

Precise Laboratories Pvt. Ltd. Vs. C.C.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-13-2005

Reported in : (2005)(102)ECC261

Judge : A T V.K., P Bajaj

Appellant : Precise Laboratories Pvt. Ltd.

Respondent : C.C.

Judgement :

1. In these 11 appeals, the common issue involved is whether the product 'Dant Mukta' imported by all the appellants from Nepal is classifiable under Sub-heading 3306.90 as confirmed in the impugned Order or under sub-heading 3306.10 of the Schedule to the Central Excise Tariff Act and whether the exemption under Notification No.6/03-CE dated 1.3.2003 and Notification No. 40/02 Cus dated 12.4.2002 is available to the product 'Dant Mukta' imported by them.

2. Shri B.L. Narasimhan, learned Advocate, submitted that principal raw-materials for the impugned product, 'Dant Mukta' are pipili, tomor seed, sunthi, clove oil, black pepper, roasted haritaki, clove leaf oil, camphor, kasni powder, menthe oil, sugandhit dravya and garric powder; that a similar product 'Dant Shakti' having the very same ingredients was initially classified s medicament on importation from Nepal; that the Department contended that the product is tooth powder meriting classification under heading 33.06; that the matter was finally decided by the Appellate Tribunal in the case of Dabur India Ltd. v. CCE 2000 (36) RLT 639

(Cegat) up-holding the contention of the Department that the product is not classifiable as medicament and is classifiable as tooth powder under heading 33.06 of the Tariff; that, thereafter, the appellants started import of the impugned product claiming classification under sub-heading 3306.10 of the Tariff; that the proceedings initiated by the Department for classifying the product as medicament were dropped by various Orders of the Commissioner Customs/Commissioner (Appeals) in favour of the appellants; that against one such order-in-appeal, the Department went in appeal before the Tribunal in the case of CC & CE Patna v. Sant Product Ltd., 004 (171) ELT 109 (T) that the Tribunal did not find merit in the Revenue's contention that the product is not classifiable under heading 3306.10 after observing that 'Dant Mukta' and 'Dant Shakti' are identical products which are used as raw-materials for manufacture of Lal Dant Manjan. He, further, mentioned that the Tribunal in the said decision has also observed that "the Commissioner (Appeals) has also discussed that the Superintendent, Customs Station, Raxaul, Bihar, Sent sample of 'Dant Mukta' to the Assistant Drugs Controller of India, Kolkata and it was informed that the sample is Dant Manjan or Tooth Powder." 3. The learned Advocate submitted that the present proceedings have been initiated by the Department contending that the impugned product merits classification under sub-heading 3306.90 as the product is neither tooth powder or tooth paste which is covered under sub-heading 3306.10; that the product has the essential characters of the final product, namely, Dant Manjan and is more akin to tooth powder which has also been accepted by the Department in the proceedings before the Tribunal in the case of Dabur india v. CCE, Meerut, 2000 (36) RLT 639 (Cegat); that in that case, the Adjudicating Authority in Adjudication Order dated 22.11.94, has held that the ingredients used in the manufacture of Dant Shakti are almost same which were used in the manufacture of Dabur Lal Dant Manjan and the impugned product has the characteristics/properties of tooth powder; that nature of tooth powder has been attained by the product in question and more especially it is a preparation for tooth powder which is separately classifiable under heading 33.06. The learned Advocate emphasised that the stand taken by the Department clearly show that the Department wanted the classification of the product as tooth powder and, therefore, the finding of the Commissioner that the Tribunal in that case has not decided the classification of the product as tooth

