

CASE NO.:
Appeal (civil) 1854-1855 of 2001

PETITIONER:
M/s. Mercantile Company

RESPONDENT:
Commnr. of Central Excise, Calcutta

DATE OF JUDGMENT: 11/10/2007

BENCH:
ASHOK BHAN & V.S. SIRPURKAR

JUDGMENT:
J U D G M E N T

BHAN, J.

1. Assessee has filed these appeals under section 35L(b) of the Central Excise Act, 1944 (hereinafter called the \021Act\022) against the final order no.1419-1420/Cal/2000 dated 31st August 2000 in appeal no. E/R-156-157/99 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, Eastern Bench, Calcutta (hereinafter called the Tribunal) whereby the Tribunal has dismissed the appeal filed by the appellant herein.

FACTS:

2. Acting on the basis of intelligence, a team of officers from CPO of Calcutta I Central Excise Commissionerate, Headquarters visited the factory-cum-office of the appellant on 5th September, 1997 and conducted a search operation. Search resulted in seizure of 3 files, 9700 pieces of Philips Ultra cleaner, 500 pieces of degreasing & cleansing fluid, 700 pieces of Switch cleaning oil all bearing brand name of Philips. These were detained and later seized on 9th February, 1998. Also, some 13 files belonging to M/s. T. Paul & Sons were tendered by the partner of the appellant firm. Certain other documents were also handed over to/seized by the raiding party.

3. On the basis of the statements made by Shri Arun Kanti Paul partner of the appellant and other records recovered from the said premises on the day of search, it was found that the orders were being received from M/s. Philips India Ltd., by M/s. T. Paul & Sons and the same were executed by the appellant on the basis of arrangement with M/s. T. Paul & Sons to the effect that the appellant gets a job charge of paise 0.20 per 50 ml. bottle of the said product. The price at which M/s. T. Paul & Sons raised bills to M/s. Philips India Ltd. is controlled by M/s. Philips India Ltd. and it appears from the cost sheet given in the statement of Shri Arun Kanti Paul that M/s. Philips India Ltd., had allowed a profit of 10%. The raw materials and packing materials supplied by M/s. T. Paul & Sons was being received directly at the factory premises of the appellant and the dispatch of the said products was directly from 298, Rabindra Sarani, Calcutta 700 073 to the consignment agent of M/s. Philips India Ltd. The goods received were filtered and put into 50 ml. plastic container by the appellant both manually and mechanically at its factory premises. After sealing, bottles were pasted with Philips Labels & holograms. Multi-colour holograms were received directly from M/s. Philips India Ltd.

4. Samples of seized goods were got tested from Departmental Chemical Laboratory at Customs House, Calcutta. The report of the Chemical Examiner was that Audio Tape Head Cleaner is in the form of colour less liquid and has the characteristics of methanol. Similarly, for Degreasing Cleansing Fluid, the report was that it is in the form of

colour less transparent liquid and has characteristics of iso-propyl alcohol. The sample of Switch Cleaning is in the form of colour less transparent liquid containing mixture of liquid hydrocarbon.

5. On 18th February, 1998, a show cause notice was issued to the appellant alleging therein that the activities carried on by the appellant amounted to manufacture and the products being filtered and repacked were classifiable under entry 3402.90. The larger period of limitation was also invoked under the proviso to Section 11A on the ground that the appellant was guilty of fraud, concealment, etc. with a view to evade the payment of excise duty.

6. Assessee filed detailed reply to the show cause notice explaining that the activities carried on by the appellant did not amount to manufacture and that the classification proposed by the department was incorrect. Various other contentions on limitations as well as on merits were raised. According to the appellant, during the said period, the appellant worked as a job worker undertaking filtering, repacking and labeling the materials supplied to it and the same would not amount to manufacture.

7. Commissioner of Central Excise Calcutta 1 in its order in original dated 27th January, 1999, confirmed the demand of duty. It was held that sub-heading 3402.90 covers surface-active preparations, washing preparations and cleansing preparations, whether or not containing soap. Explanatory notes of HSN were referred to and relied upon wherein it has been provided that washing preparation act on the surfaces by bringing the soil on the surface into a state of solution or dispersion. With reference to the degreasing preparation, it was stated that these preparations are used with a basis inter alia of solvents and emulsifiers. That the goods covered under the heading 34.02 are selected basically on the properties/characteristics of the products than on the basis of the constituents from which the goods were manufactured.

