclusive of cosmetic and toilet preparations, whether or not they contain subsidiary pharmaceutical or antiseptic constituents or are held out as having subsidiary curative or prophylactic value.

3. In his order-in-original, the Assistant Collector classified the products Calaminol, Calamyl, Aquaminol and Calacream as cosmetics and toilet -preparations made for the care of the skin under Tariff Item 14-F of the Central Excise Tariff but held that Histacalamine would continue to be classifiable under Tariff Item 14-E of the Central Excise Tariff as Patent or Proprietary medicine. When the party went up in appeal before the Collector of Central Excise (Appeals), he upheld the order of the

lower authority. It is against this order that the appellant company is in appeal before us.

4. We have heard Shri S. Ray and Shri A.K. Sil, Advocates on behalf of the appellants and Smt. J.K. Chander, JDR on behalf of the respondents.

5. It is submitted by the learned advocates that the appellant company are manufacturing different drugs and medicinal preparations, including injectable and life saving drugs such as transmission fluids, under a licence to manufacture drugs issued by the Drug Control Authority of the state under the Drugs and Cosmetics Rules, 1965. Appellants have never manufactured any cosmetics or toilet preparations and have no licence for their manufacture. It is claimed that the impugned products are basically drugs or medicinal preparations for use in external treatment or for prevention of ailment. It is submitted that Patent or Proprietary medicines can be differentiated from cosmetics on the basis of therapeutic value, intended users, identification of the products in the trade and commercial users of the product.

6. Appellants submit that Calamine is recognised in several pharmacopoeas as having therapeutic value and that they have submitted formulae of manufacture of their products of Calamine range to the Drug Control Authority who have issued licence for their manufacture as Drugs.

7. It is submitted that in the literature which is distributed by the manufacturers to the medical profession, the products are not identified as meant for skin care or for use as a cosmetic for cleansing, beautification or promoting attractiveness of the body.

Further, the products are; identified and marketed as drugs and sold through the registered licensed druggists.

8. It is also submitted that the appellants are making bulk supply of the impugned products to various hospitals and that the medical profession recognises the items as drugs and prescribes them for indicated skin diseases.

9. Appellants have submitted that no basic change had been made in the scope of 'Tariff Item No. 14-F as a result of the insertion of Explanation II and there was no warrant for interpreting this Explanation as having the effect of enlarging the scope of the tariff item.

10. Another point made by the appellants is that there is no definition of Drugs or Cosmetics under the Central Excises and Salt Act, 19f 4 and, in the absence of such definition, reliance should be placed on the definition contained in the Drugs and Cosmetics Act.

11. In support of their argument that the Explanation provided in a Tariff Item cannot enlarge its scope, appellants have cited the judgment of the Supreme Court in the case of S. Sundaram Pillai v. V.R.Pattabiraman On the issue of applicability of Drugs and Cosmetics Act, appellants rely on the decision of the Bombay High Court in the case of Collector of Central Excise, Bombay v. Pharmaceutical Capsules Laboratories -1986 (25) E.L.T. 211 (Tribunal).

12. Responding, the learned JDR reiterates the view taken by the lower authority. She states that basically the issue is whether the impugned products are primarily having the properties of medicine or of cosmetics and toilet preparations used for the care of the skin. It is pointed 'out that Calamine I.P. is contained in Calaminol and Calacream upto 5% only, and in Calamyl and Aquaminol upto only 10%. It is submitted that Calamine lotion and preparations thereof are meant to be protective and not curative or preventive, and the use of Calamine in such small proportion cannot make the products medicines or drugs. It is further submitted that the manufacturer's pamphlet covering the Calamine range of products describes them as meant for protection of skin from sunburn, roughness, cracks and defatted condition. It is conceded that while classification of a product under Central Excise Tariff cannot rest on the basis of advertisements but such advertisements do help identify the nature and character of the products.

13. The learned JDR emphasises that some of the ingredients in the products may be medicinal and mentioned in some pharmacopae, but these can only be considered to provide secondary or subsidiary attributes to the products.

14. Smt. Chander has referred to the fact that Calamine has zinc oxide as an essential ingredient. It is submitted that in the decision of this Tribunal in the case of J.L. M orison, Son & Jones (India) Ltd. v.Collector of Central Excise, Bombay - 1984 (15) E.L.T. 251, it had been held that zinc oxide had therapeutic value but later this decision was reversed in the Tribunal in the case of Surgichem v. Collector of Central Excise, Rajkot vide Order No. 727/1986C dated 27-11-1986.

The learned ODR also referred to the decision of the Madhya Pradesh High Court in the case of Commissioner of Sales Tax v. Shri Sadhna Aushadhalaya - 1963 (14) S.T.C. 813.

