Collector of Central Excise Vs. Pennar Ceramic and General

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-17-1983

Reported in : (1986)(25)ELT427TriDel

Appellant : Collector of Central Excise

Respondent : Pennar Ceramic and General

Judgement :

1. By its show-cause notice F.No. 199/33-35/73-CX.V(A) dated the 26th November, 1973, issued under Section 36(2) of the Central Excises and Salt Act, the Central Government proposed to revise four Orders-in-Appeal Nos. 1558/72-AU(V)23-B/2/16/72, 1626/72-A-23-B/2/18/72 and 1627/72(V-23B/2/18/72, all dated 12.12.1972 and 136/72(D.B.Dis.V/123-B/2/1/72-AU dated 5.12.72 passed by the Appellate Collector of Central Excise, Madras, allowing four appeals of the respondents. Since the matter was pending on 11.10.1982, when the provisions relating to the Tribunal came into force, the show-cause notice was, under Section 35P(2), Central Excises and Salt Act, transferred to the Tribunal, for being dealt with as if it were an appeal filed before the Tribunal.

2. Since the show-cause notice related to four orders-in-appeal, four appeals with the Collector of Central Excise, Hyderabad as appellant and Messrs. Pennar Ceramic and General Industries as respondents, and bearing Nos. ED(SB)(T)13/74D & ED(SB)(T)18/74D to 20/74D were registered for being dealt with as if they were appeals filed before the Tribunal by the Collector,, In this order we are dealing with the above four appeals.

3. The appeals were partly heard on 22.11.83, and the hearing was completed on 15.12.1983.

4. The appeals relate to the classification under the Central Excise Tariff Schedule of "Intalox saddles", "Rasching rings" and "unglazed balls" manufactured by the respondents. These were held by the Assistant Collector of Central Excise, Nellore, to be classifiable under Item 23B(4) of the Central Excise Tariff Schedule as "Chinaware and porcelainware, all sorts, not otherwise specified". The respondents filed appeals to the Appellate Collector of Central Excise, Madras.

That authority held that the goods in question fell outside the scope of Item 23B of the Central excise Tariff and were, therefore, non-dutiable (at that time Item 68 of the Central Excise Tariff was not in existence). He, therefore, allowed the appeals. It is against these orders of the Appellate Collector that the Central Government issued the show-cause notice which is the subject matter of the present proceedings.

5. Appearing before us for the appellant Collector, Shri K.D. Tayal submitted that the Appellate Collector had gone wrong in holding that the goods were unglazed clayware and, therefore, not covered by Item 23B. Shri Tayal pointed out that no doubt Explanation I to the item provided that "Chinaware" includes all glazed clayware but does not include terracotta. This would show that unglazed Chinaware would fall outside the scope of the item. However, since the Explanation was with specific reference to the term "Chinaware", it would not apply to porcelainware. Accordingly, porcelainware, all sorts, whether glazed or unglazed, would fall within the scope of the item. According to Shri Tayal, the goods in question were unglazed porcelainware and were, therefore, covered by Item 23B.6. Shri Tayal referred to the show-cause notice issued by the Central Government (now being treated as the appeal of the Department) wherein reference had been made to the definitions in the publications of the ASTM (American Society for Testing Materials) and the Indian Standards Institution. According to the ASTM definition porcelain is "a glazed or unglazed vitreous ceramic whiteware used for technical purposes".

"Ceramic whiteware" is in turn defined as follows:- "Ceramic whiteware: A fired ware consisting of a glazed or unglazed ceramic body which is commonly white and of fine texture. This term designates such products as China, porcelain, semi-vitreousware and earthenware".

Thus, both these definitions indicated that even unglazed ceramic articles could fall within the definition of porcelain. In the "Glossary of Terms relating to ceramicware" published by the Indian Standards Institution (Standard No. 15:2781-1964), subsequently revised in 1975, "porcelain" has been defined as "a glazed or unglazed ceramic whiteware having not more than 3 per cent water absorption". Shri Tayal submitted that this condition of having not more than 3 per cent water absorption was satisfied in the case of the goods under consideration.

It was also clear from the definition that the term "porcelain" covered unglazed goods also.

