

Collector of Central Excise Vs. Auxichem

Collector of Central Excise Vs. Auxichem

SooperKanoon Citation : sooperkanoon.com/4059

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-01-1988

Reported in : (1988)(17)LC308Tri(Delhi)

Judge : G Sankaran, S Jha, Vice, V Raghavachari, S T H.R., P A K.

Appellant : Collector of Central Excise

Respondent : Auxichem

Judgement :

This five member bench was specially constituted to hear these cases, as the normal bench C thought that there were contradictions in a few previous decisions on the subject.

1. Before this appeal was heard, M/s. Hico Products wanted to intervene as they said they were interested in the proceedings. The bench, however, did not allow their intervention.

2. According to the Appellate Collector, M/s. Auxichem, the asses-sees, manufacture (1) silicone AU 331, (2) auxichem 831 and (3) silicone softener 662 which were classified under central excise tariff item 15AA before 28.2.1982. After the amendment of this item in the 1982-83 budget, the department came to the view that as the said products were based on silicone, they should be classified under 15A(1). A notice of demand was issued in August, 1982 to recover duty from the assessee on clearances from 28.2.1982 to 31.7.1982. The Assistant

Collector decided that the goods were classifiable under 15A(1), and he required the assessee to pay a sum of Rs 465,459.60. The assessee then appealed this decision to the Collector of Central Excise Appeal, Bombay who overruled the Assistant Collector and decided that the products were classifiable under tariff item 15AA.3. In the arguments before us, the learned Counsel for the department said that the goods were silicones and since silicones are listed in 15A(1) their assessment can be only under item 15A(1). The Collector Appeals was wrong to classify the goods under 15AA by following the Tribunal's decision in order No. 368/83-C dated 2.11.1983 re : Hico Products (1984 ECR 1991). Mr. Sundar Rajan concentrated on the fact that a silicone must be assessed under the head in which it finds specific mention and that head is item 15A(1).

4. The matter, however, is not so straightforward or simple. According to the Collector, the assessee M/s. Auxichem import silicone oil and pay CV duty on it under item 15A. This silicone oil is subsequently diluted and mixed, and used in the manufacture of their products, silicone softeners 662 and silicone AU 331 etc. They manufacture no goods by the process of condensation and polycondensation etc. These goods themselves had been assessed under 15AA before the change in the tariff in February.

5. The Assistant Collector who adjudicated before him (Collector Appeals) also reproduced the arguments of the assessee as that the silicone emulsion involved no manufacturing process. There was only a mixing and no physical and no chemical reaction. This submission was not contradicted by the Assistant Collector and therefore, I take it to be correct that M/s. Auxichem simply mixed silicone oil with some other matter like water emulsifiers to produce their textile processing softeners. The appeal says that the products were based on silicone; it does not say that they were silicones. It, however, relies on the judgment of the Supreme Court on Dunlop India which rules that the end use of a product would be irrelevant for classification unless the tariff entry itself makes a reference to the end use.

6. The learned Counsel for the department Mr. Sundar Rajan said that the Tribunal's decision relied upon by the Collector Appeals was wrong.

The goods made by Auxichem were silicones and must be assessed as silicones where they are most specific.

7. The learned Counsel for M/s. Auxichem, however, said that they manufacture nothing; their activity was only to mix the silicone oil they imported (and on which they paid duty), with water and some emulsifying agents to produce the textile processing products. These products are used in textile processing. Furthermore, since the silicone oil they imported had been charged CV duty under 15A, there is no rule of charging duty on the preparations they prepare once again under the same item in central excise.

8. The case of the department is a weak one for various reasons First and foremost, the silicone oil on importation was charged to CV duty under 15A. Having paid this CV duty, the textile processing surface active preparations manufactured by Auxichem cannot be charged the same duty again. This is a fundamental principle of taxation. The Assistant Collector wants to charge duty on the preparations as if they were silicones. No product which, on entry into India, has been charged a CV duty can be charged the same duty as excise duty again whatever may be done to the product later. For this reason alone, I pronounce the action of the central excise of assessing duty on these preparations under 15A to be irregular and unlawful.

9. The only silicones that are assessable under item 15A are the synthetic polymers, the first stage when the silicone product, or if I may call it the undiluted, unmixed silicone polymer, is produced by synthesis. Generally speaking the states in which silicone appears are fluids, resins and elastomers. From these three so-called primary silicones, a number of derived products like sealants, rings washers, adhesives, surface active preparations, encapsulation cements etc. are obtained. Many of these preparations are in emulsions. All these preparations have other materials additives, emulsifiers etc. added to aid and help in the use of the preparations in the desired industry application.

