Commissioner of Central Excise Vs. Solar Packaging Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-02-2006

Reported in : (2006)(108)ECC145

Judge : J Balasundaram, Vice, A T K.K.

Appellant : Commissioner of Central Excise

Respondent : Solar Packaging Pvt. Ltd.

Judgement :

1. The adjudicating authority confirmed a duty demand of Rs. 16,110/-and imposed a penalty of Rs. 5,000/- on the respondents herein on the ground that they were liable to pay duty on the clearance of ink for marker pens which were cleared without payment of duty under notification 83/90. The manufacturer was availing the benefit of notification 67/95 (captive consumption notification) which was held not to be available to them since the final product, viz. marker pen, was being cleared without payment of duty under exemption. The claim of the assessee that the ink for marker pens was not marketable as it had no shelf life etc. and therefore the ink was not an excisable commodity, was rejected by the Assistant Commissioner who relied upon a test report of the Chemical Examiner who had opined that the product may be considered as a type of ink, and rejected the assessee's submission at the time of personal hearing that even if it was considered as an excisable commodity, it was a writing ink which attracted nil rate of duty even as per the tariff and therefore the demand should be set aside. This claim that the product was a writing ink was rejected relying upon the test report

which called the product "a type of ink". The Assistant Commissioner therefore held that the product, ink, was classifiable under CET sub-heading 3215.90 and chargeable to duty @ 18%. The Commissioner (Appeals) accepted the contention of the assessee that since the show cause notice only referred to the intermediate product, ink, as a product falling for classification under Chapter Heading 32.15, the department had not issued any notice proposing classification as other than writing ink falling under CET sub-heading 3215.90, which was required to be done before confirming the demand. Hence this appeal by the Revenue.

2. None appears for the respondents in spite of notice; hence we heard the learned SDR and perused the records.

3. While agreeing with the Commissioner (Appeals) that it was of utmost import that the department should have been sure about the classification of the disputed ink at the time of raising the demand in show cause notice, we agree with the Revenue that he should not have set aside the demand but the proper course to be followed by him was to have remanded the case to the original authority for testing the product with specific reference to its nature either as a writing ink or an ink other than writing ink before arriving at the classification thereof and the subsequent demand thereon. We, therefore, set aside the impugned order and remand the case to the adjudicating authority for the purpose of drawing samples, getting them tested by the Chemical Examiner for determination as to the nature of the ink, viz. as to whether it is a writing ink as claimed by the assessee or other than writing ink as claimed by the department. The test result is required to be communicated to the assessees and they are to be heard before passing fresh orders. The impugned order is, therefore, set aside and the appeal allowed by remand in the above terms.