7. Shri Tayal referred to the judgment of the Madhya Pradesh High Court in the case of Saurabh Potteries and Ceramics, Indore, v. Appellate Collector of Central Excise, New Delhi reported in 1979 ELT (J29). The judgment in that case was specifically with reference to Rasching rings. It had been held that though these articles might be unglazed, it did not matter, for the test of glaze applied only to tiles and to Chinaware and not to porcelainware. It had accordingly been held that Rasching rings were rightly classifiable under Item 23B(4).

8. Shri Tayal also referred to the judgement of the Madras High Court in the case of English Electric Co. of India Ltd. v. Superintendent of Central Excise and Others, reported in 1979 E.L.T. J36. In that case, it was held that H.R.C. Cartridge fuselinks were not classifiable under Item 23B, since they were not "porcelainware". Although, prima facie, this judgment appeared to be against the stand of the Department, Shri Tayal argued that it was actually in his favour. The High Court had held that porcelain normally contains China clay, quartz and feldspar as main elements. However, the variation in the proportions of each of these main elements, subject to limitations, would not alter the character of the product as porcelain. Shri Tayal submitted that in the present case there was no denial that the goods contained these three materials, though they might contain

other materials also. Accordingly, in terms of the Madras High Court judgment, they would come within the definition of porcelain. The reason why the Madras High Court had decided that matter against the Department was that the fuselinks could not be considered as porcelainware. The main reason for this conclusion was that porcelain was only a component of the fuselinks, and could not be considered as porcelainware in itself. (Apart from this, it was observed that the term "ware" means articles of merchandise or manufacture; the things which a merchant, tradesman or peddler has to sell; goods, commodities. The High Court also observed that Item 23B covered tableware, sanitaryware, glazed tiles and Chinaware and porcelainware, not other-wise specified. Although the last sub-item might appear to have a wide scope, the High Court observed that the fuselinks had no possible analogy to any of the articles which were specified, namely, tableware, sanitaryware and glazed tiles).

9. Shri Tayal contended that the main finding of the Madras High Court, namely, that the composition of porcelain could vary so long as it contained the three main components, was in his favour. The other finding, based on the fact that the fuselinks were not entirely made of porcelain, did not apply in the present case, since there was no doubt that all the goods under consideration were made entirely of the same material, whether called porcelain as had been done by the Department or as clayware as done by the respondents. He accordingly submitted that the present case was distinguishable from that dealt with by the Madras High Court.

10. Shri Tayal also referred to an Order-in-Revision of the Government of India as revisional authority, in the case of N.N. Vakil & Company reported in 1982 E.L.T. 777. In that order it was held that Rasching rings were unglazed and semi-fibrous, composed mainly of alumina and silica, did not contain any China clay, and water absorption by ASTM method was 2.2 per cent. It was, therefore, held that they were in the nature of stoneware and could not be classified under Item 23B. Shri Tayal argued that the present case could also be distinguished from the case which was the subject matter of the order of the Government of India, since the material facts, namely the composition of the goods, were clearly different.

11. For the respondents, Shri Subramanian submitted that the goods were a very inferior type of clayware and not ceramicware. He referred to the report of the Chief Chemist, Central Revenues, regarding the goods.

In that report it has been stated that the samples were in the form of dull white pieces having rough surfaces and that when written on by ink, the ink markings could not be easily rubbed off, showing that the samples were not glazed. Clearly, therefore, these goods were unglazed and they were also in the nature of clayware. Shri Subramanian also argued that even admitting that porcelainware had water absorption of below 3 per cent according to the ISI, it did not follow that all clayware which had less than 3 per cent water absorption was necessarily prceiainware. Shri Subramanian stated that the goods in question were used as "tower packings" in the process of manufacture of goods by the chemical or allied industries. They were not articles sold to the ordinary consumer. Shri Subramanian also placed before us 'an extract of a judgment of the Kerala High Court, reported in AIR 1964 - Kerala 18. This extract refers to the characteristics of porcelain and it quotes a book "Modern Pottery Manufacture" by M.M. Bose, which refers to porcelain. The characteristics of porcelain, according to this author, as quoted in the judgment are as follows: "The author says that porcelain is the highest attainment of man in the field of ceramic arts. The learned author says that porcelain is a beautiful non-porous white and bluish white body of very fine texture, translucent in this section. According to the author, the impermeability of porcelain distinguishes it from common pottery and the translucency makes it differ from stoneware".

