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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-27-1991

Reported in : (1991)LC264Tri(Delhi)

Appellant : Pieco Electronics and

Respondent : Collector of C. Ex.

Judgement :

1. The appellants were, during the material period, that is, from 1-1-1981 to 22-12-1985, engaged inter alia in the manufacture of non-cellulosic lacquers consisting of resin, pigments, filler and solvents. Classification of the goods was claimed under Item No. 68 of the erstwhile Central Excise Tariff Schedule ('CET', for short) with the benefit of duty-free captive consumption in terms of Central Excise Notification No. 118/75 dated 30-4-1975. On the basis of investigations, the department took the view that the goods were correctly classifiable under Item No. 14-I(5) CET ("Paints and enamels, not otherwise specified") and that the appellants had mis-declared the goods in the classification lists filed from time to time with a view to evade the duty payable thereon. Following a show cause notice dated 21-4-1986, covering the period from 1-1-1981 to 28-12-1985, and adjudication proceedings, the Collector of Central Excise, Pune, confirmed the demand for duty for the period of 6 months preceding the date of the show cause notice, dropping the demand for the prior period, but did not impose any penalty on the appellants.

2. We have heard Shri D.B. Shroff, Advocate, for the appellants and Shri L. Narasimhamurthy, DR, for the respondent-Collector.

3. In substance, the submission of the appellants before the Collector, as also before us, was and is - (ii) in paints, the formation of a film on the painted surface involves oxidation by reaction between the materials and atmospheric air whereas in a lacquer, the film is formed on the coated surface due to evaporation of the solvent. They have, therefore, different properties, qualities and characteristics though both are used to coat surfaces.

4. In response to a query from the Bench, the learned Counsel for the appellants, stated that the subject lacquers were marketable though not actually marketed being made according to the appellants' specifications for their in-house use.

"14. PIGMENTS, COLOURS, PAINTS, ENAMELS, VARNISHES, BLACKS AND CELLULOSE LACQUERS - 6. The Counsel assailed the Collector's logic behind his finding which seemed to be : lacquers are coatings; coatings are primers; primers are paints; hence, lacquers are paints. He submitted that this was fallacious logic. The matter was not so simple. In this connection, our attention was drawn to Page 449 of the book "Chemical Process Industry" by Shreve, published by Mcgrow Hill Kogakusha Ltd., under the heading "Lacquers", it is stated that cellulose lacquer is a liquid coating composition containing as the basic film forming ingredients cellulose esters, or ethers and plasticizers, with or without resins. By virtue of the evaporation of the solvent, they fall into the class called non-convertible coating whereas the convertible class includes oil paints and oil varnishes where the film as initially applied dries and hardens primarily though oxidation and polymerisation reactions induced by the surrounding air. The Collector, however had relied on passages from Kirk Othmer's Encyclopaedia of Chemical Technology" against the appellant without putting the material to them. Volume 16 of the Encyclopaedia deals with paint from Page 742. The paints that are discussed therein are commonly called trade-sales paints. They are air drying and are used primarily for exterior and interior coatings in houses and buildings, in contrast to those paints that are used for factory application to industrial products. The latter are dealt with as "coatings, Industrial". Lacquers figure under this head

and are stated to contain high moleculer weight builders that may be linear or branched but not cross-linked and do not change upon application and further treatment. When the solvent in a lacquers evaporates, the polymer molecules draw closer to each other and, after sufficient evaporation, the film will be dry and hard. Next, reference was made to the book "Protective Coatings for Metals" (3rd Edition) by R.M. Burns and W.W. Bradley, published by Reinhold Publishing Corporation. At page 385 following passage occurs :- The definition given earlier of a cellulose lacquer described its film-forming ingredients as cellulose esters or ethers and plasticizers with or without resins. Modern usage is in the direction of classifying non-cellulosic solvent drying type resin finishes as lacquers. For example, clear, heat reactive phenolic resin finishes are often designated as lacquers. Early Chinese and Japanese lacquers employed the sap from the varnish tree (Rhus vernicifera) as a vehicle. This is an oleoresinous material that dries by oxidation in a humin atmosphere. Pigmentation of lacquer vehicles provide what may be called lacquer enamels and these are broadly useful protective coatings. In contrast to oleoresinous type vehicles that dry by oxidative polymerization, lacquers dry by solvent evaporation. Many solvent type resins, such as the vinyls, acrylates, allyls, silicones, chlorinated rubber, non-drying alkyds, and maleic-modified ester guns, have been combined with cellulose derivatives to give coatings of improved properties. The direction of development in lacquer formulations has been toward higher solid content and this has been achieved by such means as the use of lower viscosity nitrocellulose and increasing the ratio of resin to nitrocellulose. Lacquers based on ethyl cellulose and upon non-oxidizing heat converted types of resins alone provide a great variety of finish compositions." 7. The submission of the learned Counsel based on the above-referred to, and similar, material was that lacquers were not considered in commercial parlance as paints. The department had not adduced any evidence to the contrary though the onus of classification was on them.

