

(2006) 11 SC CK 0143

In the Supreme Court Of India

Case No : Civil Appeal No. 7849 of 2004

Commissioner of Central Excise, Surat

APPELLANT

Vs

Zandu Pharmaceutical Works Ltd.

RESPONDENT

Date of Decision : 10-11-2006

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 9(2)

Central Excises and Salt Act, 1944 — Section 11A, 11AB, 4A

Citation : (2006) 113 ECC 73 : (2006) ECR 73 : (2006) 204 ELT 18 : (2006) 10 JT 524 : (2006) 11 SCALE 619 : (2006) 8 SCR 1057 Supp

Hon'ble Judges : S. B. Sinha, J; Dalveer Bhandari, J

Bench : Division Bench

Advocate : Mohan Kumar, Parasaran, A.S.G., Sandhya Goswami and B. Krishna Prasad, for the Appellant; Madhav Rao, Alok Yadav and Rajesh Kumar, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—Respondent herein manufacture hair oil under the brand name of "Alma Lio". It was classified under SH No. 3003.39 of the Schedule appended to the Central Excise Tariff Act, 1985 (for short, 'the 1985 Act'). The said entry provides for excise duty at the rate of 8% ad valorem being Ayurvedic Medicament. A show cause notice was issued as to why the said product shall not be classified under SH No. 3305.99 being a cosmetic product attracting excise duty at the rate of 30% ad valorem. It was alleged that by wrong classification of its product there had been a short payment of central excise duty amounting to Rs. 11,12,129/-. A demand of the said amount in terms of Rule 9(2) of the Central Excise Rules, 1944 (for short, 'the Rules') read with Section 11A of the Central Excise Act, 1944 (for short, 'the 1944 Act') was issued. A penal action in terms of rule 173-Q of Rules was also proposed. Cause having been shown by Respondent, the matter was heard by the Deputy Commissioner, who opined that the product was classifiable under SH 3305.99 of the 1985 Act. Respondent was directed to make good the short payment. A penalty of Rs. 11,12,129/- was also

imposed upon it together with interest. An order for recovery of interest u/s 11AB of the 1944 Act was also passed. The appeal preferred by Respondent before the Commissioner (Appeals) was dismissed by an order dated 17.4.2003. He, however, opined that the product being not perfumed and being hair tonic, and as such different from hair oil, could be classified under Chapter Heading No. 3305.99 falling in the residuary group. He also directed valuation of the goods to be done u/s 4A of the 1944 Act. On a further appeal made by Respondent before the Tribunal, the product was held to be classifiable under SH-3305.10 as 'perfumed hair oil'. The matter was remanded to the Adjudicating Authority for recomputing the duty of excise payable.

Appellant is, thus, before us.

2. Mr. Mohan Parasharan, the learned Additional Solicitor General of India, appearing on behalf of Appellant, submitted that the Tribunal went wrong in classifying the product of Respondent as perfumed hair oil although it never disclosed the manufacturing process involved therein. Mr. Madhav Rao, the learned Counsel appearing on behalf of Respondent, on the other hand, supported the judgment.

3. Before the assessing authority, Respondent disclosed the manufacturing process undertaken by it, which is as under:

(a) Aqueous extract of Mehendi, Bhiringraj, Amla, Doodhibeej Seeds, Renukbeej, Ambagotti, is prepared and concentrated.

(b) Coconut oil is hearted with Nagarevel Pan.

(c) Concentrated aqueous extract is added to coconut oil and boiled.

(d) Milk solution is added to hot Coconut oil and boiled. Then kapur kachli powder is added.

(e) Bulk is cooled and fragrance is added. It is kept for 7 days and filtered.

The assessing authority in its order furthermore noticed:

They further submitted that the Coconut oil is used in the said Product for the purpose of using the same as base to enable application of the above referred Ayurvedic Ingredients. Their product contains, time tested herbs with well known properties. They submitted the various properties of the said Ayurvedic. Ingredients ultimately ensured dandruff free hair, and also strengthen and promotes of the various ingredients use is the said "Almalio" the details against each of the said Ingredients:

(A) Mehendi, Amlaki & Kapur Kachli : To strengthen and promote healthy hair growth. (B) Bhiringraj : To make hair dark, luxuriant and prevent dandruff. (C) Doodhibeej & Dugdha : To cool head (D)Renuk beej & Amaresthi : To Nourish the scalp.

They submitted that the use of the above Ingredients in their product "Almalio"

are having Pre- dominant curative or prophylactic value and the use of the same cannot be compared with any other ordinary preparation intended to be use on hair.

4. It is, therefore, not correct to contend that Respondent never disclosed the manufacturing process. The assessing authority, inter alia, held:

(x) Assuming with admitted (sic) their product merits classification under Chapter 33 as cosmetics or toilet preparation, then it deserves to classify under Chapter Sub Heading No. 3305.10 and not under 3305.99 as alleged in the Show Cause Notice. The Chapter Sub Heading No. 3305.10 is applicable to the perfumed hair oil whereas Chapter Sub Heading No. 3305.99 covers preparation for use on the hair other than perfumed hair oil and hair fixer. They submitted that going by the contents of their product and manufacturing process set out hereinabove, their product does contain Sugandhi Dravya i.e. perfume and accordingly it merits classification as perfume hair oil under 3305.10. In this context they refer to and rely upon the decision of Honourable Supreme Court of India in the case of Dunlop India Ltd., wherein the court has held as under:

When an article has by all standard reasonable claim to be classified under an enumerated item in a Tariff Schedule then it would be against the very principle of classification to deny it a parentage and consign it to an orphanage to the residuary clause (Para-37).

