

Commissioner of Central Excise, Vapi Vs. M/s. Global Health Care Products Partnership Firm & Ors.

Civil Appeal No. 3569 of 2006 · Supreme Court of India · 2015-07-28 · A.K. SIKRI · ROHINTON FALI NARIMAN · F2J-C-1224

Full judgment text

Commissioner of Central Excise, Vapi Vs. M/s. Global Health Care Products Partnership Firm & Ors.

[Civil Appeal Nos. 5902-5909 of 2005]

[Civil Appeal No. 3569 of 2006]

A.K. SIKRI, J.

The respondent No.1 (hereinafter referred to as the 'assessee') is engaged in the manufacture of different brands of toothpaste and these are manufactured exclusively for M/s. Hindustan Lever Limited, Mumbai (for short, 'HLL') since 1998. Major brands of HLL manufactured by the assessee are Close-Up Red, Close-Up Blue, Close-Up Green and Pepsodent falling under Chapter 33 of the Excise Tariff. The assessee is registered with the appellant/Revenue and has been paying the excise duty on the aforesaid products under Chapter sub-heading 3306.10 of the tariff.

There is no dispute about these products. From July 01, 2001, a new product known as 'Close-Up Whitening' was introduced by the assessee. The assessee classified this product under Chapter sub-heading 3306.90. The Revenue treated the aforesaid classification as erroneous as according to it Close-Up Whitening also falls under Chapter sub-heading 3306.10 and not 3306.90. It also suspected that this product was deliberately misclassified in the said heading to evade payment of proper central excise duties by resorting to assessment of the product under Section 4 of the Central Excise Act, 1944 (hereinafter referred to as the 'Act') instead of assessment under Section 4A thereof.

Investigation into the matter was initiated resulting into searching of the premises of the assessee. Some documents, which the Revenue claims to be incriminating in nature, were seized under Section 12 of the Act, including a Box File with Heading 'Production Manual', namely, the literature containing pages 1 to 235 issued by the Dental Information Centre of HLL.

On the scrutiny of these documents, the Revenue noticed that the difference in raw materials used for the product in question, namely, Close-Up Whitening, and the other products, i.e. Close-Up Red/Blue/Green is the additional presence of 2.8% and 0.2% w/s Silicon Agglomerate and Bluer Agglomerates respectively in Close-Up Whitening and absence of 0.1% w/w 2,4,4 Tri Chloro 2 hydroxy Diphenyl Ether in this product in comparison with the other three products. It was also found that as far as Close-Up Whitening is concerned, there was presence of 'uniformity dispersed blue speckles'. Statements of certain persons were also recorded.

On the basis of the aforesaid material, the Revenue took the position that the aforesaid differences did not change the essential character of the product in question which still remained 'toothpaste' and, therefore, it was classifiable under Chapter sub-heading 3306.10. Show-cause notice dated March 21, 2002 was issued proposing confiscation of the goods and since these goods had already been provisionally released on payment of full excise duty as leviable on the goods under Chapter sub-heading 3306.10, show-cause notice stated as to why the amount of differential duty amounting to ₹22,64,176 be not confirmed under the provisions of Section 11A(1) of the Act and why redemption fine in lieu of confiscation as well as penalty be not imposed.

The assessee filed its reply thereto contending that it was not a toothpaste and, therefore, rightly classified by it under sub-heading 3306.90. The aforementioned contention of the assessee was brushed aside by the Commissioner in his Order-in-Original dated December 10, 2003, thereby confirming the excise duty demand as mentioned in the show-cause notice. He, inter alia, recorded the following findings in his order:

"(i) Close Up Whitening was known in the market or to the trade and public as tooth paste for cleaning the teeth as such it was nothing but tooth- paste used for cleaning the teeth.

(ii) M/s. Global Health Care Products in collusion with M/s. Hindustan Lever Ltd. by willfully suppressing the fact that Close-up Whitening was a variant of Close Up tooth paste classifiable under Tariff Heading 3306.10 failed to show particulars of classification, assessable value and duty leviable with an intention to evade payment of applicable central excise duties.

(iii) The contention of M/s. Global Health Care products that the product Close Up Whitening was classified under chapter sub heading No. 3306.90 was not accepted.

