GST/Excise & Customs: 'Keshyog Ayurvedic/Herbal Hair oil' and 'Keshyog Ayurvedic Shampoo' classifiable under Heading No. 30 as Ayurvedic medical preparation

[2018] 92 taxmann.com 220 (Madhya Pradesh)

HIGH COURT OF MADHYA PRADESH

Global Tele Mall

v.

Union of India*

P.K. JAISWAL AND VIRENDER SINGH, JJ.
CEA NOS. 102 TO 104 OF 2017
MARCH 22, 2018

Classification of goods - Heading No. 30, read with Heading No. 33, of the Central Excise Tariff Act, 1985 - Keshyog Ayurvedic/Herbal Hair Oil and Keshyog Ayurvedic Shampoo - Period January, 2006 to March, 2007 - Assessee was engaged in selling goods called 'Keshyog Ayurvedic/Herbal Oil' and 'Keshyog Ayurvedic Shampoo' - Whether said products were classifiable under Heading No. 30 as Ayurvedic medical preparation and not under Heading No. 33 as preparations for use on hair - Held, yes [Para 20][In favour of revenue]

FACTS

- The assessee was engaged in selling goods called 'Keshyog Ayurvedic/Herbal Oil' and 'Keshyog Ayurvedic Shampoo'.
- The Adjudicating Authority/Commissioner held that the said products were classifiable under Heading No. 33 as preparations for use on the hair and not under Heading No. 30 as Ayurvedic medicine.
- The Tribunal held that the products in question were rightly questionable under Heading No. 30 as Ayurvedic medical preparation.
- On appeal to High Court:

HELD

- There is an elaborate discussion by the Supreme Court in the case of *BPL Pharmaceuticals Ltd.* v. *Collector of Central Excise* [1995] taxmann.com 454 on the difference between the medicaments and cosmetics. The question that came up for consideration was relating to classification of the product by the assessee marketed under the brand name 'Selsun Suspension'. The Assessing Authority took the view that the product fell under Heading No. 33, even though, under the old Tariff, it was classified as medicine. On appeal before the Tribunal, the view taken by the Assessing Authority was upheld. The question that came up for consideration by the Supreme Court was whether 'Selsun' is to be classified as medicine under Heading No. 3305 90 as claimed by the respondent. After referring to the label, literature and medicinal properties of the product in question, the Apex Court took the view that the

product was not intended for cleansing, beautifying, promoting attractiveness or altering appearance. On the other hand, it was intended to cure certain diseases. The labels notified that it is a medical treatment for dandruff. It should be used twice weekly initially and then as often as necessary or as directed by the physician. Certain directions were also given to its use. The hair had to be washed first and then the Selsun should be messaged into the scalp and left for 2 or 3 minutes and thereafter rinsed thoroughly. The Court held that the fact the assessee had previously described the product as 'Selsun shampoo' will not conclude the controversy when the true nature of the product calls for examination. Reference was made to Note 2 under Heading No. 33 and it was held that once therapeutic quality of the ingredient used is accepted, thereafter it is not possible to hold that the constituent is subsidiary. The important factor is that selenium sulfide is the only active ingredient. The Tribunal's finding that since the Heading No. 3305 refers to preparation for use on the hair, the product can be brought under the above heading was not accepted by the Supreme Court. It was held that the Tribunal forgot that the product in question was intended as medicine for curing the disease Tinea versicolor and as such applied to skin wherever was necessary apart from curing dandruff by applying on the scalp. Therefore, the product cannot be brought under the heading preparation for use on the hair. The Court further noted the fact that the contents of the labels and the literature would show that the assessee had nowhere indicated that the product is to be used as a cosmetic or toilet preparation nor have they held it as a cosmetic product. Another reason given by the Tribunal in support of its conclusion, namely, that the product is sold with a pleasant odour was also rejected by the Supreme Court. It was held that the addition of insignificant quantity of perfume to suppress the unpleasant odour of selenium sulfide would not take away the character of the product as a drug or medicine. One finds that reasoning of the Supreme Court in the above case would apply on all fours in the instant case. [Para 18]

- In view of the aforesaid, the products of the assessee 'Keshyog Ayurvedic/Herbal Hair Oil' and 'Keshyog Ayurvedic Shampoo' have to be classified as Ayurvedic medicine under Heading No. 30. (Para 20)