5. The Tribunal, on the other hand, as indicated hereinbefore, proceeded on the basis that only because some ingredients of the product are mentioned in the authoritative books of Ayurveda, the same would not make the product a medicament. It also noticed the ingredients and the therapeutic or prophylactic uses of the product stating:

Further the properties of the various ingredients used in the manufacture of the impugned product has been described by the Appellants as under:

Ingredients Properties

- (i) Mehandi, Amla & Kapur Kachli To strengthen and promote healthy hair growth
- (ii) Bhringraj To make hair dark luxuriant and prevent dandruff.
- (iii) Doodhi Beej and Dugdha To cool head
- (iv) Ronuk Beej and Amarasthi To nourish the scalp.

The Tribunal, however, proceeded to consider the alternative submission made on behalf of Respondent to hold:

The learned Counsel has alternatively claimed the classification under sub-heading No. 3305.10 as perfumed hair oil. The Commissioner (Appeals) has classified the impugned product under sub-heading 3305.99 as there was nothing on record to show that the product is being perfumed. The learned Advocate has mentioned that fragrance is added in the impugned product at the

end of the manufacturing process. This is apparent from the manufacturing process detailed in the Adjudication Order. We, therefore, hold that the impugned product is classifiable under sub-heading 3305.10 and the matter is remanded to the jurisdictional Adjudicating Authority to recompute the duty of excise payable by the appellants. We also agree with the learned advocate that the issue involved being classification of a product for which classification declaration was filed by the Appellants, penalty under Rule 173Q of the Central Excise Rules, 1944 is not imposable. We, therefore, set aside the penalty imposed on the Appellants.

6. Respondent, as noticed hereinbefore, not only disclosed the ingredients of its products, but also disclosed the manufacturing process. On almost identical situation, as would appear from the discussions made hereinafter, such a product has been held to be an Ayurvedic product.

The relevant entries are as under:

Heading No.

Sub-heading No.

Description of goods

Rate of duty

30.03

3003.39

Other

8%

33.05

3305.10

Perfumed hair oils Other

18%

33.05

3305.99

Other

30%

Note 2 of Chapter 33 reads as follows:

2. Heading Nos. 33.03 to 33.07 apply, inter alia, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings with labels,

literature or other indications that they are for use as cosmetics or toilet preparations or put up in a form clearly specialized to such use and includes products whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value.

7. In *Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works*, , this Court noticed its earlier decisions to hold that onus of proof to show that a particular product is classifiable under one entry or the other is on the Revenue. "Banphool Oil" was held therein as classifiable as an Ayurvedic Medicament under sub-heading 3003.30 stating:

...Mere fact that a product is sold across the counters and not under a doctor's prescription, does not by itself lead to the conclusion that it is not a medicament. We are also in agreement with the submission of Mr Lakshmikumaran that merely because the percentage of medicament in a product is less, does not also ipso facto mean that the product is not a medicament. Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make the product usable. It could not be denied that all the ingredients used in Banphool Oil are those which are set out in the Ayurveda textbooks. Of course the formula may not be as per the textbooks but a medicament can also be under a patented or proprietary formula. The main criterion for determining classification is normally the use it is put to by the customers who use it. The burden of proving that Banphool Oil is understood by the customers as a hair oil was on the Revenue.

8. In *Alpine Industries Vs. Collector of Central Excise, New Delhi*, , this Court held that 'Lip salve' is a kind of 'barrier cream' or a protective cream against skin irritants and, therefore, not a medicament, stating:

...Such preparations which have a subsidiary curative or prophylactic value clearly fall under Entries 33.03 to 33.07 as per Note 2 under Chapter 33. The product clearly is covered by Entry 33.04 read with Note 5 of Chapter 33, it essentially being a preparation for protection of lips or skin. We have also gone through the minority opinion expressed by one of the members of the Tribunal and the reasoning therein supported before us on behalf of the appellant....

9. The Tribunal in 2005 (187) ELT 29 followed *Alpine Industries (supra)*, holding:

...The Respondent's product 'Kesini oil' is a preparation for use on hair and fits the description in chapter heading 33.05 of the schedule. Once a product is a preparation for use in hair, the fact that it has therapeutic values does not take it away from the purview of chapter 33. The impugned product is classifiable under chapter 33. We set aside the order of the Commissioner (Appeals) and allow the appeals.

A SLP filed there against was dismissed by this Court.

10. Recently, however, in *Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner*,

Central Excise, Nagpur, , 'Puma Hair Tonic Powder' and 'Puma Anti-Dandruff Oil', 'Puma Shishu Rakshak Tel' were held to be medicinal products having regard to the medicinal property. Respondent, therefore, could contend that there product also is an Ayurvedic medicament. Tribunal, however, proceeded on the alternative submissions made on its behalf. No appeal has been filed against the order of the Tribunal refusing to classify the product of respondent as an Ayurvedic Medicament.

11. We are, therefore, only left with the contention that the product of Respondent is a 'perfumed hair oil'. Indisputably, perfume is added. Addition of perfume is a part of manufacturing process. It is one of the ingredients of the product. We therefore without going into the question as to whether the product of Respondent has any therapeutic value or not would agree with the judgment of the Tribunal. We, thus, find no merit in this appeal. It is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.