(iv) The said product was correctly classified under sub heading 3306.10 of the Tariff attracting the provisions of Section 4A of the Act." Aggrieved by the aforesaid order, the respondents herein filed appeals before the Custom Excise & Service Tax Appellate Tribunal, Mumbai (for short, the 'Tribunal').

These appeals have been allowed by the Tribunal vide impugned order dated March 11, 2005. In these appeals, validity and correctness of the aforesaid order of the Tribunal is questioned by the Revenue. Before proceeding further, it would be necessary to take note of the exact language of the relevant entries. As mentioned above, it is the entry Heading 3306 of Central Excise Tariff Act, 1985, which is attracted in the present case. The only question is as to whether the product in question is to be classified under sub-heading 3306.90 or 3306.10.

Chapter Heading 3306 of the Tariff Act, with the aforesaid sub-headings, is reproduced below:

33.06

Preparations for oral or dental hygiene, including dentifrices (for example, toothpaste and tooth powder and denture fixative pastes and powders)

3306.1

Tooth powders and toothpaste

3306.9

Other.

The Chapter Heading makes it clear that it covers various preparations for oral and dental hygiene. These preparations specifically include dentifrices. Examples of such oral and dental hygiene are also given, like toothpaste, tooth powder, denture fixative pastes and powders. Out of these, two products which are covered by sub-heading 3306.10 are toothpaste and tooth powder. Other oral and dental hygiene preparations fall under the reminder sub-heading, i.e. 3306.90, nomenclature of which is 'Other'. Further, as pointed out above, the Revenue treats Close-Up Whitening as 'toothpaste'.

The plea of the assessee, on the other hand, is that it is not toothpaste but a 'dental cleaner', which is different from toothpaste and, therefore, has to necessarily be covered by the residual sub-heading, i.e. 3306.90. Therefore, the moot question is as to whether Close-Up Whitening is toothpaste or not. If it is found to be toothpaste then the stand of the Revenue would be justified. On the other hand, if the product does not qualify to be a toothpaste, then the assessee stands vindicated. Having noticed the controversy involved, we would like to point out the main ingredients of the product at this stage:

There is no dispute that most of the ingredients of the product Close-Up Whitening are the same which are used in the manufacture of the other products, namely, Close-Up Red/Blue/ Green, which are treated as toothpaste by the assessee itself. There are, however, additional ingredients used in the manufacture of the product in question, which are accepted by the Revenue also and noticed above. Apart from additional presence of Silicon Agglomerate and Bluer Agglomerate of specified percentage and absence of Tri Chloro 2 hydroxy Diphenyl Ether, there is a presence of uniformity dispersed blue speckles in Close-Up Whitening. There is also additional step of 'addition of silica agglomerates'. In fact, it is this ingredient which facilitates at getting uniformity dispersed speckles.

It is on the basis of these additional factors, one has to determine as to whether Close-Up Whitening loses the character of toothpaste and assumes the characteristics of another product, namely, dental cleaner. A reading of the order of the Commissioner, to which our attention was drawn by Mr. K. Radhakrishnan, learned senior counsel appearing for the appellant, with much emphasis, would disclose that the Commissioner relied upon HSN Notes, i.e. Harmonized Commodity Description and Coding System, wherein the preparation of oral and dental hygiene is mentioned in the following form:

33.06 -

PREPARATIONS FOR ORAL OR DENTAL HYGIENE, INCLUDING DENTURE FIXATIVE PASTES AND POWDERS: YARN USED TO CLEAN BETWEEN THE TEETH (DENTAL FLOSS), IN INDIVIDUAL RETAIL PACKAGES.

3306.1

Dentifrices

3306.2

Yarn used to clean between the teeth (dental floss)

3306.9

Other

This heading covers preparations for oral or dental hygiene such as:

(I) Dentifrices of all types:

(1) Tooth pastes and other preparations for teeth. These are substances or preparations used with a toothbrush, whether for cleaning or polishing the accessible surfaces of teeth or for other purposes such as anticaries prophylactic treatment. Toothpastes and other preparations for teeth remain classified in this heading, whether or not they contain abrasives and whether or not they are used by dentists.

(2) Denture cleaners, i.e., preparations for cleaning or polishing dentures, whether or not they contain agents with abrasive properties.

(II) Mouth washes and oral perfumes.

(III) Denture fixative pastes, powders and tablets.