CASE REVIEW

B.P.L. Pharmaceuticals Ltd. v. *Collector of Central Excise* 1995 taxmann.com 454 (SC) (para 18) *followed.*

CASES REFERRED TO

B.P.L. Pharmaceuticals Ltd. v. *Collector of Central Excise* 1995 taxmann.com 454 (SC) (para 10), *Himtaj Ayurvedic Udyog Kendra* v. *CCE* 2002 taxmann.com 2032 (CEGAT - New Delhi) (para 10), *CCE* v. *Sharma Chemical Works* 2003 taxmann.com 1240 (SC) (para 10), *Amrutanjan Ltd.* v. *CCE* 1995 taxmann.com 474 (SC) (para 14), *Richardson Hindustan* v. *CCE* 1988 taxmann.com 226 (CEGAT - New Delhi) (SB) (para 16) and *Balaji Agency* v. *Commissioner of Sales Tax* 1994 taxmann.com 675 (All.) (para 17).

A.K. Sethi, Ld. Sr. Adv. and **Alok Bharatwal**, Adv. *for the Appellant.* **Prasana Prasad**, Ld. counsel *for the Respondent.*

ORDER

P.K. Jaiswal, J. - Since a common question of law is involved in these appeals, therefore, they are heard together and are being disposed of by this common order. For the sake of convenience the facts are borrowed from CEA No.102/2017.

2. The appellants / assessee M/s. Global Tele Mall and M/s. GTM Tele-shopping Pvt. Ltd, were engaged in selling goods called "Kashyog Oil and Keshyog Herbal Powder Hair Wash/Shampoo". During the period January 2006 to March 2007, the goods were manufactured by vendor M/s. Gurukripa Consumer Care Products, Indore. The dispute in the present set of appeals relates to categorization of these impugned goods either as Ayurvedic medicine or cosmetic / toilet preparation and whether or not the processes undertaken by GTM will amount to manufacture.

3. On information by certain intelligence, that M/s. GTM is manufacturing Keshyog Ayurvedic/Herbal Hair Oil and Keshyog Ayurvedic Shampoo by carrying out certain process of supply procured from M/s. Gurukripa Consumer Care Products and have been removing the same without payment of Central Excise Duty searches were carried out at the premises of GTM by the Officers of Directorate General of Central Excise Intelligence Regional Unit, Indore. On completion of enquiry, proceedings were initiated by order dated 25.11.2009, confirming the demand of Central Excise duty and also imposing various penalties. The seizure of goods was separately adjudicated by the Jurisdictional Original Authority and on appeal *vide* order dated 17.5.2010, the Commissioner (Appeals) upheld the confiscation and penalties. On further appeal, the Tribunal *vide* order dated 24.1.2012, remanded the case back to the Original Authority for fresh decision on all issues including classification.

4. Paras 6 to 8 of the Order dated 24.1.2012, passed by the Customs, Excise & Service Tax Appellate Tribunal are relevant which reads as under :—

> "6. As the applicants are receiving the goods manufactured by M/s. Gurukripa which are classified under Chapter 33 of the Tariff as per the manufacturer, therefore the applicants are only re-packing and relabelling the goods. It is also submitted that applicants had not obtained a license under the Drugs and Cosmetics Act, which is essential for the manufacture of ayurvedic medicament. It is also submitted by Revenue that the applicants failed to show that the goods are manufactured as per the formula prescribed under the authoritative books. Therefore, the goods in question cannot be classifiable under Chapter 30 of the Tariff. Subsequent the present investigation applicants started marketing the same product as hair oil. The contention is that in these circumstances it cannot be said that the goods in question during the period in dispute are ayurvedic medicine classifiable under Chapter 30 0f the Tariff as claimed by applicants.
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> 7. We find that the Show Cause Notice was issued to the applicants demanding duty by classifying the product in question under Chapter 33 of the Tariff as hair oil. In reply to Show Cause Notice dated 21.7.2009, the applicants specifically challenged the classification as proposed in the Show Cause Notice and claimed the same under Chapter 30 of the Tariff as ayurvedic medicament and in reply the applicants also gave the details of use of the product and ingredients in support of their claim. The adjudicating authority in the impugned order in para 78 of the order held that "it is also a fact here that the classification of the product is not a matter of contention in the impugned Show Cause Notice and the Show Cause Notice has nowhere challenged the classification of the goods. The matter seems to have been unnecessarily raked up by the applicant M/s. GTM. We find that the adjudicating authority had not given any finding in respect of the claim in reply to Show Cause Notice.
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> 8. In view of the above facts as the claim of the applicant that the goods in question are ayurvedic medicine is not gone into the adjudicating authority in the impugned order. While admission of any fact by any of the concerned parties may be relevant, admission of legal position, like classification of goods, especially during investigation stage, will not be sufficient to establish such legal