powder and that the earlier proceedings were on the ground that the product is cosmetic or toilet preparation, is not correct; that, in fact, the present proceedings initiated by the Department are directly contrary to the earlier stand taken by the Department that once the impugned product has the essential character of the final product, namely, tooth powder, it is classifiable as tooth powder in terms of Rule 2 (a) of the Rules of Interpretation for the Schedule. The learned Advocate also referred to the clarification given by the Ministry, vide letter F. No.528/48/2002 Cus (TU) dated 4.3.2003 wherein it has been mentioned that there is not substantial difference in composition of the two products, namely, 'Dant Mukta' and 'Dant Shakti' and the Tribunal's judgment in the case of Dabur India v. C.C.E applies to this case and the product may be classifiable under heading 33.06 in line with the Tribunal's judgment and the Department's earlier stand before the Tribunal. He, further, mentioned that the Commissioner's findings that the said clarification is not applicable since it only says that 'Dant Mukta' could be classified as dental hygiene and it does not say that the product is tooth powder, is, therefore, perverse, since in this clarification, the Ministry of Finance has clearly mentioned that the earlier Order of the Tribunal holding the product 'Dant Shakti' as tooth powder has been accepted by the Board and it was indicated by the Ministry that the Department should not change its stand only because of Revenue considerations; that the subject of the said letter was itself "Classification of 'Dant Mukta' under heading 3303.39 CET or 3306.10 of CET". The reliance has also been placed on the decision in the case of CCE, Chandigarh v. Dabur India Ltd. 2004 (170) ELT 324 (T) wherein the product Mukta Shakti Yog, principal raw-material for preparation of Lal Dant Manjan has been classified as tooth powder under sub-heading 3306.10 of the Central Excise Tariff following the decision in the case of Sant Product Ltd. (supra). He, further, mentioned that the Notification granting exemption mentions 'tooth Powder' and once the impugned product is classified as tooth powder, the benefit of notification cannot be denied; that when the Tariff and the Notification refer to 'tooth powder', the interpretation of the Tariff Heading would equally apply to interpret the notification as held in the case of Eagle Flask Industries Pvt. Ltd. v. CCE, 1991 53 ELT 65 (T) and Mukund Industries CCE, Pune, 1999 (105) ELT 678 (T).

4. He also mentioned that the appeal No. C/956/04, filed by M/s.

Precise Laboratories Pvt Ltd., the show cause notice was issued to classify the product under heading 3303.39 as against sub-heading 3306.10; that, however, in impugned Order-in-Original dated 16.9.04, the classification has been held under 3306.90 which is beyond the show cause notice and as such is liable to be set aside for this reason also.

He relies upon the decision in the case of *Lauls Ltd. v. CCE* 2000 (126) ELT 623. Finally, he mentioned that in respect of Appeals Nos.

C/957-960/04, filed against the common Order-in-Appeal dated 21.9.04, the Commissioner (Appeals) has held that the appeals are not maintainable on the ground that the Deputy Commissioner's Order dated 2.8.04 denying the exemption under Notification 6/02 CE is not an appealable Order; that the said finding is not correct since they were prejudiced by the said Order and were forced to pay C.V. duty and as such they have the right to file appeals. He has relied upon the decision in the case of *Gujarat Ambuja Cements Ltd. v. CCE.*, Chandigarh (Final Order No. 432/05 dated 28.03.05 wherein the communication dated 24.2.05 informing the appellants therein that the benefit of Notification No. 67/95 CE is not available, was held to be in the nature of an Order affecting the rights of the party.

5. Countering the arguments, Sh. D.N. Choudhary, learned S.D.R. submitted that the earlier decisions, relied upon by the learned Advocate, are not applicable as certain crucial facts have not been brought to the notice of the Hon'ble Tribunal in those matters. He referred to the Memorandum of Appeal filed by M/s. Precise Laboratories Pvt. Ltd. in which in paragraph e.2, it is mentioned that 'Dant Mukta imported is used as a raw-material for the manufacture of Lal Dant Manjan. The Dant Mukta which is in a concentrated form, is diluted in order to obtain Lal Dant Manjan.' He emphasised that it is thus apparent that the imported impugned product is not tooth powder but is a raw-material for the manufacture of tooth powder and as such cannot be classified under sub-heading 3306.10. He mentioned that this contention is strengthened by letter dated 20.1.04 by M/s. Sant Products Ltd. addressed to the Superintendent (Preventive) Central Excise, Indore, wherein it is clearly mentioned that they had never sold 'Dant Mukta' as powder 'Lal Dant Manjan'; that to this effect also, there is a letter dated 6.2.04 of

M/s. Burman Laboratories Pvt.

