(2010) 02 GUJ CK 0133

In the Gujarat High Court

Case No : Tax Appeal No. 1570 of 2009

Anil Products Limited — APPELLANT

Vs

Commissioner of Central Excise — RESPONDENT

Date of Decision : 04-02-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G

Citation : (2010) 176 ECR 7 : (2010) 257 ELT 523 : (2011) 21 STR 329

Hon'ble Judges : Rajesh H. Shukla, J;K.A. Puj, J

Bench : Division Bench

Advocate : D.V. Parikh, for the Appellant; Y.N. Ravani, for the Respondent

Final Decision : Allowed

Judgement

K.A. Puj, J.—The Appellant has filed this Tax Appeal under Section-35G of the Central Excise Act, 1944 proposing to formulate the following substantial questions of law for determination and consideration of this Court.

(i) Whether or not the Hon''ble Tribunal committed an error of law in not passing a reasoned order and in not considering the outline of arguments which deal with various decisions of the Hon''ble Tribunal as well as the Circulars of the Board directly on issue ?

(ii) Whether or not the Hon''ble Tribunal erred in law in deciding the classification of Calcium Gluconate without even considering Chapter Note 2 to Chapter 30 and without even considering whether the product in question falls under Chapter Note 2(i) (a) or Chapter Note 2 (i)(b) ?

(iii) Whether the Hon''ble Tribunal clearly committed an error of law in relying upon an earlier ex-parte order passed in the case of products falling under Chapter Note 2(i)(b), when the present case clearly is a product falling under Chapter Note 2(i)(a) ?

(iv) Whether the Hon''ble Tribunal clearly committed an error of law in classifying the product under Chapter heading 2918.00 as organic chemical instead of Chapter heading 3003.30 ?

(v) Whether the Hon''ble Tribunal erred in law in proceeding beyond the SCN, in as much as, the only charge in the SCN was that the product in question is required to be converted into injection or tablet before classifying the same as ''medicament''?

(vi) Whether the Hon''ble Tribunal erred in law that once the extended period is dropped / not attracted then shorter period demand cannot subsist ?

(vii) Whether the Hon''ble Tribunal erred in holding that when classification under different chapter heads possible favourable one to Assessee be adopted ?

2. This Court has issued notice on 27.8.2009. Pursuant to the notice Mr. Y.N. Ravani, learned Standing Counsel has filed his appearance on behalf of the revenue.

3. Heard Mr. Devang V. Parikh, learned advocate appearing for the Appellant and Mr. Y.N. Ravani, learned Standing Counsel appearing for the revenue.

4. The brief facts giving rise to the present Tax Appeal are that the Appellant is carrying on business of manufacturing various products which are I.P. grade and are used only for pharmaceuticals uses. One of such products which is under dispute is Calcium Gluconate I.P. This product is being manufactured by the Appellant under the drug license. This product has therapeutic and prophylactic value. The Appellant was filling Form-II as required for non-scheduled drugs under the Drug (Price Control) Order. The fact that the product is of I.P. grade, is admitted even in the order-in-original passed by the Commissioner of Central Excise, who in his first order referred to the Indian Pharmacopoeia Rules and held that it is manufactured in accordance with the specifications and standards laid down therein. The majority of this product is sold to manufacturers of formulations. These manufacturers are doing the activity of converting calcium gluconate into tablet or into injectable form. The only active ingredient in such a medicine is the calcium gluconate.

5. A dispute arose with regard to the classification of the said product. The Appellant Assessee claimed this product as a medicament, whereas the department sought to classify the same as organic chemical. The fact that the product is put to therapeutic and prophylactic uses and the fact that majority of the sales are to persons who manufacture injections and tablets therefrom was not disputed even in the show cause notice dated 28.8.1987. The Commissioner of Central Excise passed an order-in-original on 28.9.1998 holding that this product is not medicament but organic chemical and it does not fall under Tariff heading 3003.30 (medicament) but falls under Tariff heading 2918.00 (organic chemicals).