provision. The adjudicating authority has to examine the relevant facts and law and come to his own finding. Therefore, we find the matter needs reconsideration by the adjudicating authority afresh. The impugned order is set aside in respect of the present applicants, after, waiving the pre-deposit of duty, interest and penalty, and matter is remanded to the adjudicating authority to decide afresh after affording an opportunity of hearing to the appellants."

5. The stand of the appellant was that the products in question, are questionable under Chapter 30 as Ayurvedic medicine and not Chapter 33 as cosmetic or toilet preparation. He further explained the nature of ingredients contained in the herbal hair oil and ayurvedic hair shampoo and submitted that when the product manufactured out of ingredients specified in Ayurvedic text, the same should be classified as Ayurvedic medicine.

6. Regarding process undertaken by the appellant, amounting to manufacture or not, there contention is that the appellant received packed and sealed bottles of hair oil / shampoo powder. One bottle each of the oil and powder is packed together in combi-pack. The activity on the part of the appellant is only of labelling and packing. This activity will not amount to manufacture. Note 6 of Chapter 30 has no application to the process undertaken by the appellant as they are not converting bulk pack to retail pack and as such, they are not liable to any Central Excise duty on this ground.

7. The stand of the revenue was that the products, in question, are to be considered as cosmetic and toilet preparation. Even presence of theruptic quality in the said products will not exclude them from Chapter 33. As per Note 6 of Chapter 30, makes it clear that even in case of Ayurvedic medicine labelling of containers to render them marketable to the consumer shall amount to manufacture.

8. The Original Authority held that the registration by State Authorities is for the purpose of regulation of manufacture of the goods under reference. This cannot be considered as authority for classification under Central Excise Tariff. He referred to CETH 33051090 and 33059019 and to Note 1 (d) of Chapter 30 to hold that even if these products have therapeutic value they will still be classified under Chapter 33 only.

9. The learned Commissioner after remand held that the product "Keshyog Ayurvedic/Herbal Hair Oil and Keshyog Ayurvedic Shampoo" are to be classified under CETH 3305 as preparations for use on the hair and not as Ayurvedic medicine under Chapter 30. It was further held that the activity of labelling or re-labelling of these products and making them marketable in combi-pack as "Keshyog Herbal Hair Treatment", amounts to manufacture in terms of Note 5 of Chapter 33. The Original Authority confirmed Central Excise duty of ₹ 1,36,72,354/- from M/s. GTP Teleshopping Pvt. Ltd / M/s. Global Tele Mall. Equal amount of penalty was also imposed on these appellants; ₹ 17,83,745/- was confirmed as duty from M/s. Gurukripa Consumer Care Products; equal amount of penalty was also imposed on them; penalties were imposed on Shri Anuj Agarwal, Director, Shri Gurucharan Patidar and Shri Pranayadutta Shukla, Proprietor under Rule 26 of Central Excise Rules, 2002.

10. The learned Tribunal relying on the decision of *B.P.L. Pharmaceuticals Ltd.* v. *Collector of Central Excise* 1995 taxmann.com 454 (SC), *Himtaj Ayurvedic Udyog Kendra* v. *CCE* 2002 taxmann.com 2032 (CEGAT-New Delhi) and *CCE* v. *Sharma Chemical Works* 2003 taxmann.com 1240 (SC), came to the conclusion that the products in question are rightly questionable under Chapter 30 as Ayurvedic medical preparation. Para 10 of the order impugned reads as under :—

"10. Having considered the nature of product as per the labels and the literature submitted before us, approval by the State Drug Authorities and the ratio adopted by the Tribunal in Saini Hair Products (*supra*), we find that product, in question, are rightly classifiable under Chapter 30 as Ayurvedic Medical Preparation."