8. Chapter note 6 of Chapter 34 which reads as follows:
"0236. In relation to products of sub-heading No.3402.90, packing or repacking into smaller packs, including packing or repacking of bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer shall amount to "manufacture".

was relied upon to hold that the activity of repacking, re-labeling amounted to manufacture. Chapter note 6 was introduced to Chapter 34 with effect from 1st March, 1994.

9. On the question of limitation, it was held that the letter dated 8th March, 1994 relied upon by the appellant did not disclose the entire facts and did not reflect the situation in its proper perspective. The Department was not informed about the actual activity undertaken by the appellant. It was not disclosed as to whether a new name has been given and the applicability and functions of the products were not clearly stated. That new and distinctive product came into existence which was sold and known in the commercial world under a separate name having different and distinct qualities. Commissioner of Central Excise, Calcutta 1, confirmed the demand of duty Rs.42,62,862/- proposed in the show cause notice and also levied a penalty of Rs.10 lakhs on the appellant under Section 11AC and the interest under Section 11AB. A redemption fine of Rs.20,000/- was also imposed.

10. Aggrieved against the order passed by the Commissioner of Central Excise Calcutta 1, appellant filed the appeals before the Tribunal.

Tribunal upheld the order of the Commissioner. It was held that the adjudicating authority had rightly held that the various products are classifiable under heading 3402.90. The findings recorded on the question of limitation were also confirmed. Demand of duty, interest

and penalty were also upheld. As regards personal penalty imposed under the provisions of Section 11AC, it was noted that these provisions came into existence on 28th September, 1996. Since the provisions of Section 11AC were not retrospective in nature, the penalty under the said provision could not be imposed for the period prior to 28th September, 1996. For the period prior to the said date, penalty could be imposed under Rule 173Q only. As no segregation of quantum of duty confirmed for the period prior to the said date and for the period after the said date was there, the case was remanded to the adjudicating authority for imposing penalty for the period prior to 28th September, 1996 in terms of the provisions of Rule 173Q and for period subsequent to 28th September, 1996 in terms of the provisions of Section 11AC, depending upon the quantum of duties confirmed for both the periods.

11. Demand of duty has been confirmed on the following products by treating the same as classifiable under sub-heading no.3402.90: -

- (i) Ultraclean Audiotape Headcleaner.
- (ii) DCF-847-Degreasing and Cleansing Fluid.
- (iii) SCO-846-Switch Cleaning Oil-cleans and lubricates switch controls.

12. Shri S.K. Bagaria, learned Counsel appearing for the appellant contended that the activities undertaken by the appellant of filtering, packing and labeling resulting in emergence of the said product cannot be a manufacturing activity. That filtering and re-packing thinner, liquid paraffin and Isoprophile Alcohol, which fell under tariff heading 3814.00, 2710.90 and 2905.90, respectively of the Central Excise Tariff Act, from bulk to small containers would not amount to manufacture. He submits that raw materials are not classifiable under Chapter 34 and their nature and identity do not get changed after filtration and re-packing into smaller packs. The said note was applicable to the products of Chapter 34 only. It is further submitted that with effect from 1st March, 1997, a note similar to Chapter note 6 of Chapter 34 was inserted in Chapters 29 and 38, and, if at all the activity undertaken by the appellant amounts to manufacture, then the same shall be with effect from 1st March, 1997 only. That re-packing, re-labeling and re-naming of a product would not amount to manufacture and the resultant goods shall not be liable to duty. Marketing of the product in smaller containers under a different name shall also not amount to manufacture unless the nature and identity of the product is changed. Since in the present case, the identity of the product did not change, the activity undertaken by the appellant cannot be held to be manufacture of a new product.

13. On the point of limitation, it was submitted by him that the demand has been confirmed from 1st March, 1994 to 5th September, 1997 whereas the show cause notice was issued on 18th February, 1998, well beyond the period of limitation. It was admitted by him that no classification list was filed by the appellant. He has drawn our attention to a letter dated 8th March, 1994 written by the appellant to the Assistant Collector of Central Excise, Calcutta disclosing the activity undertaken by the appellant and requesting the Revenue to let the appellant know about the Central Excise formalities required to be observed. That the writing of the letter well in advance shows the bona fides of the appellant and that there was no suppression, misstatement, etc., on the part of the appellant with an intent to evade payment of duty and the authorities below erred in holding to the contrary.

