(2024) 01 CESTAT CK 0073

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 10508 Of 2023

El PE Engineers LLP — APPELLANT

Vs

Commissioner Of Customs - Ahmedabad — RESPONDENT

Date of Decision : 29-01-2024

Acts Referred:
Customs Act,1962 — Section 28(1), 117

Citation : (2024) 01 CESTAT CK 0073

Hon'ble Judges : Ramesh Nair, Member (J);Raju, Member (T)

Bench : Division Bench

Advocate : Shamita Patel, Anil Balani, Satyapal Singh Vikal

Final Decision : Allowed

Judgement

Raju, Member (T)

1. This appeal has been filed by M/s EL PE Engineers LLP.

2. The issue involved in this Appeal is whether the goods, "MYRKOS Basic Field Package", which are "Gas Chromatograph" for monitoring Dissolved Gas in Mineral Oil, are classifiable under CTSH 9027 20 00, which specifies "Chromatographs and Electrophoresis Instruments" or whether the same are classifiable under CTSH 9027 10 00, which covers "Gas or Smoke Analysis apparatus". The Appellants have claimed classification under CTSH 9027 20 00 as Chromatograph, which was upheld by the original adjudicating authority. The order was challenged by the revenue and by the impugned Order-in-Appeal the goods have been classified under CTSH 9027 10 00 as Gas Analysis Apparatus.

2.1 The facts of the case are that during the period February 2019 to September 2019, the Appellants imported three consignments of the said goods. The said goods were assessed under CTSH 9027 90 90. The Appellants filed appeal against the assessment and, the Commissioner (Appeals) remanded the matter to the assessing officer with direction to pass Speaking Order of Assessment after hearing the Appellants.

2.2 A Show Cause Notice dated 08-02-2021 was issued to the Appellants. In the notice it was contended that the said goods were classifiable under CTSH 9027 10 00 as "Gas Analysis Apparatus" and not under CTSH 9027 20 00 as "Chromatograph". On that basis, the Show Cause Notice proposed recovery of differential duty of Rs. 10,63,111/- under Section 28 (1) of the Customs Act 1962 along with interest. The Notice also proposed imposition of penalty under Section 117 of the Custom Act, 1962.

2.3 The Additional Commissioner of Customs passed Order-in-Original dated 14-10-2021 wherein he upheld the classification of the goods under CTSH 9027 20 00 as "Chromatograph". In appeal filed by the Revenue against the said Order-in-Original, the Commissioner (Appeals) allowing the Appeal and held that the said goods to be classifiable under CTSH 9027 10 00 as "Gas Analysis Apparatus". Aggrieved by this order the appeals are before Tribunal.

3. Learned counsel submitted that it is undisputed fact that the imported goods are "Gas chromatograph" for monitoring dissolved gas in Mineral Oil. She argued that even the Order-in-Original holds that the product is a "Gas Chromatograph" for monitoring the gases in mineral Oil and the Order-in-Appeal also accepts that as per the Technical Specifications, the product uses Gas Chromatography Technology. She pointed out that even the Show Cause Notice does not dispute that the product uses Gas Chromatography Technology. Attention was also drawn to product literature that described the goods as "Dual Channel Gas Chromatograph" which showed that it is used for monitoring dissolved gases in mineral Oil. The website literature,https://www.nova-gas.com/gas-analyzers/ shows "Gas Analyzers" are used to determine the contents of carbon dioxide, carbon monoxide, oxygen, methane, etc in various gases such as process gas, flue gas, biogas, etc. The website literature, https://5.imimg.com/data5/SELLER/Doc/2022/6/UG/IT/NK/3796626/orsat-gas-apparatus-4-test-type.pdf was also produced and it was argued that Orsat Gas Analysis Apparatus, is an example of apparatus given in HSN notes under "Gas or Smoke Analysis apparatus", and it analyses a Gas sample (like fossil fuel flue gas) for its oxygen, carbon monoxide and carbon dioxide content. It was argued that the instrument imported by the Appellants does not analyze such gas sample, but analyses Mineral Oil. It was submitted that the product, a Gas Chromatograph is squarely covered by CTSH 9027 20 00, which is specific for Chromatographs and the HSN Explanatory Notes under CTH 90 27 clearly show that the sub-heading for Chromatographs covers Gas Chromatographs whereas Gas or Smoke analysis apparatus of CTSH 9027 10 analyse/ determine the contents of Combustible Gases or Burnt Gases. "Gas and Smoke Analysis Apparatus" does not test Mineral Oil and does not use Gas Chromatography. She also relied upon US Customs Tariff and the decision of the HS Committee taken at its 64th Session and the following decisions in support of his arguments:

- Manisha Pharma Plasto Pvt. Ltd. 1999(112) ELT 22
- CCE v. Telco Limited 2002(143) ELT 548, upheld by the Supreme Court as

reported in 2003(152)ELT A259

• CC v Abbott Health Care P. Ltd – 2015(328) ELT 129

•Galaxy Organics P. Ltd v CC – 1999 (111) ELT 251

4. Learned AR appearing for the Revenue relied upon the impugned order.

5. We have considered the rival submissions. The imported goods are “Gas chromatograph” used for monitoring dissolved gas in Mineral Oil. The Order-in-Original holds that the product as a Gas Chromatograph for monitoring the gases in mineral Oil and the Order-in-Appeal also accepts that as per the Technical Specifications, the product uses Gas Chromatography Technology. The Show Cause Notice also does not dispute that the said product uses Gas Chromatography Technology. The HSN Explanatory Notes under Heading 90.27 show that “Gas or smoke analysis apparatus” of CTSH 9027 10 00 analyses/ determines the contents of Combustible Gases or Burnt Gases. Such instrument determines the content of carbon dioxide, carbon monoxide, oxygen, nitrogen or hydrocarbons in Combustible gases/ Burnt gases arising in Coke Ovens, gas producers, Blast furnaces, etc. The goods imported by the Appellants do not analyse/ determine the gases contained in Combustible Gases or Burnt Gases, but monitor the nature of gases contained in Mineral Oil. The same are therefore not “Gas or smoke analysis apparatus” of CTSH 9027 10 00 as described in the HSN Notes. As it does not examine the “Combustible Gases or Burnt Gases”. The sample analysed by the instrument imported by the Appellant is of Mineral Oil and it monitors the content of gases in Mineral Oil.

