ilavia Enterprises Vs. Collector of Central Excise

ilavia Enterprises Vs. Collector of Central Excise

SooperKanoon Citation : sooperkanoon.com/9243

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-12-1996

Reported in : (1997)(90)ELT542TriDel

Appellant : ilavia Enterprises

Respondent : Collector of Central Excise

Judgement :

1. The appellant manufactures and sells a product "shikakai" bathing powder output. It commenced manufacture from 1st August, 1991 and cleared the goods at nil rate of duty. It did not file any classification list or price list for the product or otherwise declare the fact of manufacture and clearance of this product to the Central Excise Department. It filed on 28th April, 1992 a declaration to the Superintendent claiming the goods to be classified under Heading 3003.30 and claiming exemption from duty. Correspondence took place between the appellant and the department with regard to composition of goods. The department issued a show cause notice dated 8-10-1992 proposing classification of the product under Heading 3307.30 of the tariff and consequent recovery of duty [on] clearances from August, 1991. Penalty was also proposed. After considering the cause shown and hearing the assessee the Collector passed the order impugned in this appeal. He held the product to be classifiable under sub-heading 3303.30 as a bath preparation denying the Notification of 140/83, dated 5-8-1983 which the appellant had claimed confirmed the duty for Rs. 17.74 lakhs approximately and imposed a penalty of Rs. One lakh.

2. The advocate for the appellant contends that the product is an Ayur-vedic medicine; its ingredients find mention in recognised texts of Ayurvedic medicines and it is manufactured in accordance with the prescribed formulae given in such texts. The product is manufactured under a licence granted by the State Government for manufacture of Ayurvedic medicine. On inquiry by the department, this fact was confirmed by the Ayurvedic Medicine Department and the State of Rajasthan. Vaidyas skilled in practising Ayurvedic medicine also certified that product is used in treating skin disease. The goods are excluded from Chapter 33 by virtue of Note 2 to that Chapter as the product is not sold with any intimation either on the container or on the label that it is for use as cosmetics or toilet preparation or put up in a form specialised to such use. He seeks to support his argument by the judgment of the Madras High Court in Panama Chemical Works v.Collector of Central Excise andCollector of Central Excise v. Warmer HindustanHenna Export Corporation v. Collector of Central Excise - 1993 (67) E.L.T.907 and Dabur India v. Collector of Central Excise -1994 (71) E.L.T.1069. He says that it is advertised and sold as Ayurvedic medicine. The literature accompanying it and the words used on the container both indicate its use as such a medicine.

3. He says that if the product is classifiable under Chapter 33 the benefit of Notification 140/83 would be available. It had been denied by the Collector only because of his view that it contained a brand name of other person who is not eligible for grant of exemption. This view is incorrect. The appellant's entire production was marketed by M/s. Bajaj Sewashram Ltd. and this fact was indicated on the container.

He disputes the Collector's finding that these words used constitute a brand name or trade mark. He further argues that the demand in the present case is barred by limitation as the appellant made known to the department the fact of its manufacture by its letter dated 16-4-1992 under the bona fide belief that it was classifiable as an Ayurvedic medicine. The facts did not disclose suppression of material with an intent to evade the duty and therefore the extended period would not apply. He cites the judgment of the Supreme Court in Padmini Products v. Collector of Central Excise 4. The departmental representative says that it has not been established that the ingredients found place as Ayurvedic medicine and that the texts in which the formula for manufacture is contained, has not been indicated. While the product is stated on its container as Ayurvedic medicine, the specific disease or disorder which it specialised to cure is not indicated. The literature of the Company also did not indicate this. He contends that it is not sold by chemists against prescriptions issued by medical practitioners and it is available over the counter in shops selling cosmetics and toilet preparations. It is considered by the common man, not as Ayurvedic medicine but as toilet preparation for every day use. He cites the judgment of the Supreme Court in Shri Vaidyanath Ayurved Bhawan v.Collector of Central Excise - 1995 (10) RLT 327. He relies upon the decision in 1993 (67) E.L.T. 907 cited by Shri Dave to say that the Tribunal in that decision has classified herbal Shikakai powder under Heading 33.05. He says that the words "Bajaj Sewash-ram" occurring on the container or invented writing and therefore constitutes a brand name. Since the appellant did not file a declaration when it commenced manufacture in August 1991, it must be considered to have suppressed the fact of such manufacture.

5. The appellant has not cited any evidence to support its decision that ingredients of Shikakai bathing powder are found mentioned in Ayurvedic texts. Names of such texts have not been indicated and the texts in which its manufacturing formula has been prescribed have also not been indicated.

