SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Aero Industries Vs. Cce

Aero Industries Vs. Cce

SooperKanoon Citation : sooperkanoon.com/35682

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-17-2004

Reported in : (2004)(116)LC537Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : Aero Industries

Respondent : Cce

Judgement :

1. Appellants, an assessee under the Central Excise Act, 1944, inter alia, manufacture and clear on payment of duty on entity '"Baygon Mosquito Specialist" classified under CETA 1985, schedule 3808.10.

2. On scrutiny of RII 2 return and the clarification declaration filed, it was observed, ...The product "Baygon Mosquito Specialist" was in aerosol cases of 320 ml and 500 ml having spraying device for household use with a declaration on the cans 'Repels Mosquitoes and other flying insects', The assessee had replaced the words "Repels Mosquitoes and other flying insects" by the words "Control Mosquitoes and other flying insects.

They had removed the subject entity after payment of duty as value as under Section 4 of the Central Excise Act, 1944, where they were, as found by the lower authorities to discharge duty under Section 4A of the Central Excise Act, 1944 in terms of Notification No. 9/2000 CE (NT) dated 1.3.2000 and reference No. 5/2001

CE(NT) dated 1.3.2001 as covered under Sr. No. 37 of the table to the notification, entry read as "Mosquito coils, mats and other mosquito repellant". Duty demands were confirmed for the period June 2000 to March 2001 along with penalty under Section 11 AC read with Rule 173 Q(1) of the Central Excise Rule, 1944 with interest under Section 11 AB. Hence this appeal.

3. After hearing both sides and considering the material, technical literature and submissions, it is found (a) The entity in question is an aerosol can with a spray device with the markings and the changes thereon as observed in the notice and that is not in contest. The contents are also uncontested and are as follows: Recommended for household use to control flying insects like house flies and mosquitoes.

(b) The assessee, as application for the grant of licence to manufacture the products, insecticides, that they are engaged in, had made the declarations, interalia for1. Allcthrin 0.5% aerosol Baygon 13.12.1994 Baygon Mosquito Specialist3. Dcltamcthin0.11%+ 12.1.1998 Allcthrin 0.13% aerosol Thus, it is apperent, that the ingredient active and acting as an insecticide in the entity under dispute i.e. the aerosol can and the 'Mosquito coil' being manufactured is same i.e. Allethrin and in same percentage in both the products.

(c) Allethrin is an insecticide, in its effect, is not in dispute.

As per the use of Allethrin, The Pesticide Manual Tenth Edition, prescribes the following under the heading 'Applications' Mode of action Non-systematic insecticide with contact, stomach and respiratory action. Gives rapid knowekdown. Paralyses insects before killing them. Uses control of flies, mosquitoes, ants, and other household and public health insect pests. Often used with piperonyl butoxidc or other synergists for control of chewing and sucking insects on ornaments, vegetables and other crops, for household and public health insect control, for insect control in animal houses, and as an animal ectoparasiticide.

The use of the active acting insecticide Allethrin in the "Mosquito Coil" and the aerosol, entity disputed herein, both being manufactured by the same assesee is "Control of Masquitoes". The effect of the ingredient would be the same, since

quantum is 5% in both the products is the same. The effect being different i.e. as killer in Aerosol and as repellent in Mosquito Coil is doubtful and not established.

(d) The effective use and application of an aerosol method for "Control of Mosquito" as it appears from the technical literature shown books, viz. Wold Book Encyclopedia' prescribes Aerosols as a mixture of extremely small particles and gas. The particles may be liquid droplets or tiny bits of solid materials. They are suspended (distributed) throughout the gas. Clouds and fog are aerosols that occur naturally....

Thus clouds, smoke, fog etc. or aerosol sprayer in a given space are the same effect. Methods for the aerosol production or smoke production may be different, the end products are same having an effect by same modus...

(e) (i) The internet download of the Changzhou Kangmel Chemical Industry Co. Ltd. on Brief Introduction to Application of Household Sanitation Insecticide as relied upon by the learned Jt. CDR on perusal reads and reveals ...In order to serve customers and society the application technology of mosquito repellent incense, electro-thermal mosquito repellent incense, liquid mosquito repellent incense, aerosol and spraying agent, etc. and the application of Kangmei's raw materials are introduced as follows...

Thereafter it deals with the coil shaped incense which states that the temperature on combustion volatilizes effectively into the air the active ingredient Allethrin. Similarly the tablets placed on electric heater volatilize the active ingredient Allethrin into the air; the liquid also acts in the same manner by volatilizing the liquid containing the insecticide by electric heating; aerosols achieve the effect by transmitting the ingredient Allethrin into a cloud/fog they create, by the spray action.

