

Bongaingaon Refinery and Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-27-1995

Reported in : (1996)(84)ELT25TriDel

Appellant : Bongaingaon Refinery and

Respondent : C.C.E.

Judgement :

1. Among the products manufactured by the appellant is orthoxylene.

With effect from 1-3-1986 consequent upon coming into force of the Central Excise Tariff Act, 1985, the appellants classified orthoxylylene under Heading 2710.39 of this Tariff. This classification list was approved by the Assistant Collector. Subsequently based on the clarification dated 21-9-1986 issued by the Central Board of Excise & Customs, it was decided that orthoxylylene of a purity exceeding 95% would be classifiable as a separate chemically defined compound under Chapter 29 of the Tariff. Apparently based on this clarification, two notices were issued to the appellant for the period 1-3-1986 to 21-9-1986 and 22-9-1986 to 14-1-1987 proposing recovery of the differential duty on orthoxylylene cleared during those periods. The notices were dated 1-6-1988 and invoked the extended period of five years prescribed in the proviso to Section 11A of the Central Excises and Salt Act on the ground that the appellant in the classification list had wilfully suppressed the fact that the purity of the orthoxylylene exceeded 95%. After considering the cause shown and hearing the appellant, the Collector confirmed the demand for duty. Hence, this appeal.

2. We find considerable force in the arguments of the advocate for the appellant that the department itself was initially unaware that orthoxylene of purity exceeding 95% was to be classified under Chapter 29 and not under Chapter 27. The fact that the earlier classification list classifying the product under Chapter 27 was approved, and the issue of the Board's circular support this view. In addition, the department had been drawing quarterly samples of this product. The classification list was also approved, after the product was tested.

The fact that the test memo and the test reports do not touch upon the purity shows that the department itself was unaware of the need to test purity.

3. We are also persuaded by the advocate's argument that there was no suppression of the purity of the product. The Collector in his order does not dispute the appellant's claim that copies of the tests report for each batch of orthoxylene, conducted by its laboratories and forwarded to the Range Superintendent. Included among these is a report dated 31-3-1986. This establishes two facts. Firstly, the department itself was aware on this date that the purity of the orthoxylene exceeded 95%. The claim that the fact was not made known to the Assistant Collector does not answer this point, after all the classification lists are generally submitted routinely to the Superintendent to be passed on his recommendation to the Assistant Collector. It also establishes that the appellant did not suppress the purity of the orthoxylene from the department. What was made available to the Superintendent would be available for perusal by higher officers at any time. We are not able to accept the contention of the Departmental Representative that, at least after the issue of the Board's Circular dated 21-9-1986, the assessee ought to have been filed a fresh report including the purity. While the Board's Circular is dated 21-9-1986 it would have taken time to travel down the various steps. Therefore the appellant's contention that on coming to know about the Board's Circular in January, 1987 from its publication in the Excise Law Times, submitted revised classification list on 15-1-1987 is convincing.

4. The Supreme Court has held in a long list of judgments, the latest of which is Pushpam Pharmaceuticals v. Collector -1995 (78) E.L.T. 401 that was the

extended period under proviso to Section 11A to be invoked. Suppression must be wilful and with a view to evade duty. On the facts of this case it does not emerge that there was any wilful intent to evade duty. The demand is therefore, barred by limitation. In these circumstances, we allow the appeal.

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