The heading also covers yarn used to clean between the teeth, in individual retail packages (dental floss)." The Commissioner, thus, noted that in the HSN Notes, sub-heading 3306.10 deals with dentifrices. The Commissioner noted that the meaning of dentifrices as per the Concise Oxford Dictionary is 'a paste or powder for cleaning of teeth'.

On that basis, he concluded that the product in question was paste, namely, the toothpaste for cleaning the teeth and, therefore, would fall under sub-heading 3306.10. En passe, the Commissioner also observed that there is no major difference in these products, namely, Close-Up Whitening and Close-Up Red/ Blue/Green, except one ingredient used in the manufacture of Close-Up Whitening and the addition of that ingredient does not change the purpose, nature as well as definition of the product in a common market parlance. He observed that in the market the product was known as toothpaste. He also observed that it is treated as toothpaste as per the product manual issued by the Dental Invocation Centre, Mumbai. Discussion is summed up in para 32 of the order passed by the Commissioner, which reads as under:

"32. As narrated in the SCN that the tooth paste, being dentifrice has been correctly classified under the HSN and the Central Excise Tariff has been based on HSN. Accordingly it is essential to follow the correct classification of the product in question as described and classified under the relevant chapter of HSN. In this connection it may be mentioned that the Hon'ble Supreme Court in the case of CCE, Shillong vs. Wood Craft Product Ltd. Reported in 1995 (77) ELT 23 (SC) in para 18 has held that the structure of Central Excise Tariff is based on the internationally accepted nomenclature found in the HSN and therefore any dispute relating to tariff classification must, as far as possible be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated in the Central Excise Tariff Act, 1985 itself.

Further it may be mentioned that the Hon'ble Bombay High Court in the case of Jagdish D. Devgekar Vs. Collector of Central Excise, Poona reported in 1978 (2) ELT (J581) in para 6 has held that the correct test in interpreting any item mentioned in the first schedule to the Central Excise Act is to see the commercial sense in which the item is understood or the sense in which traders or persons dealing in that terms understand it and not the technical or scientific sense.

Even it may be mentioned that the Hon'ble Tribunal in case Veto Co. Vs. CCE reported in 1992 (62) ELT 584 (T) in para 6 has held that the goods have to be classified under the tariff schedule according to their popular meaning or as they are understood in their commercial sense and not as per their scientific or technical meaning. While holding so the Hon'ble Tribunal has referred to the observations of the Hon'ble Supreme Court's judgment in case of Plasmac Machine Mfg. Co. Pvt. Ltd. Vs. CCE reported in 1991 (51) ELT 161 (SC) (Para 13)."

The aforesaid approach adopted by the Commissioner has been found fault with by the Tribunal. The Tribunal pointed out that there was material difference in the sub-heading 3306.10 in the Indian statute when contrasted with Harmonized Commodity Description and Coding System. Whereas, as per the tariff entry 3306.10 in the Excise Act, it is 'tooth powder' and 'toothpaste', under the Harmonized Commodity Description and Coding System, what is mentioned is 'dentifrices'. It is further noticed by the Tribunal that dentifrices was more generic in nature as it recognized all three types of products, namely,

- (i) toothpaste,
- (ii) other preparations for teeth and
- (iii) denture cleaners, than tooth powders and toothpaste.

Thus, when under Indian statutory regime there is a restricted sub-heading under 3306.10, namely, tooth powder and toothpaste only, the approach of the Commissioner in taking aid of HSN Notes was erroneous. Discussion on this aspect runs as follows: "A perusal of the HSN notes would indicate that all three types of 'Dentifrices' are recognized as

- (i) 'Toothpaste',
- (ii) Other preparations for teeth, and
- (iii) 'Denture cleaners'.

The Note further explains that "Dentifrices" to include 'toothpaste' and "other preparations for teeth" whether for cleaning or polishing the assessable surface of teeth or for other purposes such as Anticaries prophylactic treatment. The Note also enumerates that 'toothpaste' and 'other preparations for teeth' remains classified under Heading 3306 whether or not they contain abrasives and whether or not they are used by dentist.

The correct scope of the heading as per the submission of the appellants is that when one refers to HSN item 3306 and the bifurcations as also under CETA 1985 there is a variance seen. In other words, this bifurcation under Heading 3306 for HSN and is not *pari materia* and under CETA 1985 and therefore the sub heading structure of HSN would not apply to CETA. The CETA proves preparation for oral or dental hygiene including Dentifrices and Denture Fixative paste and powders under Heading 3306 and at the four digit level it is *para material* HSN. The scope of sub heading 3306.10 of CETA 1985 restricts it to only 'tooth powder and paste' and any entity which is not a 'toothpowder or toothpaste' would be covered under heading 3306.90. This submission has to be upheld."