10. I am not able to see the logic of assessing everything and anything containing silicone under 15A. The department itself is mistaken to say that silicone oil is listed in 15A, and that these preparations containing silicones are also listed. They

are not listed in 15A; only silicones are listed and they may be in pasty form, emulsion form; solution form, or they may be powder, blocks or lumps. However, great care must be taken here. It would not be correct to understand this to mean that any emulsion must be assessed under 15A. Only an emulsion of a silicone as such silicone in its primary state or one of its primary states, will be covered. A preparation containing silicone in emulsion for specific uses as in wetting, mould release, lubrication, will not be that emulsion; it is only an emulsion preparation used as wetting, mould release or lubricating preparation; otherwise all goods containing polymers or synthetic resins will have to be assessed under 15A. Thus paints, lubricants, adhesives, to name only a few, all contain varying amounts of synthetic polymers in mixtures or emulsions.

Silicones finds uses even in medicines as antifatulents. In all these preparations, mixtures compounds, it is the synthetic polymers that give the products their active, distinctive qualities and properties.

For example, in a coating (paint) compound, it is the polymer that coats, protects and binds. The adhesion caused by the synthetic glue is also due to the polymer. It would be a fantastic operation to assess medicines as a silicone under 15A simply because they contain silicone, even though silicone is the ingredient that gives the medicine its active character. Silicones find wide use as adhesives. They also find use in the preparation of varnishing compounds. To argue as the department does, all such products must come under 15A. And to travel further, many fibres are synthetic polymers in origin, nylon and polyester being the most well-known. We will then have to assess nylon and polyester fibres under 15A because they contain synthetic polymers, and because, according to the department, their specification under other heads would not prevent their assessment under the head specifying the material, synthetic polymer, of which they are made.

11. The department say that end use is irrelevant and they quote, in support, the Supreme Court decision in Dunlop India. I am afraid, however, that the appellants have not understood its meaning. The Supreme Court was dealing with the assessment of VP Latex. It held that no reasonable person could come to the

conclusion that VP Latex would not come under raw rubber. Since VP Latex was held to be raw rubber it is difficult to see what the use of VP Latex has to do with its assessment as raw rubber. If it was raw rubber, that was enough for the purpose of assessment specially when we know that the substance has so many uses. In the case of M/s. Auxichem, the product is not a silicone, but a preparation containing silicone for use in textile processing, it is its properties as a textile processing preparation that will govern its assessment, a preparation that finds application by virtue of certain qualities that it has through the presence of silicone. The use of silicones is irrelevant if it were silicones that we are discussing; but we are not discussing silicones, but a textile finish preparation that contains silicone. And for assessing surface active agents/preparations, if the use is not to be looked into, how does the department discover if a mixture or compound is a surface active preparation Surface active property is an attribute possessed by several different substances which find more uses elsewhere than in surface active applications.

12. The amendment of the tariff item 15A in 1982 was a subject of fierce controversy between the two opposing counsels. The learned Counsel for M/s. Auxichem said that their products had been assessed for several years under 15AA; it was only the amendment in February, 1982 that changed the view of the central excise department. The learned Counsel for central excise on the other hand, said that with this amendment, sili-cones were defined in a way that would effect a change in the kind of substances and products brought within coverage.

But, I confess, I am not able to understand the department's logic.

13. Silicones were listed in 15A even before 1982, and definition does not, as far as my knowledge goes, make any difference to the structure.

A defined silicone is identical in every respect, from all that I have read about it, to an undefined silicone : it is always a polymer produced by chemical synthesis and contains in its structure silicone atoms. I shall hold to this view until I am confronted by authoritative works to the contrary; and nothing was shown to me at the hearing to change my mind. If silicones are assessable under 15A after February 1982 they were assessable under the same item before that month. The

department's claim that the amendment in 1982 caused them to change their view is as unconvincing as it is lacking in scientific basis.

14. I shall now end this work by quoting from that oft-quoted authority, Hawley's CONDENSED CHEMICAL DICTIONARY, and the Harmonised Code. In the article on Silicones the dictionary lists the uses to which silicones in liquid form, resin form, elastomer form, are put.

The liquid finds uses as adhesives, lubricants, protective coating, mould release agent, wetting agent, surfactants, antifoaming agent, textile finishes. The resin finds uses as coatings, moulding compounds, sealants, bonding agents among others; while the elastomer finds uses as encapsulation, gaskets, surgical membranes etc. etc. It is worth our while to note a few significant points. Liquids which find uses as adhesives and resins also find uses as bonding agents. The two uses are closely alike in nature and function and for both, liquids and resins are used. Resins are used in coating and so are liquids. This is clear indication that the primary product or substance may be one, but the uses in which it is employed are several; and that two primary forms may find identical or near identical uses. The products occur in various forms; these find varying applications, the form depending on the use and vice versa. A lubricant which contains silicone liquid will also contain other medium, a carrier, an additive, a thinner or a thickener. The same article lists the form of silicones as fluid, powder, emulsion, solution, resin, paste; elastomer. These same forms of emulsion, fluid, resin, solution, will be found in preparations in the form of emulsion, fluids, pastes etc. etc. and so on and so forth.