(ii) Therefore, there is no essential difference in the manner of functional operation i.e. by transmitting the active ingredient Allethrin droplets/solids in the vaopur/fog in the 'space to be disinfected'. Allethrin, as per the literature paralysis the prey i.e. mosquito and thereafter in higher doses and time of contact kills. The net effect is the space where the aerosol spray/surface fog/vapours are infused gets rid of

mosquitoes/flying insects.

(iii) The Webster's Encyclopedia Unabridged Dictionary of English language at page 1216 explains the term Repellant as Causing distaste or aversion, repulsive, repelling driving back, noun something that repeals "used repellent" and the word "Repel" is--"to drive back or force back (as assailant, in radar etc.) to thust back or away, to resist efficiently, etc..

(i) While the 20th Century Dictionary New Edition at page 1096 define "Repel is to drive off or back to repulse, to reject, to hold off, to provoke aversion is to repudiate These definitions are relied upon by the lower authority along with other submissions made and Technical Dictionary material shown by the assessee, which was also reiterated before us. However, when it is found that the effect along with of mosquito coil tablet, liquid and aerosol containing is the same. The mode of operation being same, the active ingredient is the same, then it cannot be concluded that only Mosquito Coil, Mosquito Tablet (Mats), Mosquito Liquid, would be covered as Repellents under the entry 37 to the notification which reads as Mosquito coils, mats and other mosquito repellants" and the same insecticide acting and delivered in same fashion could not be a repellant and covered by that entry.

(f) The appellants have tried to distinguish between insecticides that that kill and insecticides that repel and submit that should be different. They claims the aerosol to be used for 'Kill' and of insecticide is without any basis. When mosquito coil with the same percentage of Allethrin as in the 'aerosol' and acting in the same fashion, i.e. by producing fog smoke, like the aerosol is not claimed to be a "Kill" type of insecticide by same assessee. No special reason is advanced as to how the product declared as for control of mosquitoes earlier now becomes as 'Killer' only. The arguments advanced, though attractive, fail to convince. When Allethrin is in same percentage in the aerosol mode or coil mode, it could not be a repellent in aerosol, but could be a killer cannot be accepted.

(g) The plea on principle of "Ejusden genesis" and the case law relied upon by the learned Advocate for the appellant and the submission thereto to lead to the proposition that the coverage by the term 'Other mosquito repellant' the use of

heat energy to vapourable the active ingredient would be essential is considered. The energy to vapourable the active ingredient would be essential is considered. The aerosol/vapours and delivers is not contested. Vapour state is produced by pressure. The same could be and is achieved by temperature. The use of heat energy is use of temperature. The high pressures can substitute for less temperature and high temperature can substitute less pressure is the rule of physical science. Therefore the effect of "active ingredient dispensed by vapour in small droplets/solids dispersed in a given space" would be the common feature of the germs covered by the entry 37 of the notification. Aerosols, coils, mats, liquids with some percentage of Allethrin would be in same genra. The plea of Aerosols not being covered by 'other repellants' on grounds of Ejusden genesis would fail.

(h) The assessments under Section 4A are therefore called and duty as determined is upheld.(i) The advertising mode will not be relevant for classification.

However, the change, in the advertising mode, would be relevant to who the conduct of the assessee to be an exercise in revenue avoidance. The line between avoidance and evasion is very thin. The Ghost of Westminister has been exorcised from the law in UK and also by the Apex Court in India. "Avoision" is an amalgamation of the words 'avoidance' and 'evasion' and is a recognized word being used in literature on the subject of Tax Dodging, Tax Shelters. There is a case of 'avoision' when advertisement declaration on packs are effected to synchronize with notifications. Such avoision needs no encouragement. Liability to penalties for violation of the provisions are to be upheld. The question only to be considered is of quantum.

(i) Considering the orders on question of penalty as imposed equivalent to duty confined by invoking Section 11AC and Rule 173Q by Commissioner (Appeals), it is seen It is also on record that the appellant has been selling the product as repellant during the period prior to the disputed period. The labels on the container were absolutely bearing the word "Repellant Mosquito and other fly insects". Subsequently the word "Repellant" was substituted by the word "Control". The substitution of the world "Control" for repellant apparently has been made to place the product out of the purview of Section 11A, though there was no change in the

formulations and composition. Since the product has been marketed as "Repellant and ultimate customers by the product as repellant, the same should be categorized as "Mosquito Repellant'. Further there is nothing on record which can conclusively prove the disputed product is a 'mosquito killer'.

While these findings sustain the levy of duty under Section 4A notification on the basis of MR.P. declared, these findings Ipso facto will not be applicable to uphold the mandatory penalty equivalent to the duty. There was no requirement to file a declaration under Rule 173C. The assessee being a SSI, can be granted the benefit of an interpretation for classification. Section 11AC is not invokable. The violation of rules in as much as correct duty was not arrived at and paid has to be upheld, to call for a penalty under Rule 173Q(1). The same is therefore reduced from Rs. 34,17,075/- as imposed to Rs. 10 lakhs under Rule 173Q(1).

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com