We find ourselves in agreement with the aforesaid approach of the Tribunal having regard to the cogent reasons given by it. This Court in the case of Camlin Limited v. Commissioner of Central Excise, Mumbai[1] held that if the entries under HSN and the entries under the Central Excise Tariff are different, then reliance cannot be placed upon HSN Notes for the purposes of classification of goods under Central Excise Tariff. This is so stated in para 24 of the judgment that makes the following reading:

"24. In our considered view, the Tribunal erred in relying upon the HSN for the purpose of marker inks in classifying them under Chapter Sub- Heading 3215.90 of the said Tariff. The Tribunal failed to appreciate that the entries under the HSN and the entries under the said Tariff are completely different. As mentioned above, it is settled law that when the entries in the HSN and the said Tariff are not aligned, reliance cannot be placed upon HSN for the purpose of classification of goods under the said Tariff. One of the factors on which the Tribunal based its conclusion is the entries in the HSN.

The said conclusion in the order of the Tribunal is, therefore, vitiated and, accordingly, set aside. We agree with the findings recorded by the Commissioner (Appeals)." The issue, therefore, has to be decided *dehors* HSN Notes as aid thereof cannot be taken in the instant case. Faced with the aforesaid position, Mr. Radhakrishnan argued that the Commissioner has also come to the conclusion that mere

addition of one ingredient does not change the purpose, nature as well as character of the product and further the product was known in the market as 'toothpaste'. The Tribunal has differed with the aforesaid view. In the first place, it is pointed out that there is no evidence on record placed by the Revenue which would reflect that the product in question is known to the consumers as toothpaste. When this was pointed out to Mr. Radhakrishnan, he was unable to pinpoint any evidence in support that was led by the Revenue. We may record that a finding is arrived at by the Tribunal to the effect that Close-Up Whitening is not a toothpaste but a dental cleaner.

We are convinced that this finding is perfectly just and proper for the following reasons:

(a) The Tribunal has pointed out the differences which are noted above and accepted by the Department itself. From these differences, it is held that ingredients and ratio of all the inputs which go into the manufacturing of a toothpaste and dental cleaner are different and varying. The dental cleaner, in addition, has two more ingredients, namely, Silicon Agglomerate and Bluer Agglomerates, which play an active role as abrasive.

(b) Even the manufacturing process of Close-Up toothpaste and Close-up Whitening is different. While the total stages for manufacturing toothpaste were nine, the number of stages for manufacture of Close-Up Whitening were eleven. It takes 120 minutes to manufacture a toothpaste tube, while it takes 155 minutes to effect the manufacture of Close-Up Whitening.

(c) Statement of one Mr. N.H. Bijlani, the only expert in this case and whose statement was recorded on January 09, 2002, was referred to by the Tribunal. In this statement, Mr. Bijlani has explained the difference between toothpaste and dental cleaners and has opined that Close-Up Whitening dental cleaner cannot be equated with toothpaste.

(d) The Tribunal has also found that as per records, classification of the same product in an earlier avatar/brand was acceptable to the Department as the same was classified under a different name for all these years when the rate of duty under Heading 3306.90 were higher than that under Heading 3306.10. It, thus, observed that mere change of duty and brand name cannot be the reason to alter classification.

(e) Another important aspect, in conjunction with aforesaid features which has to be kept in mind, is that in the instant case even Food and Drug Authorities (FDA) from where prior permission is needed for manufacturing 'toothpaste' and sale thereof, had not registered the product in question as 'toothpaste' but as a dental cleaner. It becomes a supporting factor along with other features of the product, which have been taken note of and discussed above. The upshot of the aforesaid discussion would be to hold that Close-Up Whitening dental cleaner is not a 'toothpaste' but other form of dental hygiene and, therefore will have to be classified under sub-heading 3306.90 as a consequence. These appeals are found bereft of any merits and are, accordingly, dismissed.

No costs.

.....J. (A.K. SIKRI)

.....J. (ROHINTON FALI NARIMAN)

NEW DELHI;

JULY 28, 2015.

[1] (2008) 9 SCC 82

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