(2006) 07 CESTAT CK 0001

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : E/542/01 AND E/1614/04 AND E/CO-56/01

Commissioner of Central Excise and Customs; Balsara Herbal Products Private Limited — APPELLANT

Vs

Balsara Herbal Products Private Limited; Commissioner of Central Excise and Customs — RESPONDENT

Date of Decision : 26-07-2006

Acts Referred:

Citation : (2006) 07 CESTAT CK 0001

Hon'ble Judges : Jyoti Balasundaram, President, Chittaranjan Satapathy

Advocate : Ajay Saxena, Prakash Shah

Judgement

Jyoti Balasundaram, Vice President

1. Is "Babool Powder" manufactured by M/s. Balsara Herbal Products Pvt. Ltd. a toothpowder/preparation for oral or dental hygiene classifiable under CET sub-heading 3306.00 attracting duty at the rate of 30% ad valorem as per tariff rate and 10% effective rate as per notification 10/94, as contended by the Revenue, or an ayurvedic medicament under CET subheading 3003.30 eligible to exemption from payment of duty in terms of notification 75/94, This is the issue to be determined in the above appeals.

2. In appeal No. E/542/01, the proceedings commenced by issue of show cause notice dated 19.2.1998 proposing classification of Babool tooth powder under CET sub-heading 3306.00 and not under CET sub-heading 3003.30 as claimed by the manufacturers in their classification lists for the period 1993-94 and 1994-95, and proposing consequent recovery of duty of Rs. 5,62,033/- and proposing penal action, which notice was adjudicated by the Additional Commissioner vide his order dated 5.2.1999, by confirming duty demand as raised in the notice together with interest and imposing penalty of amount equal to duty under Section 11 AC of the Central Excise Act and Rs.2,000/- under Rule 9(2) of the Central Excise Rules. Penalties of Rs. 2,00,000/- each were imposed on three directors of the assessee company. Vide order-in-appeal dated

22.11.2000, the Commissioner of Central Excise (Appeals) set aside the demand on the ground of limitation and also set aside the penalties on the company and its directors. The Revenue has preferred the above appeal against the above order-in-appeal.

3. Appeal No. E/1614/04 arises out of the order dated 22.1.2004 of the Commissioner of Central Excise upholding the Assistant Commissioner''s order dated 2.3.1998 by which the product in dispute was held to fall for classification under CET sub-heading 3306.00 attracting appropriate rate of central excise duty.

4. We have heard both sides.

5. Chemical analysis of the product by the Deputy Chief Chemist, Central Excise Laboratory, Mumbai, shows that it is composed of Babool, Kalimiri, Sunthi, Lavang oil, Kapur, Pimpli, Pudina ke phool and Geru powder and is a preparation for oral or dental hygiene. For the purpose of ruling out classification as an ayurvedic medicament, reliance has been placed by the authorities below on the apex court''s decision in Shree Baidyanath Ayurved Bhavan Ltd. v. CCE, Nagpur wherein it was held that Baidyanath Dant Manjan Lal (which is of almost the same composition as the disputed product) was a toilet requisite under Chapter Heading 33.06. The Supreme Court upheld the finding of the Tribunal that the product was understood in popular parlance as a toilet requisite and that ordinarily, a medicine is prescribed by medical practitioner and it is used for a limited time and not everyday, unless it is so prescribed to deal with a specific disease, while Dant Manjan Lal was used by a common man daily to clean his teeth. However, as rightly pointed out by the learned Counsel for the manufacturers, the requirement that in order for a product to be considered as a medicament, it should be prescribed by a medical practitioner and is to be used for a limited period, is no longer a relevant criterion, in the light of the later decisions in the case of CCE Calcutta-IV v. Pandit D.P. Sharma , CCE, Nagpur v. Vicco Laboratories and Puma Ayurvedic Herbal (P) Ltd. v. CCE, Nagpur wherein it has been held that sale of the product under a doctor''s prescription is not necessary for the purpose of determining whether an item is a medicament or not. In the above three decisions as well as in the apex court''s decision in Dabur (India) Ltd. v. CCE, Jamshedpur 2005 (182) ELT 290 (SC), the common parlance test has been held to be very relevant along with the test that the ingredients used in the product must be mentioned in the authoritative text book on ayurveda. There is no dispute in the present case that all the ingredients used in the product are mentioned in the authoritative text books on ayurveda. The appellants also possess an ayurvedic licence under the Drugs & Cosmetics Act, 1940 for the manufacture of the product. Therefore, the only test that remains to be applied is the common parlance or popular understanding test. The Revenue has not led in any evidence to show that the product is commonly understood as a toilet requisite and has thus failed to discharge the burden cast upon it. The learned SDR urges us to hold that the product is commonly understood as a toilet requisite as an almost identical product, namely Dant Manjan Lal, was held

to have satisfied the test of common parlance as a toilet requisite as seen from the judgment of the apex court in Shree'' Baidyanath Ayurved Bhavan Lid. supra. However, we find that in the later decision of Vicco Laboratories cites supra, where the products in dispute were turmeric skin cream and vajradanti toothpaste and toothpowder, the Supreme Court has held that the burden of proof that a product is classifiable under a particular tariff heading is on the Revenue and must be discharged by proving that it is so understood by consumers of the product or in common parlance and this was not the ground on which show cause notice was issued to Vicco Laboratories, the notices could not be sustained, leaving it open to the department to gather evidence of popular understanding of the product for the purpose of future classification under appropriate tariff heading. The ratio of the above decision is applicable on all fours to the facts of the present case for the reason that the department has not discharged the burden of proving that Babool powder is classifiable under CET sub-heading 3306.00 as a toothpowder on the ground that it is so understood by its consumers or in common parlance, and further the show cause notice issued to the manufacturers did not proceed on the ground that such common parlance test was satisfied in the case of the product. Further, in the present case admittedly, the manufacturers had filed affidavits of doctors to the effect that they were prescribing Babool powder for prevention and treatment of various ailments including mouth diseases and oral dental ailments and disorders, and affidavits of stockists of the product to the effect that people come to their shops to buy ayurvedic medicines for treatment of dental and oral disorders, and such stockists recommend purchase of Babool powder, and affidavits of users of Babool powder for treatment of dental disorders.

6. Following the ratio of the apex court''s judgments in CCE, Calcutta-IV v. Pandit D.P. Sharma , CCE, Nagpur v. Vicco Laboratories , Dabur (India) Ltd. v. CCE, Jamshedpur 2005 (182) ELT 290 (SC) and Puma Ayurvedic Herbal (P) Ltd. v. CCE, Nagpur , we set aside the impugned order dated 22.1.2004 and allow appeal No. E/1614/04. Consequent to the above decisions setting aside the classification of the product adopted by the department, namely under CET sub-heading 3306.00, the demand on mis basis also fails. Hence the impugned order dated 22.11.2000 is upheld and appeal No. E/542/01 of the Revenue is dismissed.

7. Cross objections are also disposed of accordingly.