Ltd. addressed to the Superintendent (Preventive) Central Excise, Indore. The learned SDR emphasised the fact that heading 33.06 of the Central Excise Tariff Applies to "Preparations for oral or dental hygiene including dentifrices (for example, tooth paste and tooth powder) and denture fixative pastes and powders"; that sub-heading 3306.10 only applies to "Tooth Powder and tooth paste" and all Other products covered by Heading 33.06 will merit classification under Sub-heading 3306.90 as "Other"; that as the impugned products is used as raw-material for the manufacture of tooth powder, it cannot, by itself, be classified as tooth powder meriting classification under sub-heading 3306.10 and it has to be classified as "Other" in sub-heading 3306.90. The learned SDR, finally, submitted that the Notification No. 6/03CE, dated 1.3.2002 (Sl. N. 63) only exempts tooth powder and as the impugned product is only a raw-material for manufacture of tooth powder, the benefit of Notification cannot be extended to the impugned product. In this regard, he relied upon the decision in the case of Rajasthan Spg. Wvg. Mills Ltd v. CCE, 1995 (77) ELT 474 (SC) wherein it has been held by the Supreme Court that when the Notification No. 332/77-CE exempts polypropylene spun yarn falling under Tariff item 18E and not blended spun yarn containing 52% polypropylene and 48% viscose, the benefit of Notification will not be available as the Notification only exempts polypropylene spun yarn and not the blended yarn.

6. We have considered the submissions of both the sides. The learned Advocate has rightly submitted that the matter regarding classification of 'Dant Mukta' has been decided by the Tribunal in the case of Sant Products Ltd. (supra) following the decision of the Tribunal in the case of Dabur India. We do not find any force in the submissions of the learned SDR that the ratio of the decision in the case of Dabur India is not applicable as the rival headings were 30.03 and 33.06 in that case. In Dabur India case, it was the contention of the Revenue that 'Dant Shakti' is more akin to the tooth powder and it has essential character of tooth powder and as such is classifiable under heading 33.06 in view of Rule 2(a) of the Rules for the interpretation of the Schedule. The Tribunal accepted the submissions made by the Revenue in Dabur India Case (supra) and Note 2 to Chapter 33 of the Central Excise Tariff was also held to be applicable and "as the product is akin

to tooth powder", the Tribunal classified the same under heading 33.06. In *sant Products Ltd. case*, the Tribunal clearly held that the product is classifiable under heading 3306.10. There is also no force in the submissions of the learned SDR that the fact that the impugned product is used as raw-material in the manufacture of 'Dant Mukta' was not brought to the notice of the Tribunal in *Dabur India case*. It is specifically mentioned in *Dabur India case* that the 'Dant Shakti' is ultimately for manufacture of Dant Manjan (Tooth Powder) used for dental hygiene and that the impugned product has characteristics/properties of tooth powder. Rule 2(a) of the Interpretative Rules clearly mentions that any reference in a heading to goods shall be taken to include a reference to those goods incomplete or unfinished, provided that the incomplete or unfinished goods have the essential character of the complete or finished goods.

As the impugned product has the essential character of the complete or the finished goods i.e. tooth powder, it is to be classified under sub-heading 3306.10 which applies to tooth powder and tooth paste. Once the product is to be classified as tooth powder on account of its having the essential character of tooth powder, the benefit of Notification cannot be denied to the product as the notification also exempts tooth powder. It has been held by the Tribunal in the case of *Western Refrigeration Pvt. Ltd. v. CCE, 1995 (77) ELT 673 (T)* that when wording of the two entries is same, goods satisfying the entry of the Tariff Item and deemed to have also satisfied the working of the notification. The Tribunal has held that "As can be seen from the ratios of the above judgement for interpreting the wordings in the notification, the understanding of the relevant tariff entry and its rules has also been applied." This decision was followed by the Tribunal in the case of *Mukund Industries Ltd. (supra)* wherein it is mentioned that the decision in *Western Refrigeration case* has been upheld by the Supreme Court as reported in 1996 (83) ELT A 175.

Accordingly, we hold that the impugned products are classifiable as tooth powder under sub-heading 3306.10 of the Tariff and the benefit of Notification is available. In view of this decision, we are not considering the other submissions made by the learned Advocate in respect of Appeal No. C/956/04 filed by M/s. Precise Laboratories on the ground that the show cause notice was issued for classifying

the product under Chapter 30 of the Tariff. Similarly, we agree with the Learned Advocate that other four appeals No. C/957-960/04 are maintainable as by letter dated 28.02.2004, the Department has disallowed the benefit of the notification to the appellants. We, therefore, allow all the appeals.

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