6. Being aggrieved by the order of the Central Excise the Appellant preferred an Appeal before the Tribunal and the Tribunal vide its order dated 5.1.2004

remanded the matter to the Commissioner with certain directions. On remand again the Commissioner passed his order on 24.1.2006 upholding the classification of the product as canvassed by the Revenue. Being further aggrieved by the said order the Appellant preferred an Appeal to the Tribunal. It is the case of the Appellant that detailed submissions were made to the Tribunal and detailed outline of argument was also filed before the Tribunal. Without considering this submission which go to the very root of the matter, the Tribunal passed an order after four months on 22.6.2009 and dismissed the Appeal filed by the Appellant. It is this order which is under challenge in the present Tax Appeal.

7. Mr. Devang Parikh, learned advocate appearing for the Appellant has submitted that the impugned order is Ex-facie non-reasoned and non-speaking order. It fails to deal with the submissions raised before the Tribunal in their true perspective. There is settled legal position by now that a non-speaking or non-reasoned order cannot be sustained under any circumstances. He has further submitted that issue with regard to the classification of product as a medicament or in its base category as an organic chemical is answered by the provisions of the Central Excise Tariff Act itself. There are lot of products which have primarily of therapeutic use but they would also qualify for classification as organic chemical. In this context, the Central Excise Tariff Act itself provides a complete answer. He has further submitted that for classifying the product as a pharmaceuticals product under Chapter 30, one has to look at Chapter Note. 2 which contains the specific definition of ''medicament''. It states that ''medicaments'' means goods (other than foods or beverages such as dietic, diabetic or fortified foods, tonic beverages) not falling within heading No. 30.02 or 30.04 which are either (a) products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses (b) unmixed products suitable for such uses put up in measured doses or in packings for retail sale or for use in hospitals. He has submitted that on the basis of this definition it is obvious that a product comprising of two or more constituents which have been mixed or compounded for therapeutic and prophylactic uses would be classifiable as medicament. The product need not be put in a state as to be directly administered as medicine. If these were the intent, the Chapter note would have become wholly unnecessary, and it would only have read that the product which is sold in the market as a medicament should be classified as a medicament. He has, therefore, submitted that the product falling under Chapter Note. 2(i)(a) need not be a product which is directly to be administered to a patient. It thus covers products which are recognized as bulk drug . These products, out of which the medicaments are made, can be directly administered to a patient. Thus undoubtedly such bulk drugs are made for their therapeutic and prophylactic uses. He has further submitted that Central Excise Tariff provides that if the intent is to use the product for therapeutic and prophylactic uses and the manufacturer does mixing or compounding two constituents for these purposes, then such a product would

classify as medicament.

8. Mr. Parikh further submitted that Part (b) of the definition refers to unmixed product. With regard to such unmixed product, it is required that unmixed product which are basically organic chemicals, must be put up in measured dosages or packed in such a way to be fit for medical use directly, before they can be classified as ''medicaments''. Thus, the need for the product to be directly administrable to a patient is necessary only in the case of unmixed product and certainly not in the case of a product which consists of two constituents which are put together for therapeutic or prophylactic uses. He has, therefore, submitted that the Tribunal has failed to appreciate this clear language of the chapter note. The Tribunal has further failed to appreciate that even the show cause notice itself admits that the product has therapeutic and prophylactic uses. The only case made in the show cause notice was that, Calcium Gluconate is yet to be converted into injection or tablet and unless it is in tablet or injection form irrespective of any change in composition or content of the product, it cannot be classified as a ''medicament''. He has submitted that this very perception is Ex-facie opposed to the definition of ''medicament'' as contained in the chapter note No. 2 of Chapter 30. Mr. Parikh relies on the decision of the Apex Court in the case of State of Haryana v. Dalmia Dadri Cement Ltd. reported in 2004 (178) ELT 13 wherein it is held that the words for use must be read as intended for use and not actually used . He has further submitted that when the product made is of I.P. grade, and it satisfies the requirement of Drug Rules as held by the Commissioner, and when it is made under a Drug License, and necessary forms under the Drugs (Price Control) Order are also submitted, in that case it can certainly be said that the product is being made for therapeutic and prophylactic use. He has further submitted that this Chapter note -2 of Chapter 30 has been interpreted by the Tribunal itself in various cases. In two of the cases the Tribunal clarified the proposition of classification. In the case of 2003 (108) ECR 445 it was held that the need to pack the same for ready use is only required in the case of a single component product falling under Chapter note 2 (i)(b). In the case of BECOAT v. Commissioner of Central Excise, Cochin it was held that if a product comprises of two or more constituents, it need not be put up in measured dosages or packed for retail sale. Even this issue or manner of classification is settled by a Circular issued by the Government being Circular No. 13/89 dated 21.2.1989 which says that a product made of two constituents having therapeutic and prophylactic use need not be put in retail packs so as to render it directly usable. He has, therefore, submitted that despite this clear position as per the provisions of the Tariff Act and the judgments of the Tribunal, this issue was not at all considered in this light and without going into this basic issue the Tribunal held that the product in question is classifiable under Chapter 29.