Shri Subramanian pointed out that the goods in question had a dull white appearance and a rough surface and could not by any means be said to possess translucency.

12. According to the ASTM specification No.C515-63T for chemical resistant ceramic tower packings, vide para 5(b)(1), the products should be impervious to dye penetration. However, the Chief Chemist's report had shown that when written on by ink, the ink markings could not be easily rubbed off. This showed that the goods were not impervious to dye penetration.

13. In short, according to Shri Subramanian, the goods in question lacked the three essential qualities of porcelain, namely, fine texture, translucency and imperviousness to dye penetration and could not, therefore, be regarded as porcelain.

14. Shri Subramanian also relied on the order-in-review of the Government of India reproduced in 1982 E.L.T. 777 and referred to in para 10 above. He urged that the order of the Government of India, although not binding on the Tribunal, had great persuasive force and should be followed.

15. With reference to Shri Tayal's arguments based on the Madras High Court decision in the case of English Electric Co,. Shri Subramanian submitted that although China clay was contained in the goods, it was in a negligible quantity, of only about 8% whereas more than 70% was ball clay. (Shri Tayal objected that this submission was not based on anything in the record, and Shri subramanian admitted that the specific composition of the goods was not on record).

16. Shri Subramanian also stated that the factory, of the respondents, which was at the relevant time situated in Nellore, Andhra Pradesh, had since been closed down, and they had started in another factory in Haryana. According to him, the goods manufactured by this factory were similar in all material respects to the goods manufactured by their earlier factory, and these goods were now being classified under Item 68 of the Central Excise Tariff, namely, as "All other goods N.E.S." and not under Item 23B. We asked Shri Tayal whether he had any submissions to make on this point. Shri Tayal stated that he had no information in this regard and therefore no submissions to make.

17. We have carefully considered the arguments advanced by both sides.

A number of judgments and orders have been brought to our notice which have a more or less direct bearing on the issue before us. Thus, the judgment of the Madhya Pradesh High Court, reported in 1979 E.L.T. 29, referred to in para 7 above, is with specific reference to Rasching rings, and holds them to be classifiable under Item 23B(4). Although prima facie, this would appear to clinch the matter, we find that the arguments in that case turned mainly on the question

that the goods were not glazed. The High Court had pointed out that with reference to porcelainware the test of glaze did not apply. The questions of the actual composition of the goods, that is whether from the point of view of composition they could be considered as porcelainware, and as to whether articles of this nature could be considered as "porcelainware" (apart from being articles made of porcelain) do not appear to have been discussed at all. As will be pointed out subsequently, terms such as "glassware", "porcelainware", etc. have a special connotation which has formed the subject of decisions by the Supreme Court and also by High Courts and if we take those judgments into account we feel, with great respect to the Madhya Pradesh High Court, that the matter does not stand concluded by their judgment referred to above.

18. We find considerable force in the submission of Shri Subramanian that the goods in question could not, even apart from their being unglazed, be considered as porcelain. Shri Subramanian had submitted that though they contained China clay, the percentage of China clay was as low as about 8%, and as much as 70% was ball clay, which is a much inferior material. As rightly pointed out by Shri Tayal, the exact composition of the goods is not on record, and we cannot go only by Shri Subramanian's statement in this regard. At the same time, the Chief Chemist's report, which testifies that the goods were dull white and had rough surfaces, bears out that the percentage of China clay could not have been very high. The judgment of the Madras High Court in the case of English Electric Co., indicates that China clay, quartz and feldspar should be the main components of porcelain, although the exact proportion of these may vary. It would be difficult to regard as porcelain an article which contains only a minor proportion of these components. Even the ISI definition of porcelain states that it is ceramic whiteware, and ceramic whiteware is described as being commonly white and of fine texture. The goods in question which are stated to be "dull white" and having rough surfaces, do not easily fit into this definition. We, therefore, find that there is considerable force in the argument of the respondents that the goods cannot be considered as made of porcelain. This is also broadly the view which has been taken by the Appellate Collector in his Orders-in-Appeal and by the Government of India in Order-in-review referred to in para 10 above.