11. In the case of *B.P.L. Pharmaceuticals Ltd.* (*supra*), the issue involved was the classification of 'Selsun' an antidandruff preparation containing 2.5% selenium sulphide. Having regard to the preparation's lable, literature, expert opinion and commercial parlance understanding the Hon'ble Supreme Court held that the item would fall as a drug and not a cosmetic.

12. In the case of *Sharma Chemical Works* (*supra*) the dispute was about the classification of 'Banphool oil'. The Apex court held that the mere fact that a product is sold across the counter and not under a doctor's prescription, does not by itself lead to the conclusion that it is not a medicament. The burden of proving that an item is understood by customers in a particular manner was on the Revenue. Relying on the aforesaid decisions, the Tribunal has held that the Appellate Authority rightly classified the product in question under Chapter 30 as Ayurvedic Medical Preparation.

13. On the question as to whether the process of labeling packing undertaken by the appellant will amount to manufacture or not, the learned Tribunal upheld the finding that the process undertaken by the appellant amounts to manufacture. Para 12 is relevant which reads as under :—

> '12. We are not able to accept the contention of the appellant to the effect that processes in the said note are not undertaken by them. The facts of the case are that M/s. Gurukripa Consumer Care Products manufactured these items and packed them in plastic containers of 120 ml and 60 gms. The shampoo bottle was printed with text "TM Keshyog Herbal Powder Shampoo". The bottles of hair oil and shampoo powder were dispatched in separate corrugated boxes, normally containing 200 numbers of bottles of hair oil, 200 bottles of shampoo, respectively. Thereafter these products are put in combo box containing one bottle of hair oil and one bottle of shampoo powder alongwith product brochure. The labels for the containers were also affixed (by GTM/Global) in their premises. Thus, it is clear that labelling of the products, packing from bulk cartons to combo boxes (with one oil and one shampoo container) and making them ready for retail market is carried out by M/s GTM/Global, in their premises. The cartons with 200 bottles received by M/s GTM/Global are meant for inter-unit transfer in bulk and not for retail consumer. Such bulk consignments are made into retail packs (combo packs with bottle of oil and powder) in a single retail carton box. This cartoon box is fit for retail sale under taken by GTM/Global. Applying the provisions of Note 6 of Chapter 30, we find that the processes undertaken by the appellant will amount to manufacture attracting Central Excise levy. The case laws referred to by the appellants are not on the facts, as described above. The nature of activities undertaken by the appellants being not in dispute, we find that the findings of the lower authority regarding the question of manufacture is correct, though the Original Authority discussed Note 5 of Chapter 33, the wordings are similar in Note 6 of Chapter 30. The emphasis made by the appellant on the word "and" before "repacking from bulk packs to retail packs" in the note is of no relevance or help to the appellant as the nature of activies undertaken discussed above are covered by the scope of the chapter note. As stated, the appellant (GTM) are repacking from bulk to retail, labelling and making the product fit for marketing. As such, we find the process undertaken by the appellants amount to manufacture.'

14. The learned Tribunal set aside the personal penalty imposed on Shri Anuj Agrawal and Pranay Shukla. In respect of imposition of penalty against M/s GTM Teleshopping Pvt. Ltd, the learned Tribunal has held that the Commissioner (Appeals) reduced the penalty from 11.92 lakh to Rs. 1.5 lakh. Since the main issue has been decided by the Tribunal, they rejected the prayer and held that no further modification is required in the impugned order by Commissioner (Appeals) with reference to the penalties. After considering the aforesaid, the learned Tribunal held that the products are liable to be classified as Ayurvedic medicine under Chapter 30 and duty liability has to be discharged wherever applicable on manufacture of such items by the manufacturer as well as by the person undertaking the process of labelling, packing and rendering the product fit for retail sale. They set aside the penalties imposed *vide* original order dated 23.4.2012 on individuals and disposed of all the appeals on the above

terms.

15. As per law laid down by the Apex Court in the case of *Amrutanjan Ltd* v. *CCE* 1995 taxmann.com 474, the only requirement is that the product contain Ayurvedic ingredients. It is not essential that the manufacturing process should follow the formula in any text book and it was held by the Supreme Court that Amrutanjan is a Ayurvedic medicine entitled to be classified as such.

