**Collector of Central Excise Vs. Famous Cine Laboratory**

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**SooperKanoon Citation** : sooperkanoon.com/6978

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Feb-25-1992

**Reported in** : (1993)(66)ELT253TriDel

**Appellant** : Collector of Central Excise

**Respondent** : Famous Cine Laboratory

**Judgement** :

1. These are appeals filed by the Collector of Central Excise, Bombay-I against orders dated 19-8-1987 and 24-1-1990 passed by the Collector of Central Excise (Appeals) Bombay. The facts leading to these appeals are as under. The respondents herein produce what is called hypo-solution which the department sought to classify under Heading 3706 upto 1987 and under Heading 3707 after 1-3-1987. They also issued show cause notice to the respondents for having produced the goods without following Central Excise formalities and having cleared the same without payment of duty. The plea of the respondents that the goods were not dutiable as they cannot be said to be excisable goods was rejected and the Assistant Collector, Central Excise, Divn. G.I., Bombay-I Collectorate passed his order dated 24-1-1990 holding that the hypo-solution manufactured out of duty-paid granules amounts to manufacture of excisable goods, answering to description under Heading 3707.00 of Central Excise Tariff Act. This order of the Assistant Collector was challenged in appeal. The Collector (Appeals) in his impugned order dated 13-9-1990 allowed the appeal and set aside the Assistant Collector's order. He held that the material hypo-solution has

got a very short shelf life and is not marketable and therefore, will not become liable to Central Excise duty. In the other appeal, the Assistant Collector passed a cryptic order on 12-9-1986 saying that sulphur hypo crude falling under Heading 3706.00 is not eligible for exemption under Notification No. 217/86. This order of the Assistant Collector was also set aside in appeal by Collector (Appeals) by his order dated August, 1987 but there is no reasoning in this order of the Collector (Appeals) except to say that Assistant Collector's order is ex parte.

2. When the appeals were called none was present for the respondents who have sent their communication to say that the issue may be decided on merits. They filed a Cross Objection containing their objections to the appeal.

3. Shri L.N. Murthy, learned JDR contended that the hypo-solution in this case has been got tested by the Chief Chemist, New Delhi who was of the opinion that the photographic film negative upon removal from the developing solution is still sensitive to light as it contains undeveloped silver salt in the shadow portion of the image. To make the negative image permanent by removing the undeveloped salt as well as to make it clear and transparent for printing the action of the familiar fixing bath is employed. This solution contains other chemicals in addition to hypo like primary components, hardeners, bisulite, buffers, boric acid which increases the fixing bath lifetime and also decreases the propensity for alum hardness to initial sludge formation. The Departmental Representative pointed out that the process above would show that the fixing bath is specially formulated product and not a mere solution of hypo in water. As such, the product "Hypo Bath" (Hypo-solution) is a different manufactured product and not mere solution of Hypo would attract excise duty under Heading 3707 CETA.4. The respondents on the other hand have contended in their Cross Objection that the hypo-solution which is a ephemeral and which is prepared for instant use and which is not marketable and which has short shelf life and not goods at all attracting Central Excise duty.

It is submitted that the solution is prepared entirely for use in a continuous process and has no shelf life to consider that it can be bottled up and could be sent to the market for sale. They have cited case law in support of their proposition that the Supreme Court in their recent decision in the case of Bhor Industries Ltd. v. CCE -

reported in 1989 (40) E.L.T. 280 (SC) decided that the goods manufactured or produced referred to the articles which are being sold and that marketability is the crux of excisability. They have contended that in the case of hypo-solution, the material is not at all a marketable commodity and as such solution is never available in the market.

5. We have carefully considered the submissions made by the learned DR and the submissions of the respondents herein. The central issue to be decided here is whether the hypo-solution produced by the respondents herein would be excisable goods falling within the Tariff Heading 3707, as contended by the department. The Department no doubt at this stage before us have relied upon the opinion of the Chief Chemist to the fact that the hypo-solution is especially formulated product and not a mere solution of hypo in water but the Department at the same time has failed to rebut the finding of the Collector (Appeals) in his order to the effect that the hypo-solution has got a short shelf life and is not marketable and on this ground taking the view that it is not excisable goods. The Supreme Court decision relied upon by the respondents herein has clearly laid down that the marketability of the product has to be established to show that it comes within the ambit of goods and thereafter to show that it will be excisable goods. The Department has not brought on record any evidence to rebut the claim of the respondents and also in their Cross Objection that hypo-solution is mainly for instant use and that it is ephemeral in nature. In the absence of such evidence being brought on record it is not possible for us to accept the Department's contention that merely based on the Chief Chemist opinion about the composition of the product it should be held to be excisable goods because of lack of evidence to show the marketability of the product which is an essential criteria laid down for excisability in the decision of the Supreme Court in the case of Bhor Industries Ltd. (supra). In this view of the matter we see no reason to interfere with the order passed by the Collector (Appeals) holding that the goods hypo-solution is not excisable goods. The appeals are, therefore, rejected and Cross Objections are disposed of accordingly.