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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-11-1994

Reported in : (1994)(73)ELT853TriDel

Appellant : Morarjee Brothers (imports and

Respondent : C.C.E.

Advocate for Pet/Ap. : Shri. K.K. Lahri

Judgement :

1. Being dissatisfied with the demand of duty and rejection of the refund claim as a consequence of the classification of the product "MORAKFLOC" under Heading ISA of Central Excise Tariff, against the claim of the appellants for its classification under Tariff Item 68, the appellants have filed their present appeal.

2. FACTUAL BACKDROP : The appellants - a Private Limited Co. inter alia are the manufacturer of a product known as Morarfloc. A Show Cause Notice-cum-Demand dated 17-7-1985 calling upon them to show cause as to why their subject product manufactured by them be not classified under Tariff Item 15A(1) w.e.f. 1-3-1982 (instead of Tariff Heading 68) on the ground that in the Budget, 1982 Tariff Item ISA has been substantially modified by Explanation III as it has been provided to include liquid or pasty (including emulsions, dispersions and solutions) forms and, therefore, why the refund claim pertaining to the period from 1-3-1982 onwards be not rejected and why the duty on the excess clearance value of Rs. 1,52,109.95 (after the allowance of Rs. 7,50,000) at nil rate of duty under

Notification No. 83/83 dated 1-3-1983 for the year 1984-85 be not recovered was issued. In reply, it was contended by the appellants that in or about July, 1979, the appellants were granted an excise licence to manufacture the subject product, namely, Morarfloc and they classified the , 1994] MORARJEE BROTHERS (IMPORTS & EXPORTS) PVT. LTD. v. C.C.E., BOMBAY-III 855 subject product under Tariff Item 68 as then in force. Thereafter, on or about 26th February, 1981 samples of the subject product were drawn by the Department and on the basis of the said report, two Show Cause Notices dated 22nd July, 1981 and 19th August, 1981 were issued to the appellants to show cause as to why the subject product be not classified under Tariff Item ISA. A demand for short term was also raised. The Assistant Collector adjudicated the same and confirmed the demand by his order dated 20-3-1986. Against that order of the Assistant Collector, the appellants filed their appeal before the Collector (Appeals), Bombay, who vide his Order-in-Appeal dated 16-7-1984 allowed the appeal filed by the appellants holding that since the subject product is a solution of resin and cannot be held as resin, it cannot be classified under Tariff Item ISA and as a consequence thereof, the subject product is correctly classifiable under Tariff Item 68, with the consequential relief, if any, to the appellants. As a sequel thereof, the appellants cleared the subject product under Tariff Item 68 and also filed various refund claims for the period ranging from 1st April, 1981 to 31st March, 1984. In the meantime, from 1st April, 1982 onwards Tariff Item ISA was amended, and as a consequence thereof, Show Cause Notice dated 17-7-1985, as aforesaid, was issued and various pleas were raised before the Assistant Collector who while negating the defence of the appellants but agreeing on the point of limitation confirmed the demand for the period from February to March, 1985 which was within six months from the date of Show Cause Notice holding that the subject goods are classifiable under Tariff Item ISA on account of the change in the said Tariff Item. He also partly rejected the refund claim filed by the appellants from 1-3-1982 onwards. Against that Order of the Assistant Collector, the appellants filed their appeal before the Collector of Central Excise (Appeals), Bombay, but without success. Hence the present appeal.

3. Arguing on behalf of the appellants, Shri K.K. Lahri, learned counsel for the appellants, submitted that the subject product, namely, Morarfloc is manufactured