It is impossible to list the variation and the combination which the primary product can go into. I will only repeat what I have said: it would be a mistake to assess a product or an emulsion containing silicone a second time under 15A simply because it contains silicones in emulsion or in solution or in mixture. The classification of silicones and its products is immensely difficult, even tricky, and it would be easy to make a wrong identification. For my part, I hold to the view I wrote in 1984 ECR 1991 that a product like katrang 150 was assessable not under 15A though it contains silicone, but under 15AA, as a surface active preparation,

because this was a more specific head.

I, furthermore, reiterate the view I set forth in order No. 368/83-C, re: HICO that a second levy to central excise duty is not warranted on goods after processing if they have already been charged to CV duty under the same head at the time of import.

15. The heading in the Harmonized Code which defines silicones is 39.10 and is reproduced below in full: The silicones of this heading are non-chemically defined products containing in the molecule more than one silicon-oxygen-silicone linkage, and containing organic groups connected to the silicone atoms by direct silicon-carbon bonds.

They have a high stability and may be, either liquid, semi-liquid or solid. The products include silicone oils, greases, resins and elastomers-- (1) Silicone oils and greases are used as lubricants remaining stable at high or low temperatures, as water-repellent impregnating products, dielectric products, as foam inhibitors, as mould release agents, etc. Lubricating preparations consisting of mixtures containing silicone greases or oils fall in heading 27.10 or 34.03 as the case may be (see corresponding Explanatory Notes).

(2) Silicone resins are used mainly in the manufacture of varnishes, insulating or waterproof coatings, etc., where stability at high temperature is required. They are also used in the preparation of laminates with glass fibre, asbestos or mica as the reinforcing material, as flexible moulds and for electrical encapsulation.

(3) Silicone elastomers, although not covered by the definition of synthetic rubber in Chapter 40, have some extensibility which is not changed by high or low temperatures. This property renders them suitable for manufacture into washers or other packings for appliances submitted to high or low temperatures. An application in the medical field is the manufacture of automatic brain valves used in cases of hydrocephalus.

16. It is easy to see that this expert and authoritative work classes under the head Silicones only such liquids, solids etc. as are silicones in primary form. It

specifically excludes mixtures and preparations containing silicone fluids, oils, greases. This is because the mixtures and preparations are not silicone liquids in primary forms. Silicones are not understood to include even compounds, blends, combinations which contain silicones with other materials and ingredients for specialised application. The CCCN also makes this explicit exclusion in chapter 39 in the heading on silicones.

Furthermore, both Harmonized System and the CCCN specify lubricating preparations and mould release preparations containing silicones under heads outside the main SILICONES head.

17. For the reasons I have set out above, I rule that M/s. Auxichem's products we have been discussing cannot be assessed under item 15A as they are not silicones, but only preparations of silicones. And as they are used in textile processing, it is evident that their nature is most akin to surface active preparations, wetting agents, softeners, and so on. For these products, there is only one appropriate item in the central excise tariff: item 15AA, which covers, with other products, surface active preparation, softeners, wetting agents etc.

18. I have read with great care the order proposed by brother Shri Syiem. I agree with his conclusion that the products under consideration in this appeal are appropriately classifiable under item No. 15AA of the Central Excise Tariff Schedule and not under item 15-A *ibid*.

19. However, I have to express my reservation on the finding contained in paragraph 8 which is repeated towards the end of paragraph 14 of Shri Syiem's order that it is not permissible to charge Central Excise duty under a particular item of the Central Excise Tariff Schedule on a preparation which is manufactured in India out of a product imported into India which has suffered additional duty of customs with reference to the same entry in the Excise Tariff Schedule under which the preparation manufactured in India is sought to be taxed. In my opinion it is not necessary to go into this question for the purpose of disposal of the present appeals. I would, therefore, not like to express any opinion on this aspect of the matter till a suitable opportunity arises.

20. I agree with Brother Syiem's conclusion that the product in question is only a preparation containing silicone and would merit classification under T.I. 15AA. I also share the reservation pointed out by the Senior Vice President in para 19 of the order. I must also express my reservation as to use of Harmonized Code and CCCN referred to in paras 15 and 16 of Brother Syiem's order in view of the observation of the Supreme Court in Atul Glass Industries Ltd. & Others v. Collector of Central Excise & Others classification of goods under Central Excise Tariff on the basis of B.T.N. With the qualifications aforesaid I agree with the conclusion.

Sd/- (S.D. Jha) 21. I agree that the proper classification of the product in issue is under item 15-AA CET. Accordingly the appeal is dismissed.

Sd/- (V.T. Raghavachari) 22. I also agree that the proper classification of the impugned product is under item 15-AA CET and dismiss the appeal.

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