

Collector of Central Excise Vs. Wander Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-10-1996

Reported in : (1999)(112)ELT498TriDel

Appellant : Collector of Central Excise

Respondent : Wander Ltd.

Judgement :

1. The appeal throws up two issues namely: (a) whether 'spert' is a milk food or not so that it comes within the mischief of Entry 14 of Notification No. 17/70, dated 1-3-1970 and (b) whether the product in question is exempt under the aforesaid notification.

2. The facts of the case are that the respondents are engaged in the manufacture of a product described by them as "spert". The Assistant Collector in his Order-in-Original held that the product described by the appellants as "spert" is nothing but a milk food and hence was not exempted in terms of Notification 17/70. The appellants went in appeal against this order of the Assistant Collector. The Collector (Appeals) set aside the order of the Assistant Collector and allowed the appeal of the respondents. Against this order of the Collector (Appeals) the department has come up in appeal before us.

3. Shri A.K. Madan, the learned SDR appearing for the Revenue submitted that the entry at Serial Number 14 of the Schedule to the Notification No. 17/70 broadly specifies the composition of the product covered by the entry; that it does not refer

to trade nomenclature or technical nomenclature; that simply because the assessee had described this product using some other Y- terminology and used the terminology for his commercial purpose, would not take the product away from the said Serial Number 14. He referred to the order-in-original and submitted that Serial Number 14 of the Schedule to Notification No. 17/70 covers preparations basically of two components; that the first component is malted barley; that the second component is milk food. The product manufactured by the respondent herein has skimmed milk powder; that according to the ISI specification 1806-1975 the product is milk food.

He submits that it is not the description of the product alone which is material for determining its classification for purpose of serial number 14 but it is the constituents of the product which should form the basis for determining whether the product falls within the mischief of the Schedule to Notification 17/70. The learned SDR submitted that since the product contained skimmed milk powder therefore it was a milk food and was dutiable in terms of serial number 14 of the Schedule to the aforesaid notification. The learned SDR therefore prayed that the impugned order may be set aside and the order of the Assistant Collector may be restored.

4. The learned Advocate appearing for the respondents submits that the appellants manufacture "spert" which is a protein rich food supplement and not a milk food. He submits that in their own case for an earlier period this Tribunal in their Final Order No. E/121/94-D, dated 24-2-1994 had held that the product "spert" manufactured by the respondents therein is not covered by entry 14 of the Schedule to the Notification 17/70, dated 1-3-1970 and that in this view of the matter it was exempted from payment of excise duty. The learned Counsel submitted that for arriving at this decision the Tribunal had relied on their earlier judgment in the case of CCE Pune v. Frozen Foods Ltd. -1987 (27) E.L.T. 195. He submitted that the product in this two cases was the same namely, "spert". He, therefore, submitted that their case was fully covered by ratio of the above two judgments and prayed that the appeal may be rejected and the impugned order may be upheld.5. Heard the submissions of both sides. We find that the issue in brief revolves around the identification of the product "spert". The department

contended that "spert" is a milk food whereas the respondents herein right from the beginning have been claiming that it was a protein food supplement. We find that exactly similar arguments were placed before this Tribunal in the case of CCE, Pune v. Frozen Foods (P) Ltd. reported 1987 (27) E.L.T. 195. The Contention of the department that the product of the respondent was a milk food was discussed in para 19 of the Tribunal's order. In para 20 of their order this Tribunal held that the product of the respondent herein described as "spert" does not fall under serial number 14 of the Schedule to the notification and therefore was exempted from duty. Paras 19 and 20 of the said order are reproduced: "19. It is interesting to note in this connection that in response to the respondent's letter dated 12-1-1985 to the Assistant Collector seeking clarification on what, according to the department, was 'milk food' so as to enable the respondent to reply to the show cause notice, the Assistant Collector in his reply (undated) of January, 1985 has not been able to clarify the query.

He has merely stated that the Central Excise Tariff has not defined 'milk food' and that he was, therefore, unable to give any definition excepting that it should carry the meaning as commonly understood. The Assistant Collector added that it was for the respondent to defend his case as the show cause notice was based on the tariff wordings. This shows the lack of any precise or unassailable definition or meaning of the expression "milk food". In this background, I do not see any reason why the opinions expressed by eminent persons in the field of food science and food technology, doctors, dealers and chemists, should not be accepted and acted upon, particularly, when the appellants have not placed any material before us which may throw any other angle of light to the proper understanding of the expression or contradict the opinion given by these persons.

20. Though Notification No. 17/70, dated 1-3-1970 is an exemption notification, the general principle that it is for the assessee who claims exemption from duty to show that his goods fall within the four corners of the notification, may not strictly apply in the present case. It is for the reason that, unlike the general run of notifications, which name products and exempt them, the present notification exempts all goods falling under item No. 1B of the Central Excise Tariff Schedule from payment of excise duty except those enumerated in the Schedule to the

Notification. In other words, if a product is covered by any of the entries in the Schedule to the notification, it is taxable, otherwise not. In my view, it is, therefore, for the department which is seeking to tax "Spert" under entry No. 14 of the Schedule to show that it falls within the entry. I am afraid that department has not discharged its burden, whereas the respondent has, on its part, produced sufficient material to point to the conclusion that its product does not fall within the mischief of entry No. 14." 6. We also find that this order of the Tribunal was further followed by this Tribunal in the case of respondents herein themselves for an earlier period.

7. We find that the Tribunal has already considered the contention of the department whether "spert" is a milk food or not and the Tribunal came to the conclusion after examining the various affidavits expert opinions and other matters including the ISI specification relied upon by the department and came to the conclusion that the product described as "spert" by the respondents herein is not milk food and that for the purpose of Notification 17/70 it was an exempted item. Following the ratio of the judgments of this Tribunal we hold that "spert" is not a milk food and is entitled to exemption under Notification 17/70.

8. In the above view of the matter we uphold the impugned order and reject the appeal.

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