19. An equally strong ground against holding these goods to be covered by Item 23B is the difficulty in considering them as "porcelainware".

As already observed in para 17 above, words such as "glassware" and "porcelainware" carry a particular connotation. This has been clearly brought out in the judgment of the Supreme Court in the case of Indo International Industries v. Commissioner of Sales Tax, UP, reported in 1981 E.L.T. 325 (S.C.). That judgment related to a case under the U.P.Sales-Tax Act, 1948, and the question was whether hypodermic clinical syringes could be considered as "glassware" falling under entry 39 of the First Schedule to the above Act. The Supreme Court observed that in interpreting items in statutes like the Excise tax Acts or Sales-tax Acts, which classify diverse products, articles and substances, resort should be had not to the scientific and technical meaning of the terms of expressions used, but their popular meaning, that is to say, the meaning attached to them by those dealing in them. The Supreme Court then went on to make the following observations which are of great relevance to the present case:- "Having regard to the aforesaid well-settled test the question is whether clinical syringes could be regarded as "'glassware" falling within Entry 39 of the First Schedule to the act? It is true -that the dictionary meaning of the expression "glassware" is "articles made of glass" (See: Websters New World Dictionary). However, in commercial sense glassware would never comprise articles like clinical syringes, thermometers, lactometers, and the like which have specialised significance and utility. In popular or commercial parlance a general merchant dealing in "glassware" does not ordinarily deal in articles like clinical syringes, thermometers, lactometers, etc. which articles though made of glass, are normally available in medical stores or with manufacturers thereof like the assessee. It is equally unlikely that consumer would ask for such articles from a glassware shop. In popular sense when one talks of glassware such specialised articles like clinical syringes, thermometers, lactometers and the like do not come up to one's mind.

Applying the aforesaid test, therefore, we are clearly of the view that the clinical syringes which the assessee manufactures and sells cannot be considered as "glassware" falling within Entry 39 of the First Schedule of the Act".

In the present case we are concerned with the term "porcelainware", whereas the above judgment specifically dealt with the term "glassware". We, however, find it obvious that the same considerations which were set out by the Supreme Court with reference to glassware would be equally applicable to porcelainware. We also find that such considerations have in fact been applied by High Courts with reference to the terms "porcelainware" and "glassware". Thus, in the case of English Electric Co., the Madras High Court had observed that although Item 23B covers porcelain-ware of all sorts, it was doubtful whether an article like H.R.C. fuselinks would be within the ambit of the entry, since it had no possible analogy to any of the things specified in that entry. Again, the Bombay High Court had occasion to consider whether glass windscreens would be classifiable as "glass" or "glassware", vide their decision reported in 1982 E.L.T. 237 (Bom.). The High Court answered this question in the negative. In doing so, the High Court applied the test as to whether windscreens could be purchased from a glass or glassware shop or whether they could be purchased only from dealers in motor parts. The High Court found it to be established that windscreens could be purchased only from dealers in motor parts. They also noted the statement of the learned Counsel for the Department that if he walked into glass or glasswareshop he could not purchase an automobile windscreen. The High Court, therefore, concluded that in commercial parlance a windscreen is an entirely different commercial commodity identified independently from glass or glassware.

20. From the judgments cited above, it would be seen that the Supreme Court had held that although the dictionary meaning of the expression "glassware" is "articles made of glass", in the commercial sense glassware would never comprise articles like clinical syringes and like which have specialised significance and utility, nor does a general merchant dealing in "glassware" ordinarily deal in articles like clinical syringes. These consideration are, in our view, equally applicable to the term "porcelainware". It is clear that the articles under consideration, namely, Rasching rings, intolax saddles and balls unglazed are articles of specialised nature, used as part of the equipment of chemical and allied industries. One would certainly not expect to buy them from a shop dealing with porcelainware as ordinarily understood, such as articles of tableware. In our view, therefore, the goods under consideration, even if they could be said to be made of porcelain,

cannot be considered as articles of porcelainware, so as to pome within the scope of Item 23B(4).

21. In the result, we consider that the Appellate Collector's orders were correct. We accordingly reject the four appeals of the Department against these orders.