14. As against this, learned Counsel for the Revenue, Shri M.M. Paikadey, supported the Commissioner's findings recorded in the order-in-original. It was submitted by him that the process undertaken by the appellant was not as simple as has been projected by him. That the items in question have been given specific names and the same were used

for specific purpose for which the raw material cannot be used. The impugned goods were specially packed in the cardboard packages and are known differently in the commercial as well as common circles. That the appellant's products are cleansing products and deserved to be classified under Chapter 34 and the adjudicating authority has rightly classified them under heading 3402.90.

15. As regards limitation, it was submitted on behalf of the Revenue that the letter dated 8th March, 1994 written by the appellant did not state the entire facts. The same was vague and lacking in particulars. In the letter, it was not disclosed by the appellant that the products were being marketed as 'cleanser' and gave the impression as if they are only re-packing the raw material into smaller packs. It was not disclosed that a new name has been given to the products. That the appellant did not disclose the applicability and functions of the products. The correspondence between T. Paul & Sons and M/s. Philips India Ltd. clearly indicates that there was a doubt as to whether the products would invite the Central Excise duty. To overcome this, they obtained the opinion of an Advocate and the Advocate advised them that instead of solvent, the word 'thinner' should be printed on the carton to avoid the Central Excise Rules.

16. Counsels for the parties have been heard at length.

17. It would be necessary to refer to the relevant entries to Chapters 34, 27, 29 and 38 to appreciate the controversy involved in the case.

18. Chapter 34 deals with soap and organic surface-active agents, etc. Heading No. 34.02 reads as under: -

Heading No. duty (1)	Sub-Heading No. (2)	Description of goods (3)	Rate of
34.02		Organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap.	
	3402.10 -	Sulphonated castor oil, fish oil or sperm oil	NIL
	3402.90 -	Other	30%

19. Chapter 27 deals with Minerals Fuels, Mineral Oils & Products of Their Distillation: Bituminous Substances; Mineral Waxes. Sub-heading 27.10 reads as under:

Heading No. duty (1)	Sub-Heading No. (2)	Description of goods (3)	Rate of
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(4)
27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude; preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations.

2710.11 -	XXX	
2710.12 -	XXX	
2710.13 -	XXX	
2710.14 -	XXX	
2710.90 -	Other	10%

20. Chapter 29 deals with Organic Chemicals. Sub-heading 29.05 reads as under:

Heading No. duty (1) (4)	Sub-Heading No. (2)	Description of goods (3)	Rate of
		II. ALCOHOLS AND THEIR HALOGENATED, SULPHONATED, NITRATED OR NITROSATED DERIVATIVES.	
29.05		Acyclic alcohols and their halogenated, sulphonated, nitrated or nitrosated derivatives.	
	2905.10	Methanol	20%
	2905.90	Other	20%

21. Chapter 38 deals with Miscellaneous Chemicals Products. Sub-heading 38.14 reads as under:

Heading No. uty (1) (4)	Sub-Heading No. (2)	Description of goods (3)	Rate of
38.14	3814.00	Organic composite solvents and thinners, not elsewhere specified or included; prepared paint or varnish removers.	20%

22. Chart (as per appellant) showing the material supplied and the relevant headings under which the said material would fall, activity undertaken and the description on the labels put on the bottles reads as under: -

S.No.
Materials supplied to
the Appellant

Activities
undertaken by
the Appellant
Description on the
labels

(a)
Thinners falling
under SH 3814.00
Filtering,
packing in
small plastic
containers or
bottles and
pasting of
labels and
holograms of
Phillips India
Ltd.

Ultraclean Audio Tape
Head cleaner (Special
thinner for cleaning all
kinds of recording head,
pinch rollers and
capstans of audio tape-
recorders).

(b)
Liquid Paraffin
falling under SH
2710.90

-do-
SC0- 845 \026 Switch
cleaning oil \026 cleans
and lubricates switch
controls

(c)
Isopropyl Alcohol
falling under SH
2905.90

-do-
DCF 847 \026 de-greasing
and cleaning fluid
(specially packed for
servicing audio/video
industry).

23. It is not in dispute that the raw materials out of which the impugned goods have been manufactured by way of filtering, repacking, etc. were classifiable under a separate heading prior to the activities undertaken by the appellant.