9. Mr. Parikh further submitted that the Tribunal has committed an error in holding that the product in question is not a medicament. For arriving at this conclusion the Tribunal relied on the decision in the case of 2000 (119) ELT 416

The Tribunal has, however, not considered the fact that the said decision was not only an ex-parte but various other products were packed for classification together and it was presumed that the case fell under Chapter note 2(i)(b) and not under 2(i)(a). He has further submitted that a reference to the statement of the person concerned with Shanpur Industries is highly irrelevant in as much as his statement was taken in 1997, even prior to the Tribunal''s own decision in that case. In any case, all these aspects which go to the very root of the matter and hence the sole reliance on the decision of Shanpur Industries (Supra) is wholly unjustified. He has, therefore, submitted that the substantial questions of law do arise out of the order of the Tribunal and since the notice is issued by this Court calling upon the department to make its stand clear, appropriate order may be passed either accepting the Appeal in toto or at the most remanding the matter back to the Tribunal to decide the Appeal afresh in light of the submissions made by the Appellant.

10. Mr. Y.N. Ravani, learned Standing Counsel appearing for the Revenue, at the outset raised a preliminary issue and submitted that this Appeal itself is not maintainable. When the issue regarding classification is involved Appeal lies to the Apex Court and not to this Court. He has, therefore, submitted that this Appeal should be dismissed only on this short ground. Even with regard to other submissions made on behalf of the Appellant, Mr. Y.N. Ravani has submitted that there is no substance in the arguments canvassed by Mr. Parikh that the Tribunal has not considered all the issues raised before it. He has submitted that the Tribunal has referred to various submissions made on behalf of the Appellant before it. The Tribunal has also considered the submissions made on behalf of the Revenue. The Tribunal has referred to the submissions made by the learned Departmental Representative and documents which inter alia includes opinion of Shri A. Venkatasubramanian, Senior Executive and Production Incharge who admitted that calcium gluconate manufactured by them was for industrial use and sold in unit quantity of 25 Kgs. Shri D.K.J. Padia of M/s. Bhakthi Pharma engaged in trading of bulk drugs chemicals had stated that calcium gluconate IP in powder from was not a medicament but a chemical compound. Shri Nilesh Bhupendra Shah, Manager of M/s. Shanpur Industries, had stated that they are manufacturing calcium gluconate IP and classifying the same under sub heading 2918.00. Shri Maheshbhai M. Mehta Partner of M/s. Dexoline Pharmaceuticals Ltd., has said that they were engaged in the manufacture of IV Fluids and they were using calcium gluconate as raw material. He has also stated that calcium gluconate IP received by them in powder form was nothing but an organic chemical capable of being used as bulk drugs. Shri Ravindra Natwarlal Shah, Director of M/s. Comet Pharmaceuticals Pvt. Ltd., also stated that calcium gluconate IP in powder form was a pure organic chemical and a raw material for manufacture of medicaments. The Tribunal has, thereafter, referred to the decision of Shanpur Industries (Supra) wherein it was held that calcium gluconate is classifiable under CETH 2918.00. The Tribunal, thereafter, observed that for deciding classification of a product, recourse should not be had to be a

scientific or technical meaning of terms and expressions but to their popular meaning as attached to it by persons dealing with that product. While applying from common parlance test also calcium gluconate is classifiable under CETH 2918.00. The Tribunal has also referred to the new Central Excise Tariff introduced with effect from 28.2.2005, calcium gluconate appears under sub-heading 2918.1610.

