

(2015) 09 SC CK 0014

In the Supreme Court Of India

Case No : Civil Appeal No. 3945 of 2006 with C.A. No. 1768 of 2007.

**Commissioner of Customs and Central Excise - Appellant @HASH 20
Microns Ltd.**

Date of Decision : 08-09-2015

Acts Referred:

Citation : (2015) 324 ELT 14

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : S/Shri Yashank Adhyaru, Sr. Advocate, Ritesh Kumar, Ajay Sharma, R.S. Jena and B. Krishna Prasad, Advocates, for the Appellant; S/Shri V. Lakshmikumaran, Ranjit Raut, Ms. Vina Gupta, Aditya Bhattacharya and Ms. Charanya Lakshmikumaran, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

1. The question that arises for consideration in the instant appeal relates to the classification of the product manufactured by the respondent-assessee which is known as "Calcined China Clay". According to the Revenue, it needs to be classified under Chapter sub-heading 3824.90 to the Schedule to Central Excise Tariff Act, 1985, whereas the assessee maintains that the appropriate classification is under Chapter Heading 25.05.

2. In the show cause notice dated 16-9-2003 that was issued by the Commissioner of Central Excise and Customs to the assessee, it was alleged that the assessee was not manufacturing "China Clay" but was indulging in the manufacture of dutiable and excisable commodity, viz., "Calcined China Clay". Thus, the product "China Clay" was sought to be differentiated from "Calcined China Clay". The basis given in the show cause notice is that the China Clay manufactured and marketed by the assessee had to undergo a number of processes, either physical or with use of chemicals like sulfuric acid and magnetic separators for removal of foreign materials and the assessee had also introduced calcination process according to which the temperature was raised from 700 degree centigrade to 1200 degree centigrade to the cake lumps/powder of China

Clay. The emphasis, thus, was on the calcination of China Clay, which according to the Commissioner, made it a different product. For this purpose, a reference was made to Note 2 of Chapter Heading 25 which reads as under :-

"2. Except where their context otherwise requires, Heading Nos. 25.01, 25.03 and 25.05 cover only products which have been washed (even with chemical substances, eliminating the impurities without changing the structure of the product), crushed ground, powdered, levigated, sifted, screened, or concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products that have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading or sub-heading."

3. As per the Revenue, the aforesaid Note covers various products but specifically excludes those products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each Heading or sub-heading. It was on this basis, the show cause notice mentioned that since the product in question was calcined, it no longer be covered under Chapter Heading 25. As per the Revenue, such a product was to be classified under Chapter Heading 38.24.

4. Before we proceed further, we reproduce the description of goods under Chapter Heading 25.05 as well as Chapter Heading 38.24 :

"25.05 Mineral substances, not elsewhere specified (including clay, earth colours, natural abrasives, sulphurs, slate and stone), lime; plasters with a basis of calcium sulphate, whether or not coloured, but not including plasters specially prepared for use in dentistry.

2505.10 Kaolin and other kaolinic clays, whether or not calcined; other clays, andalusite, kyanite and sillimanite, whether or not calcined; mullite; chamotte or dinas earths."

"38.24 Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included."

5. Thus, the Show Cause Notice proceeded on the basis that as China Clay was calcined, it could not be included under Chapter Heading 25.05 and since Chapter Heading 38.24 mentions about some specified product including those consisting of mixture of natural products, it would fall under Chapter Heading 38.24.

6. The assessee herein submitted its reply to the aforesaid Show Cause Notice contesting the position that was taken by the Revenue and placed material in support of its plea that the product was rightly classified under Chapter Heading 25.05 by the assessee. The contention of the assessee was not accepted by the Commissioner who passed the Order-in-Original confirming the demand made in

the Show Cause Notice. The assessee preferred appeal against the said Order of the Commissioner and the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT") has allowed the said appeal thereby accepting the plea of the respondent-assessee [2006 (199) E.L.T. 41 (Tri. - Mum)].

7. Challenging the order of the CESTAT, the present appeal is preferred by the Revenue.

8. The arguments before us advanced by Mr. Yashank Adhyaru, learned senior counsel appearing for the Revenue, remained the same which were the basis of passing the Order-in-Original predicated on the submissions made in the Show Cause Notice as already noticed above. In the nutshell, it was emphasised that since the product-clay was calcined, as per Chapter Note 2, that is already reproduced above, it could not be included in Chapter Heading 25.05.

9. The aforesaid contention is rejected by the CESTAT, and in our opinion, rightly so. In order to appreciate the reasons given by the CESTAT, we may have to address the history of Chapter 25, i.e., the provision which prevailed before the provision in question came into existence in 1990. Before the new provision was introduced in 1990, the same Chapter 25 which dealt with these very products contained different Head Note 2. This provision which remained in operation from 1986-1990 is -

"2. Heading Nos. 25.01, 25.03 and 25.05 cover only products which have been washed (even with chemical substances, eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, or concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products that have been roasted, calcined or obtained by mixing."

10. In the aforesaid Note, after mentioning the products, there is again an exclusion clause which excludes the products that have been roasted, calcined or obtained by mixing. Calcination was excluded there as well. However, when this Head Note is contrasted with Head Note 2 which was introduced in the year 1990, we find significant addition of words in the beginning of the said Note which are "except where the context otherwise requires". Therefore, the exclusion of calcination would not apply in respect of those products where the context otherwise includes calcination. Chapter Heading 25.05 which has already been reproduced above mentions under Entry 2505.10 "Kaolin and other kaolinic clays, whether or not calcined". It is not in dispute that the china clay otherwise is known as Kaolin as well and the process of Kaolin is same as that of china clay. Here the Kaolin is included under Entry 2505.10, i.e., under Chapter Heading 25.05, even when it is calcined. Therefore, it follows from the above that the context here requires such a product to remain included under Chapter 25.05 even when it is calcined. We find that the amended/new provision in the form of Chapter Note 2 as well as Entry 25.05 was made to bring it in tune with HSN Notes which have been produced for our perusal.

11. Chapter Note 1 of Chapter 25 of HSN Notes, which deals with mineral products is as under :-

"1. Except where their context or Note 4 to this Chapter otherwise requires, the headings of this Chapter cover only product which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading."

12. Likewise, Chapter Heading 25.07 of HSN Notes which deals with Kaolin and other Kaolinic clays specifically mentions "whether or not calcined" as is clear from the reading of the same and we reproduce it hereunder :-

"25.07 - Kaolin and other Kaolinic Clays, whether or not calcined.

This heading covers kaolin and other kaolinic clays, the main constituents of which are kaolin minerals such as kaolinite, dickite and nacrite, anauxite, and halloysite. Such clays remain in the heading even when calcined.

Kaolin, also known as China clay, is a high grade, white or nearly white clay used in the porcelain and paper-making industries. Kaolin-bearing sands are excluded (Heading 25.05)."

13. From the aforesaid discussion, it becomes clear that merely because the product of assessee, i.e., China Clay is calcined, it would not put it out of Chapter Heading 25.05.

14. We, thus, find order of the CESTAT without any blemish and are of the opinion that there is no merit in the instant appeal which is, accordingly, dismissed.

Civil Appeal No. 1768 of 2007

15. This appeal also stands dismissed in terms of the aforesaid order in Civil Appeal No. 3945 of 2006.