Commissioner of Central Excise Vs. Pharma Medico (i) Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-07-2005

Reported in : (2005)(190)ELT254Tri(Mum.)bai

Judge : J Balasundaram, Vice-, A M Moheb

Appellant : Commissioner of Central Excise

Respondent : Pharma Medico (i) Pvt. Ltd.

Judgement :

1. The issue for determination in these appeals is the classification of Imidil dusting powder and Mi-cocept dusting powder manufactured and cleared by the assessees during the period in dispute - whether under GET sub-heading 3003.20 as pharmacopoeial products, as claimed by the assessees or under GET sub-heading 3304.00 as preparations for care of skin, as contended by the Revenue.

3. The products were tested by Chief Chemist whose report is reproduced below:- "The sample is in the form of white powder in an original unit container packing of 100 gms. It is mainly composed of talcum powder and perfumery compounds. To ascertain the exact composition of the product, on the spot study of manufacturing process and ingredients used is required." 4. Show cause notice dated 5-2-1996 proposing recovery of duty of Rs. 46,598/- on the ground that the products were preparations for care of the skin and proposing imposition of penalty was issued to the assessees which was adjudicated by the Assistant Commissioner vide his order dated 10-5-1996 approving the classification of the above mentioned two

products under CET subheading 3304.00 at 40% ad valorem and finalising the assessments accordingly, confirming the duty demand and imposing a penalty of Rs. 1,000/- on the assessees. This order was challenged before the Commissioner of Central Excise (Appeals), Mumbai, who allowed the appeal by way of remand by his order dated 11-8-1997; the matter was heard afresh by the Assistant Commissioner who passed fresh orders on 31-8-1998 ordering classification of the two dusting powders once again under CET sub-heading 3304.00 and imposed penalty of Rs. 1,000/- on the assessees. The matter was carried in appeal to the Commissioner (Appeals) who vide his order dated 9-4-1999 set aside the order of the Assistant Commissioner and accepted the claim of the assessees for classification under CET sub-heading 3003.10 on the grounds inter alia that both products contain clotrimazole which gives medicinal value to the products and that talcum powder functions as carrier. It is against this order that the Revenue has filed Appeal No.E/32/2000. In the meanwhile, show cause notice dated 21-8-1997 was issued for recovery of Rs. 25,83,944/- on clearances of the two products during the period September, 1992 to May, 1996 on the basis that the products were classifiable under Chapter Heading 33.04. The notice also proposed penal action against the assessees. The notice was adjudicated by the Commissioner of Central Excise, Mumbai, by order dated 24-2-1999 in which he upheld the contention of the department and confirmed the duty demand raised in the notice and also imposed penalty of amount equal to duty upon the assessees. This gives rise to Appeal No. E/2182/99.

7. The assessees have explained that 1% clotrimazole is as recommended in the recognised pharmacopoeia, that it is the main ingredient which is of therapeutic value and it is the only active ingredient in the products and that talcum powder is only a carrier or a medium. This has been controverted by the Revenue. Further, we note that the Commissioner, in the order challenged by the assessees, has relied upon the Tribunal's decision on similar product in the case of CCE, Mumbai v. Mutter & Phipps (India) Ltd. - 2000 (126) E.L.T. 856 dealing with prickly heat powder, and C.B.E.C. Circular No. 356/72/97-CX., dated 20-11-1997 to conclude that the disputed products are not medicaments but preparation for care of the skin. However, we find that the Tribunal's order has been reversed by the Apex Court as seen from wherein the Supreme Court has applied the common parlance

test in respect of the similar product, and that the circular has been quashed by the Hon'ble Delhi High Court in the case of Manisha Pharma Plasto Pvt. Ltd. v. UOI - . Since there is no dispute that the products in question are similar to prickly heat powder, the ratio of the High Court's decision and the Apex Court's decision cited supra is squarely applicable. Following the ratio thereof, we accept the assessees' submission that the two dusting powders, which are the subject matter of these appeals, fall for classification as medicaments under CET sub-heading 3003.10. The objection raised by the learned SDR to the non-challenge of the chemical examination report by the assessees is overruled for the reason that even according to the assessees, the product is mainly composed of talcum powder and perfumery compounds.

8. In the result, Appeal No. E/2182/99 filed by the assessee-company is allowed while Appeal No. E/32/2000 filed by the Revenue is dismissed.