6. There is some reference in the letter dated 14-10-1993 of the Drugs Inspector, Udaipur to the department to say that the manufacturing licence have been given to the appellant for Ayurvedic medicine. The letter however, does not clearly says that the product manufactured is an Ayurvedic medicine. It says "it is inevitable to obtain a licence for Ayurvedic medicine as well as the powder of the above name, it is under the Ayurvedic medicine series. A copy of the licence issued by an authority whose designation is not clear, had been filed. However, from the reference to the letter to the Drug Inspector quoted above, it is not possible to conclude clearly that the concerned authority of the State Government have concluded that the product manufactured by the appellant is an Ayurvedic medicine. In Panama Chemical Works v. Union of India -1992 (62) E.L.T. 241 cited by the advocate, the assessee manufactured a product which was licenced

for a manufacture as an Ayurvedic medicine. On a complaint by the Central Excise Department that the licence had been wrongly issued, the Drugs Controller of the State issued notices proposing cancellation of the licence. After considering facts including the opinion of the experts, the Drug Controller held that the commodity had been correctly licensed as an Ayurvedic medicine. The ratio of the judgment would not apply to this case. It has been held in the order of this Tribunal in Naturelle Health Product v. Collector of Central Excise -1996 (12) RLT 96 (see Paragraph 9) that in view of the wide definition of drugs in the Drugs Control Act, a manufacturing licence would be required under that Act for goods which would not be classifiable under Chapter 30 of the Tariff. Therefore, the issue of a licence by the Drug Controller does not ispo facto render the product classifiable under Chapter 30. The letter of the Director leads one to believe that the product is not an Ayurvedic medicine but something similar or akin to it. We cannot, therefore, conclude solely on this basis that the product is classifiable under Chapter 30.

7. The appellant's claim that the product has been certified by Vaidyas to be an ayurvedic medicine is answered by the judgment of the Supreme Court in Shri Baidyanath Ayurved Bhavan Ltd. v. Collector of Central Excise, Nagpur and Anr. - 1996 (10) RLT 327. The Court held that in classifying Dant Manjan Lal tooth powder as toilet preparation and not as an Ayurvedic medicine, the Tribunal was correct not to accept the certificate of Vaidyas in the absence of evidence to show the user of the product considered it to be a medicine and not a toilet requisite.

A medicine must contain pharmaceutical or therapeutic properties for the cure of prevention of ailment to cure disease, illness or disorder.

There is nothing on the container of the product to indicate its use as medicine as I have indicated above. The literature produced by the appellant for the product calls it 'the best Ayurvedic medicine' and its ingredients are 'most beneficial for body and particularly for hair and skalp'. The directions for use say "Apply three to five teaspoons full of Shikakai bathing powder on wet body and hair. Rub and rinse them with clean water. These are indications that one would expect for use of a product daily for conditioning the scalp, hair or skin." The directions did not say that the product is used for specific illness and for a specific period which would be the case if it were used as medicine. Its container is also a cylindrical plastic drum, printed in bright colours. No evidence has been produced of its sale by a chemists. The claim that the product is a medicine may have been made to boost the sales of the product but does not stand up to scrutiny.

8. The other decisions cited by the advocate do not support the appellant's case. The product has not been recognised in a prescribed Ayurved texts and use. Hence the ratio of 1989 (42) E.L.T. 33 would not apply. The Tribunal in 1993 (67) E.L.T. 907 classified the Henna Shikakai powder sold in unit packing on labels indicating its use for the conditioning the hair under Heading 33.05 supports the department's stand.

9. The Note 2 to Chapter 33 provides that Headings 33.03 to 33.07 applies inter alia to products suitable for use as goods for these headings and put up in packing with labels, literature or other indication that they have used as a cosmetic or toilet preparation, or put up in a form clearly specialised to such use. The first requirement is satisfied in this case. The literature indicates the use of the product for conditioning the hair and scalp. Classification under Chapter 33, therefore is confirmed by application of this rule.

10. The next question is the availability of Notification No. 140/83.

The benefit has been denied on the ground that the container has on it a "brand name" or "trade name" of Bajaj Sewashram. The relevant words on the container are "Marketed by Bajaj Sewashram Ltd." The notification provides that it will not apply where the brand name or a trade name as defined thereon as used on the container. The fact that the provision has been held to be unconstitutional by Calcutta and Madras High Courts, will not have any bearing upon the applicability of this condition. The appellant is within the jurisdiction of the Rajasthan High Court and that High Court has not held a provision to be unconditional or conditional, the provision would equally apply to the appellant. The words "Bajaj Sewashram Ltd." are in a different type faced than the other words printed on the container. They are much larger and no capitals are used. On reading these words we are satisfied that they are used to indicate the connection between the goods and Bajaj Sewashram, by use of invented writing, benefit of notification will not be available.

11. The appellant had commenced manufacture of product on 11th August, 1990 and only declared it to the department in April, 1992. The claim that the declaration was not required earlier because the exemption was unconditional is contrary to the provisions of the rules. We are, therefore not satisfied that failure to declare the manufacture was bona fide. The extended period has therefore, incorrectly applied.

12. Taking all factors into account, we reduce the penalty to Rs. 20,000/- but otherwise decline to interfere.