8. The learned DR, in his reply relied on the definition of 'Paint' in the book "Chemical & Process Technology Encyclopaedia" by Considine.

The definition reads as follows :- "Paint is a very broad word used to describe many types of materials used for decorative and protective coating of various

surfaces. In this description, the word paint is used to describe all types of pigmented coatings such as enamels, lacquers, latex coatings and alkyd flat wall paints." Similarly, enamels were also paints. The submission was that lacquer which was a coating did not cease to be a paint and since paints were properly classifiable only under Item 14 the subject lacquers were properly classifiable only that under item. Since lacquers did not fall in any of the sub-items, they would fall under residuary Entry 14I(5) which covered "paints and enamels, not otherwise specified".

9. The Counsel had submitted during the hearing two affidavits, one from D.K. Deshmukh, Paint Technologist and the other from Dr. M.A.Shenoy, Reader in Polymer Technology, Department of Chemical Technology, University of Bombay. Shri Deshmukh's affidavit stated that on going through the manufacturing process, the lacquers produced by the appellants could not be considered as paints, that they belonged to the lacquer family not based on cellulose or introcellulose and that lacquers as known to the trade and industry were different from paints, varnish, enamels etc. Dr. Shenoy's affidavit stated that acrylic lacquers could not be regarded as paints. They took longer to dry and the method of drying was different. Paints dry by oxidation whereas lacquers dry by solvent evaporation. The coating produced by paint would give a totally different effect. Generally lacquers were more expensive than paints. Therefore, they were not recommended for applications where paints would suffice. Dr. Shenoy further stated that acrylic lacquers were manufactured using acrylic resins and that there were other lacquers also based on nitrocellulose but this had different properties and end-uses.

10. With regard to these affidavits, the DR submitted that the opinion of these experts was not the same thing as opinion of the trade.

11. In his rejoinder, the learned Counsel for the appellants drew our attention to Chapter 32 of the Schedule to the Central Excise Tariff Act, 1985 which provided for specific coverage of lacquers based on acrylic or vinyl polymers.

12. We have carefully considered the rival submissions and perused the record. It is not necessary to discuss the evidence all over again because the import of the

evidence adduced by the appellants has been brought out in the preceding paragraphs. The appellants have produced sufficient material to show that in the parlance of the paint industry, paints, though a word of wide import, is known differently and distinctly from enamels and lacquers. Paints, as seen from the literature on record, act by oxidation or polymerisation of material in the coat of paint applied to a surface on the drying up of the paint.

On the other hand, when lacquer is applied to a surface, the solvent evaporates leaving the dissolved material in a dry and closed film. As against the evidence produced by the appellants, the Revenue has not shown, though the onus was on it, that lacquers are known in the trade as paints.

13. Item 14 (the relevant extracts of which have been reproduced earlier) has specific sub-items for different types of paints - such as Water Paints, Oil Paints, Ready mixed paints, etc. It has also a residuary entry for paints not otherwise specified. Certain lacquers have been grouped under sub-item III under the head Cellulose Lacquers.

This sub-item has been divided into two groups - (i) Nitrocellulose lacquers and nitrocellulose ancillaries and (ii) Cellulose lacquers, not otherwise specified. The main heading of Item 14 specifies cellulose lacquers distinctly and differently from paints. Therefore, it is reasonable and safe to assume that, for the purpose of the tariff also, lacquers have been treated as goods distinct and different from paints. However, Item 14 covers only Cellulose Lacquers and does not cover non-cellulose lacquers. Since lacquers are distinct and different from paints, it is not appropriate to classify them as paints, not otherwise specified. The proper classification would be under Item 68 which covers all goods not specifically described elsewhere in the Tariff Schedule.

14. In the above view of the matter, we set aside the impugned order and allow the appeal with consequential relief to the appellants.

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