and obtained by the conversion of acrylonitrile to acrylamide and by directly polymerising the aqueous solution to a concentration of about 10-12% of polyacrylamide by additional polymerisation. The said product is a solution in an aqueous form containing some solid content which varies from 10 to 20% whereas the water component in the said product is about 80%. The said product is used as a flocculating agent to remove impurities from liquids. The said product does not ever become a part of any finished product. Thus, the said product at the end of the process as submitted above remains a solution of resin and never becomes a resin. It is a product which is a step much prior to resin coming into existence. Resin comes into existence only after dehydration takes place and the appellants do not undertake any process of dehydration whatsoever in respect of the said product. He also took us through the unamended Tariff Item ISA as well as to the amended Tariff Item 15A and submitted that Explanation III to Tariff Item ISA introduced on account of the change in the said Tariff Item did not in any way enlarge the scope of the said Tariff to include in its ambit any product which is not a resin and cited the case of *Chemicals & Fibres (India) Ltd. v. Union of India*, 1982 ELT 917 (Bom.) and *Indian Plastics & Chemicals Private Ltd. v. Union of India*, 1981 ELT 108 (Del.). He also took us through the letter dated 7th January, 1982 (certificate) of National Chemical Laboratory, Pune, and to the certificate of Analysis dated 19th August, 1981 issued by Italab Pvt.

Ltd. and also to the affidavit of Dr. S.P. Potnis dated 24th February, 1983 to show that the subject product is not synthetic resin as it does not contain 50% or more of solids. As regards the report of the Deputy Chief Chemist referred to by the Collector (Appeals) in his impugned Order, he submitted that only the extract of the said report was supplied to the appellants and not the full report. During the pendency of the present appeal effort was also made to obtain the said report of the Deputy Chief Chemist, but the Assistant Collector (Legal) Central Excise, Bombay-III, vide his Telex message dated 20-10-1993 informed that since the said report is not traceable with the Assistant Collector or with the Range Superintendent, a copy of the test report available in Range Sample Register is placed on record.

4. Besides the merits of the case, it was also argued by the learned counsel for the appellants that the present Show Cause Notice was not maintainable and was also beyond the powers and jurisdiction of the authorities issuing it in view of the final and binding order on the Collector (Appeals) dated 16th July, 1984 passed earlier classifying the subject product under Tariff Item 68 and not under Tariff Item 15A.5. In reply, Shri Sharad Bhansali, learned SDR, while supporting the impugned Orders submitted that the case law cited at the Bar does not apply to the present case as the Hon'ble High Courts concerned decided the said cases in the light of the erstwhile Tariff Item ISA and since the said Tariff Item stood changed with the passing of the Budget in 1982, the subject goods were rightly classified under Tariff Item 15A, as amended. As regards the contention of the learned counsel for the appellants that the full report of the Deputy Chief Chemist was not supplied to the appellants, he contended that this very report was the basis of earlier Show Cause Notices and those Show Cause Notices were finally disposed of by the Collector (Appeals) vide his Order-in-Appeal dated 16th July, 1984 and it would appear from the copy of the said Order-in-Appeal filed by the appellants that it was never challenged nor any grievance was made that the full report of the Deputy Chief Chemist was not given to them. In other words his submission was that since with the passage of time, the said test report is not available and only the contents of the said report as recorded in the Range Sample Register (which have already been placed on the record by the Revenue, as directed by the Authority) are available, the appellants want to make a mileage of it. As regards the certificates produced by the appellants, as aforesaid, he submitted that they do not improve the case of the appellants in view of the fact that in Explanation III to Chapter ISA even the liquid or pasty material (including emulsions, dispersions and solutions) are made classifiable under Tariff Item 15A. With regard to the submission of the appellants that the earlier Order-in-Appeal passed by the Collector (Appeals) became final and, therefore, the present proceedings were not maintainable, he submitted that the issue of the classification could be reopened with the change in the Tariff Item and, therefore, the present case was rightly adjudicated upon and the authorities below confirmed the demand only from 1-3-1982, that is to say, when there was a change in Tariff Item ISA with the passing of the Budget, 1982.