11. After referring to the arguments of both the sides the Tribunal ultimately came to the conclusion that the decision in the case of Shanpur Industries was rendered considering the products as calcium gluconate only. In that case also the decision was rendered considering that the product was covered by the very Chapter notes. Further, the Manager of the very same Shanpur Industries, has stated that they were classifying the product under CETH 2918.00 only. The Tribunal has also referred the other decisions and observed that those decisions are distinguishable on facts. Mr. Ravani has, therefore, submitted that there is no infirmity in the order passed by the Tribunal and the Appeal deserves to be dismissed.

12. We have considered the rival submissions made by the learned advocates appearing for the parties. We have also gone through the impugned order of the Tribunal as well as all other documents produced before the Court. Dealing with the preliminary objection raised by Mr. Ravani against the maintainability of this Appeal, we are of the view that this objection would have held good if we would have decided the issue regarding the classification in the present Tax Appeal. However, the bare perusal of the questions framed by the Appellant would clearly indicate that the main grievance of the Appellant is about the non-speaking and non-reasoned order passed by the Tribunal. The Appellant''s other grievance is that despite various submissions were made and several judgments were relied upon by the Appellant, the same were not considered in their true perspective and the Tribunal has merely relied on the decision of Shanpur Industries (Supra) which was an exparte decision and while deciding the said matter, the Tribunal had not an advantage of considering the submissions that may be made on behalf of the Assessee. If we concentrate only on this question leaving aside the question regarding classification of the Appellant''s product, we are of the view that this Tax Appeal is certainly maintainable before this Court. Once we take this view that this Appeal can be entertained only on this limited aspect there is no hesitation on our part to hold that the Tribunal has not considered all the submissions of the Appellant that were made before it. Mere reproduction of submissions in the body of the order is not enough. The finding of the deciding authority on these submissions is equally necessary. Mere reliance on an earlier decision, that too, when it was decided exparte, is also not sufficient to take any decision one way or the other. Despite the fact that the submission was made to the effect that the said decision is not applicable to the facts of the case and the real controversy was not highlighted in that decision, the Tribunal has not considered this aspect. As a matter of fact, if we peruse the order passed by the Tribunal in the case of Shanpur Industries it reveals that the Appellant sought

classification of ten products under Sub heading 3003.30, which inter alia includes calcium gluconate. The Assistant Collector classified the product under Sub heading 2915.90 as organic chemicals. The Collector (Appeals) upheld the classification. Before the Tribunal there was no appearance on behalf of the Appellant. The Tribunal merely refers to the fact that the Assessee continues to maintain that Note 2(1)(a) would apply to their products. Without discussing anything else the Tribunal in that case observed that the manner in which the products have been described, makes it difficult to believe that they are mixture of different constituents. In the manner the goods are described, the provision that would attract is Sub-clause (b). For such products to become medicaments, they have to be put up in measured doses or in packings for retail sale. Since the products do not fit under Chapter Note 2 at all, the Tribunal upheld the impugned order passed by the Commissioner (Appeals). It is relevant to observe that there was no discussion worth its name in the decision of Shanpur Industries. Again this decision is rendered in respect of ten products. The product in question in the present Appeal i.e. Calcium Gluconate has not at all been separately considered.

13. In the above view of the matter, we are of the opinion that the sole reliance placed by the Tribunal in the decision of Shanpur Industries (Supra) is not justified and the Tribunal ought to have given its specific findings on the various submissions made, judgments relied upon and the distinguishing features pointed out by the Appellant before the Tribunal. We, therefore, set aside the impugned order passed by the Tribunal and remand the matter back to the Tribunal to decide the whole issue afresh after giving an adequate opportunity to the parties and after considering various submissions that may be made before it and to pass a reasoned as well as speaking order.

14. It is made clear that we have not expressed any opinion on the classification of the product in question. It is open for the Tribunal to take appropriate decision in accordance with law and after considering the submissions that may be made by the parties before it.

15. Subject to the aforesaid directions and observations this Appeal is allowed to the above extent and questions proposed to this Court are answered accordingly.