15. We have carefully considered the facts of the case and the submissions made before us. Before we deal with the arguments put forward by either side, let us first examine as to what are the items, the classification of which has to be decided by us. The containers of the, item carry the following print: (i) Calaminol : Liniment Calamine - protects skin from sunburn -Calamine 5% - On an oil in water emulsion base perfume, indications; As a soothing antiseptic and astringent it is used in all forms of allergic (atopic contact and occupational) dermatities, urticaria, angioneurotic cedema and other irritable conditions of the skin. Application; To be dabbed on the affected part twice daily with a cotton wool swab. Apply three times a day or more if the skin is irritable.

(ii) Calamyl; Liniment Calamine - Composition; Calamine I.P. 10% w/v in oil in water emulsion base, agreeably perfumed. Indications; Indicated in eczema, urticaria and all forms of allergic, (atopic, contact and occupational) dermatitis, caterpillar, dermatitis, insect-bites, sunburn and any other irritable conditions of the skin. Application; Dab Calamyl on the affected area with a piece of cotton wool three times a day or more frequently if the skin is irritable.

(iii) Aquaminol : (Calamine lotion) Composition; Calamine I.P. 109& w/v (in aqueous base). Indications; As a soothing lotion, Aquaminol is indicated in eczema, urticaria, all forms of atopic, allergic, contact and occupational dermatitis, or any other irritable conditions of the skin like insect bite, caterpillar, dermatitis etc. Application; Dab Aquaminol on the affected areas with a piece of cotton wool three times a day or more frequently if the skin is irritable or as advised by the physician.

(iv) Calacream : A soothing and Astrigent cream in Lanolin Base -Gently rub Calacream on the effected area twice a day or more frequently for a quick relief. Composition : Calamine IP 5% w/v in washable cream base. Use calacream to have an instant soothing effect in sunburn and to keep the skin soft and healthy.

(v)Histacalamine ; Calamine with- antihistaminic agent. Calamine IP 5% Chlorpheniramine Maleate USP 0.4%. Indications - indicated in urticaria, eczema, sunburn etc. or allergic dermatitis of any kind.

Application : Apply locally twice or thrice daily or as directed by the physician.

16. The essential question for us to consider is whether the impugned products are cosmetics and toilet preparations under Tariff Item No.14-F; Sub-item (ii) which deals with preparations for the care of the hair and Sub-item (iii) which covers shaving creams, have to be straightaway ruled out. What survives for consideration is whether they are classifiable under Sub-item (i) as preparations for the care of the skin.

17. It is seen that the notice to "show cause issued to the appellants states that the impugned products, which were hitherto classified under Tariff Item 1A-E as Patent or Proprietary medicines, would become classifiable under revised Tariff Item 14-F(i) of the Central Excise Tariff with effect from 17th March, 1985 (the date of revision of the Tariff Item). The show cause notice refers to Explanation II to Tariff Item 14-F according to' which the Item includes cosmetics and toilet preparations, whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative and prophylactic value.

There is nothing else contained in the show cause notice to justify the re-classification of the impugned products, which were previously classified under Tariff Item 14-E as Patent or Proprietary medicines, under the revised Tariff Item No. 14-F(i), as Cosmetics and toilet preparations.

18. It is for us to consider in this background whether the amendment of Central Excise Tariff Item 14-F 'with effect from 17th March 1985, read with Explanation II

ibid, would justify re-classification of certain items held to; be Patent or Proprietary medicines prior to 17th March, 1985 as cosmetic and toilet preparations. We have also to decide whether the impugned products are cosmetic and toilet preparations containing subsidiary curative and prophylactic value or whether they are essentially Patent or Proprietary medicines which may also be useful for the care of the skin.

19. The Assistant Collector in his order-in-original has taken the view that while as per the Indian pharmacopae, calamine is categorised as astringent but preparations of calamine are shown as protective. He, therefore, concludes that such preparations cannot be "curative or preventive". The Assistant Collector then makes the general observation that there are many products in the category of cosmetics and toilet preparations which are useful in the protection of the skin against certain effects on the skin, but that does not make those products, drugs or medicines. In this connection he mentions the cosmetic preparation available in the market by the name of Lactocalamine. He points out that this item is used, sold and known as cosmetics.

20. It seems to us that there is a fallacy in these arguments.

Cosmetics and toilet preparations, which incidentally or secondarily have curative or prophylactic use, cannot be classified as drugs or medicines. At the same time, it is equally true that drugs and medicines, which incidentally may be useful also in the protection or care of the skin can hardly, because of their latter attribute, be classifiable as cosmetics or toilet preparations.