7. Before we advert to the controversy in hand it would be advantageous to reproduce Tariff Item No. 15A as it existed before and after the change on the passing of the Budget, 1982 :- 8. From a reading of the said Tariff Item 15A(1) as it existed before the change by the Budget of 1982 and thereafter, it is dear that, the description of the goods in column No. 2 stands substantially changed w.e.f. 1-3-1982. Prior to change in 1982, the description of the goods in Tariff Item 15A(1) so far as relevant, was "The following artificial or synthetic resins ... in any form, whether solid, liquid or pasty ...". But by the Budget of 1982 the description of the goods in column No. 2 of Tariff Item 15A(1) has been re-worded. The words "in any form, whether solid, liquid or pasty ..." have been omitted and in its place a new Explanation III has been added providing that "Sub-item (1) is to be taken to apply to materials in the following forms only : (a) liquid or pasty (including emulsions, dispersions and solutions). In other words, sub-item 15A(1) prior to its change in 1982 does not mention resin in solution form whereas after the change as per Explanation III, sub-item 15A(1) does include in its fold resin in solution form. This change, that is to say inclusion of resin in solution form in our considered opinion may be on account of the judgment of the Delhi High Court dated 22-10-1980 rendered in the case of Indian Plastics & Chemicals Pvt. Ltd. v. Union of India, reported in 1981 ELT 108, wherein while interpreting the description of the goods given in Tariff Item 15A(1) as it stood at that time it was held that the two terms "liquid resin" and "solution of resins" are not synonymous inasmuch as 'resin in liquid form' is a single substance while the 'solution of resin' is a combination of two different substances, namely, resin and water and since the resin appearing in column No. 2 of Item No. 15A(1) refers to the resin as fully manufactured and not to any solution of resin it would fall under Tariff Item 68 and not under Tariff Item 15A - a case cited by the appellants themselves during the hearing, as aforesaid.

9. Now coming to the facts of the instant case, it may be stated that the present case relates to the interpretation of Tariff Item 15A(1), as amended in 1982. It was the case of the appellants themselves that earlier also the dispute regarding the classification of the subject product, namely, Morarfloc arose between the appellants and the Department, and the Collector (Appeals) vide his Order-in-Appeal No.M-1535-1536/B II-220-221/81 dated 16-7-1984 while interpreting the

Tariff Item 15A(1) as it stood at that time concluded that the subject product is a solution of resin and cannot be held as resin and, therefore, following the judgments rendered by the Delhi High Court in the case of Indian Plastics & Chemicals Pvt. Ltd. v. Union of India, supra, and the decision rendered by the Bombay High Court in the case of Chemicals and Fibres India Ltd. v. Union of India, supra, classified the subject goods, namely, Morarfloc under erstwhile Tariff Item 68 and not under Tariff Item 15A, as it stood at that time. From the copy of the said order of the Collector (Appeals) filed by the appellants themselves and is on our record (Exhibit 'A' - Page 22 of the paper book), we find that while holding that the subject product, namely, Morarfloc is a solution of resin, the Collector (Appeals) also referred to the certificate given by the National Chemical Laboratory, Department of Chemical Laboratory and ITALAB Pvt. Ltd. (which are dated 7th January, 1982 and 19-8-1981 respectively) which were also referred to by the learned counsel for the appellants before us, as aforesaid.

From the said order of the Collector (Appeals), we further find that the report of the Deputy Chief Chemist (which is dated 26-2-1981) wherein he had opined that the subject product, namely, is in the form of Jelly like mass. It is aqueous paste of synthetic resin (polylanilamide type) was also referred to by the Collector (Appeals) in his said Order dated 16-7-1984. It is significant to note that before him [Collector (Appeals)] it was the case of the appellants themselves that their subject product is solution of resin, which contains less than 20% of solid and, therefore, it cannot be classified under Tariff Item 15A, as it stood prior to 1-3-1982. From a reading of the said order of the Collector (Appeals), it is clear that, the Collector (Appeals) agreed with the said contention of the appellants and held as aforesaid, that the product of the appellants in question is solution of resin containing approximately 20% solid and it is on these findings, on the point of repetition, that the Collector (Appeals) held that the subject product is classifiable under Tariff Item 15A prior to 1-3-1982.

10. That apart, from the report of the National Chemical Laboratory dated 7th January, 1982, we find that on test the subject product was found to contain as follows :-4.

Free alkali Below detection limits by titration method
Moisture by Dean & Stark Method 87.56 per cent w/w
Total Solids 12.92 per cent w/w 10.2 Dr. S.P. Potnis in his affidavit dated 24-2-1983 has opined that the subject product is a dilute aqueous solution of polyacrylamide containing 90% water.