24. The goods covered under heading 34.02 are selected basically on the properties/characteristics of the products than on the basis of constituents from which the goods are manufactured.

25. The outer coverage of 3 products shown to us during the course of hearing shows that the ULTRA CLEAN-AUDIO TAPE HEAD CLEANER is a special thinner for cleaning all kinds of recording heads pinch rollers and capstans of audio tape recorders. SWITCH CLEANING OIL cleans and lubricates switch controls. DEGREASING AND CLEANING FLUID is used for servicing in the Audio/Video recorders industry. The above shows that

the products in question are different commercial commodities than the raw materials out of which the same were manufactured. The impugned goods became fit for commercial use by the target consumers only after the process undertaken by the appellants. Chapter Note 6 of Chapter 34 provides that the packing or repacking of products of sub-heading No.3402.90 into smaller packs, including packing or repacking of bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture.

26. The basic property of mixture is cleansing as is evident from the statement of the partner of M/s. Thinner & Company.

27. Extracts of H.S.N. under Chapter 34 sub heading No. 3402.90 provides: -

Cleaning preparation whether or not containing soap, other than those heading 34.01 and cleaning preparation serve for cleaning floors, windows, or other surface.

28. The clause of manufacture with reference to repacking from bulk packs to retail packs introduced by the Finance Act from 1994 clearly points to the fact that even if the bulk material is identifiable excisable goods, the fact of repacking from bulk to retail pack would render the product separately classifiable. Admittedly, the product manufactured by the appellant is used as cleanser. It no longer remained the product which was supplied to the appellant. It was known in the market by a different name and for a different use. The same would not fall either under Chapter 27, 29 or 38. The same would fall under sub-heading No. 34.02 as a cleansing product.

29. Contention of the counsel for the appellant that a note similar to Chapter Note 6 of Chapter 34 was introduced in Chapter 29 and 38 with effect from 1.3.1997 and till that date the repacking or re-labeling of the goods supplied to it which were classifiable under Chapters 27, 29 and 38 could not be covered under Chapter 34 cannot be accepted as the goods after repacking were being supplied and marketed as cleansing products, which is evident from the outer cover of the 3 products shown to us by the appellant during the course of hearing.

30. On the question of limitation, the submission made by the counsel for the appellant that the letter dated 8th March, 1994 disclosed the entire facts to the authorities regarding the items manufactured by the appellant cannot be accepted. The letter dated 8th March, 1994 did not disclose the entire facts. The letter did not disclose the situation in its proper perspective. The authorities were not informed about the actual activity undertaken by the appellant. The authorities were also not informed that a new name has been given to the products. The applicability and functions of the new products was also not clearly stated. The new and distinct product which had come into existence was sold and known in the commercial world under a separate name having different and distinct qualities. The appellant had not produced sample of the subject goods along with the letter. For the aforesaid reasons, it cannot be held that the authorities had full knowledge about the activities undertaken by the appellant.

31. It appears that duty liability under the Central Excise Act & Rules was well known to the appellant as is evident from the correspondences made by Shri Arun Kanti Paul (who is the common partner of M/s. T. Paul & Sons and the appellant) on 23rd August, 1995 with M/s. Philips India Ltd. Shri Arun Kanti Paul, in his letter has stated that they could avoid Central Excise liability by printing thinner instead of solvent on the packs of bottles. M/s. Philips India Ltd., by its letter No. HD/CE/ACCY dated 6th September, 1995, endorsed the same and permitted M/s. Paul & Sons to print thinner instead of solvent on the outer pack. The direction of M/s. Philips India Ltd. was actually executed by the appellant by printing thinner

instead of 'solvent' on the cartons. Shri Arun Kanti Paul during examination, when asked to throw some light on the correspondence with M/s. Philips India Ltd., stated that he had some doubt about the excise liability of these products and accordingly he obtained legal opinion regarding the same and persuaded M/s. Philips India Ltd., to allow them to print 'thinner' against 'solvent' on the cartons. It clearly shows that the appellant although was conscious of the fact that the products manufactured by them could attract the Excise Duty, made a deliberate attempt to evade the same by printing 'thinner' instead of 'solvent' on the cartons.

32. The Tribunal has rightly come to the conclusion that the department could under the circumstances invoke larger period of limitation.

33. For the reasons stated above, we do not find any merit in these appeals and dismiss the same with no order as to costs.