21. The argument in regard to lectocalamine is self defeating. Firstly, it is not shown that the impugned products are identical to lectocalamine or are of the same variety. Secondly, while it is known that lectocalamine is widely used, sold and known as a cosmetic preparation, it is not at all shown by any evidence referred to in the orders of the lower authorities, or any evidence produced before us by the department, that the impugned products' are used sold or known as cosmetics.

22. The Order-in-Original refers to the pamphlet covering the calamine range of products stating that the products afford "protection of skin from sunburns, roughness, cracks and defatted conditions" and comes to the conclusion that these are properties of cosmetics preparations used for the care of the skin. We, however, observe that the Assistant Collector has chosen to extract from the catalogue certain properties attributed to the products to the complete exclusion of every thing else that is stated in the catalogue and on the cartons. In the case of cala-minol, calamyl, aquaminol as well as histacalamine, it is stated that the product is indicated in urticarie, eczema, sunburn and allergic dermatitis etc. Calacreme is stated to be the drug of choice for patients suffering from all types of dermatitis as mentioned above in dry conditions, Calamine is described as being a potent sunscreen effective in reddened and inflamatory conditions of skin due to sunburn. Calaminol and Histacalamine, as per the catalogue is indicated in oozing dermatitis.

23. The argument in the orders of the lower authority that the attributes of the impugned products are of a protective rather than curative nature does not appear to be well founded. It is seen that in the case of all products other than Calacreme, there are instructions as regards application according to which the "affected area" should be dabbed with the product a number of times a day. Affected areas can only be areas already affected by disease or infection, and the effect of the use of the product, in such cases can only be curative and not protective.

24. Orders of the lower authorities hold that Lactocalamine is popularly known as a cosmetic and is available with dealers in cosmetics and toilet preparations. There is no claim at all from the department's side that the impugned products are similarly known as cosmetics or toilet preparations or commonly sold as such. Appellants have categorically claimed that the impugned products are sold only-through licensed druggists and this is not refuted by the department.

25. In the face of the catalogue and specimens of cartons produced before us, which give the nature of the product, its attributes, indications and applications, quite clearly they are not advertised or sold as cosmetics, or toilet preparations.

26. There is an argument made before the lower authorities that the perfume' used in these items is the same as that used in some cosmetics or toilet preparations. The use of special perfume to give pleasant smell to the items in question will not make them cosmetics and toilet preparations.

27. The lower authorities have sought to dismiss the curative or prophylactic properties of the product by saying that they are subsidiary. In the face of what has been discussed above this is not supportable, as, in the first instance, it has not been shown that the items in question are known, sold or used as cosmetics and toilet preparations.

28. The appellants have produced invoices to show that large supplies are made to Hospitals and that these are prescribed by the Doctors for the ailments indicated. Nothing that has been said before us on behalf of the Department refutes this claim.

29. We have considered the case law cited by the learned JDR. The decision of the Madhya Pradesh High Court in the case of Shri Sadhna Aushadhalaya related to hair oil manufactured by the assessee and the claim was that, it should be treated as a medicinal preparation and not as a toilet article. It would be seen that the product in question was undoubtedly an hair oil, a toilet item. According to the decision in that case the product had to be considered as per common parlance and commercial use as a toilet article in spite of the fact that it was an Ayurvedic preparation. In the matter before us, on the other hand it has not been shown at all that the item is a toilet item or a cosmetic.

30. In the two cases of 3.L. Morison & Surgichem cited on behalf of the department, the product in question was zinc oxide adhesive plasters.

In J.L. Morison's case, it had been decided that zinc oxide adhesive plaster was classifiable under Central Excise Tariff Item 14-E as patent or proprietary medicine but this decision was reversed in the case of Surgichem. It is true that in the case of Surgichem it was held that adhesive plastic B.P.C. tape does not possess any medicinal or therapeutic properties. V/e, however, feel that the product in these two decisions, namely, zinc oxide adhesive plaster, was totally different, and the decision was taken on the basis of the facts and evidence relating to the particular product. These facts and the related evidence cannot apply in the present case where the product is quite different.

31. We are not inclined at all :to go into the question of the ingredients of the impugned products or to weigh the arguments in terms of therapeutic value of the different contents. We are of the view that decision in such cases must rest on consideration of the basic issue as to what are the products known in the market as and how are they treated in the medical profession. We have noted that the products are being prescribed by doctors for specific ailments and diseases and supplied for use in various hospitals. Considering all the facts and evidence produced before us, it is clear that these are not items 'which are bought and sold in the market or used as items of toilet preparations or cosmetics.

32. In view of the foregoing the orders of the lower authorities in respect of products other than Histacalamine are set aside. Appeal allowed.