5.1 The Commissioner (Appeals) has held that CTSH 9027 10 00 covers apparatus/ instruments which analyse combustible gas (i.e. sample to be analysed is Combustible gas), he commit an error by proceeding on the basis that the Appellants’ instrument analyse 9 gases and is therefore covered by CTSH 9027 10 00. He failed in appreciating that the sample analysed by the Appellants’ instrument is not a Combustible gas, but Mineral Oil and it monitors the presence of the 9 gases in mineral oil and not in Combustible gases.

5.2 It is clear from the HSN explanatory Notes that the Gas and Smoke Analyser of CTSH 9027 10 analyse Sample of Combustible/ Burnt Gas by a processes which is not Chromatography/ Gas Chromatography. It can be seen from the HSN Notes and the literature produced that Orsat Gas Analysis Apparatus, which is an example of apparatus given in HSN notes under “Gas or Smoke Analysis apparatus”, operates on a principle, which is other than Chromatography. It operates on following principle:-

“The Orsat apparatus works using a very simple method. To find the volume of a particular gas within the sample a fixed volume of the sampled gas is passed through a specific solution which absorbs only the required gas. The remaining volume of the gas can then be re- measured and compared with the original volume to find the proportion of a specific gas within the sample”.

5.3 The other processes/ principles applied by Gas Analysers of CTSH 9027 10 00, as can be seen from the HSN explanatory Notes and from the literature produced, are Infra-Red Sensors, thermal conductivity, heating effect on electrode, etc, all of which are other than Chromatography. This is also evident form the Chartered Engineer's Certificate produced by the Appellants. In a Gas Chromatograph, which the Appellants' goods are, the sample (mineral oil) is injected into the Inlet by a Syringe. The sample is then vaporised by heating. Once vaporised, the sample is then carried by a Carrier Gas (Mobile Phase) to the Column (Stationary Phase). In the Column, the different components of the vaporised sample separate from one another based on the strength of their interaction with the stationary phase. It is evident from the literature produced on behalf of the appellants that the word "Gas" in Gas Chromatography does not refer to the type of samples the technique applies to, but rather the fact that a gas carries the sample through the instrument. It would be therefore, wholly misconceived to classify a Gas Chromatograph as a Gas Analyser of CTSH 9027 10 00 because of the word "Gas" in "Gas Chromatograph". As is evident from the literature produced on behalf of the appellants, the word Gas in Gas Chromatograph refers not to the sample being analysed, but to the carrier gas which carries the vaporised sample (Mobile Phase) from the Inlet to the Column. It would be contrary to the HSN explanatory notes to classify Gas Chromatograph as Gas Analyser under CTSH 9027 10 00 instead of classifying the same as Chromatograph under CTSH 9027 20 00 which is more specific description. The HSN Notes while explaining the scope of "Chromatograph" has referred to all kinds of Chromatographs, whether Gas, Liquid, Ion or thin Layer Chromatographs and have not excluded Gas Chromatographs from Chromatographs. The US Customs Tariff, gives 10-digit sub-classification and as per which Gas Chromatograph appears at Sub-heading 9027. 20.50.50. Foreign manufacturer-supplier's Invoice also mentions the said Sub-heading 9027.20.50.50.

5.4 The Appellant's claim for classification of Gas Chromatograph for monitoring of Dissolved gases in mineral oil, under CTSH 9027 20 00, is also supported by the decision of the HS Committee taken at its 64th Session. The product considered by the HS Committee in the said decision is "Online Dissolved Gas Analysis (DGA) Apparatus" used for monitoring dissolved gases in transformer oil, which consisted of Gas Chromatography System. The HS Committee decision relies on Note 3 of Chapter 90, which provides that Note 3 of Section XVI applies to Chapter 90. Note 3 of Section XVI provides that a composite machine has to be classified according to its principal function. Considering gas chromatography to be the principal function of the Dissolved Gas Analysis Apparatus, the said apparatus is held to be classifiable as Chromatograph under CTSH 9027 20 as against CTSH 9027 10. The Hon'able High Court of Delhi has in the case of Manisha Pharma Plasto Pvt. Ltd. 1999(112) ELT 22 held that the opinion of the HS Committee has a lot of pervasive value and should ordinarily be taken as binding. The said decision has been followed by the Tribunal in the case of CCE v.

Telco Limited 2002(143) E.L.T 548 which has been upheld by the Supreme Court as reported in 2003(152)E.L.T A259. The said decision has also been followed by the Tribunal in the case CC v Abbott Health Care P. Ltd – 2015(328) E.L.T 129. Reliance is also placed on the Tribunal's decision in the case of Galaxy Organics P. Ltd v CC – 1999 (111) ELT 251, wherein part of the Gas Chromatograph was held classifiable along with the Gas Chromatograph under CTSH 9027.20.

5. In view of above, the subject goods imported by the Appellants are held to be classifiable as Gas Chromatograph under CTSH 9027 20 00. The impugned order is therefore set aside. The appeal is allowed with consequential relief in accordance with law.