11. The said reports and the opinion of Dr. S.P. Potnis do not say that the subject product is not a resin in the form of solution. Presumably, therefore, an argument was advanced before us that though the subject product Morarfloc is a solution in an aqueous form, but it contains solids varying from 10 to 20% whereas the water component in the said product is about 80% and endeavour was made to support this argument with the aid of the case of Indian Plastics & Chemicals Pvt. Ltd. v. Union of India, supra, wherein the Delhi High Court while dealing with the Tariff Item 15A(1), as it stood prior to 1-3-1982 referred to certain instructions issued by the Central Board of Customs & Excise (observing that though these are not binding, yet these instructions sought to explain the meaning of the aforesaid Tariff Item 15A) inter alia stated that "Solution of artificial or synthetic resin in volatile organic solvent are excluded from the scope of this item, if and when the weight of such solvent exceeds 50 per cent of the weight of the solution" and held that the solution of resin which was the subject matter of dispute before the Court could not be classified as resin under Item 15A; firstly because it [Item No. 15A(1)] refers to the resin as fully manufactured and not any 'solution of resin', and secondly, if more than 50 per cent weight is that of solvent then the product cannot be regarded as 'resin' at all. To which it may be answered that the present Tariff Item 15A does not lay down any limit for solvent contained and the description of the product is "artificial or synthetic resin" and Explanation III to it expressly and specifically mentions that sub-item (1) of Tariff Item 15A is to be taken to apply to materials in the liquid or pasty (including emulsions, dispersions and solutions) forms. The Assistant Collector of Central Excise in the instant case has also observed that the subject product is solution in the form of liquid and ambit of the word "liquid" is very much broader which do not speak about the percentage of the solid contained in the liquid solution. On appeal, the Collector (Appeals) has also endorsed his view with which we agree. Report of the Deputy Chief Chemist, as referred to above, also supports the classification of the subject goods under Tariff Item 15A(1) and, therefore, was rightly relied upon by the Collector (Appeals). The

contention of the appellants that only the gist of the said report was supplied to them and not the copy of the report, also does not improve the case of the appellants nor it is fatal to the case of the Revenue.

It is significant to note that the said report is dated 26-2-1981 and was the subject matter of the earlier adjudication proceedings when the question regarding the classification of the subject product prior to 1-3-1982 was in dispute and ultimately decided by the Collector (Appeals) in favour of the appellants by his order dated 16-7-1984.

From the said Order (Exhibit 'A' - page 22 of the paper book) we find that this very report of the Deputy Chief Chemist was not contested by the appellants. For ready reference the relevant portion of the said order may be reproduced as follows : "4. All the arguments of the appellants contained in their appeal petitions and urged at the time of personal hearing have been duly considered. The lower authority has classified the product of the appellants only on the basis of the report of the Deputy Chief Chemist that the product is an 'Aqueous Paste' of Synthetic Resin and the appellants have not contested this report of the Deputy Chief Chemist when the gist of the same was communicated to them ...".

It is interesting to note that the appellants themselves relied upon the said report and argued before the Collector (Appeals) - that their product is solution of resin and ultimately got the favourable order at his hands regarding the classification of the subject product under erstwhile Tariff Item 68 and not under Tariff Item 15A prior to 1-3-1982. For the record it may be stated that when the said grievance that only the gist of the report of the Deputy Chief Chemist was given to the appellants and not the copy of the report was made before us we also made an attempt to obtain the same and asked the Department to produce the said report and gave repeated time to the Revenue for this purpose. The authorities made the effort to trace out the said report but failed to trace it out, since that report is an old one and pertains to the period prior to 1-3-1982 and, therefore, they placed the copy of the test report available in the Range Sample Register on our record. The copy of the which was given to the appellants also.

12. In view of the above, we uphold the impugned Orders and hold that the subject product Morarfloc is classifiable under T.I. ISA and the case law cited at the Bar is not applicable to the present case as it relates to the description of the goods given in the earlier T.I. ISA, as it stood prior to 1-3-1982.

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