16. In *Richardson Hindustan* v. *CCE* 1988 taxmann.com 226 (CEGAT-New Delhi) (SB) the question that came up for consideration was whether two products of the appellant, namely Vicks Vapo Rub and Vicks Inhaler are medicaments falling under Heading 3003.30 or are medicaments falling under Tariff heading 3003.19. These products were intially classified under heading 3003.19. Later the appellants sought revised classification under Heading 3003.30 for the reason that the Directorate General of Technical Development had approved those preparations as Ayurvedic. After considering elaborately the contentions raised by both sides, the Tribunal took note of the fact that there is no definition of Ayurvedic medicaments in the Central Excise and Salt Act or in the Central Excise Tariff. Although Ayurvedic medicines have been defined under Section 3(a) of the Drugs and Cosmetics Act, the same cannot be applied for the purpose of classification of a product for Central Excise duty under the Central Excise and Salt Act in view of several judicial pronouncements. The arguments put forward by the Revenue that one should go by the definition of Section 3(a) of the Drugs and Cosmetics Act to find out whether the product is an ayurvedic medicine was not accepted by the Tribunal. Admittedly the products concerned were not manufactured in accordance with the formulae in a text book and therefore, it was contended that it will not come under 3003.30. The Tribunal took the view that the products should be classified under Central Excise Tariff Heading 3003.30 if it is found that in the common parlance it is known as Ayurvedic medicine and all ingredients are mentioned in the authoritative books on Ayurvedic medicines. It is not necessary that the product was manufactured in accordance with the formulae in the text book. To examine these aspects the matter was remanded. The Revenue took up the matter in appeal before the Supreme Court as Civil Appeal No.2127/88. The appeal was dismissed on 10.1.89. It should, therefore, be taken that the Supreme court has approved the two tests laid down in the decision of the Tribunal.

17. In the judgment of Allahabad High court in *Balaji Agency* v. *Commissioner of Sales Tax* 1994 taxmann.com 675 (All.), even though Court considered a case which was under the provisions of the Sales Tax Act, the question which directly came up for consideration was whether 'Himtaj Oil' is a cosmetic or a medicinal oil. The Assistant Commissioner (Judicial) took the view that it is a medicinal oil and its main function is to relieve from pain. This view was reversed by the Tribunal. The High Court of Allahabad did not agree. It upheld the view taken by the Assistant Commissioner (Judicial) and observed as follows :—

> "There are many oil that are medicines used for massaging painful parts of the body. Such oils would naturally fall in the category of medicines although somebody may use such oil as hair oil. Such occasional or exceptional use will not change the basic character of thing. There is nothing in the order passed by the Tribunal to justify a revision of view taken by the learned Commissioner (Judicial) who specifically held that it was medicinal oil used for relief from pain and for certain other diseases. On this point, therefore, the Tribunal order suffers from an error of law and deserves to be reversed."

18. There is an elaborate discussion by the Supreme Court in *BPL Pharmaceuticals Ltd.* (*supra*) on the difference between the medicaments and cosmetics. The question that came up for consideration was on relating to classification of the product by the appellant marketed under the brand name 'Selsun Suspension'. The assessing authority took the view that the product fell under Chapter 33, even though, under the old Tariff, it was classified as medicine. On appeal before the Tribunal, the view taekn by the

assessing authority was upheld. The question that came up for consideration by the Supreme Court was whether 'Selsun' is to be classified as medicine under Heading 3305.90, as claimed by the respondent. After referring to the label, literature and medicinal properties of the product in question, the Apex Court took the view that the product was not intended for cleansing, beautifying, promoting attractiveness or altering appearance. On the other hand, it was intended to cure certain diseases. The labels notified that it is a medical treatment for dandruff. It should be used twice weekly initially and then as often as necessary or as directed by the physician. Certain directions were also given to its use. The hair had to be washed first and then the selsun should be massaged into the scalp and left for 2 or 3 minutes and thereafter rinsed thoroughly. The court held that the fact the appellant had previously described the product as 'Selsun shampoo' will not conclude the controversy when the true nature of the product calls for examination. Reference was made to Note 2 under Chapter 33 and it was held that once therapeutic quality of the ingredient used, is accepted, thereafter it is not possible to hold that the constituent is subsidiary. The important factor is that selenium sulfide is the only active ingredient. The Tribunal's finding that since the Heading 33.05 refers to preparation for use on the hair, and therefore, the product can be brought under the above heading was not accepted by the Supreme Court. It was held that the Tribunal forgot that the product in question was intended as medicine for cuaring the disease Tinea versicolor and as such applied to skin wherever was necessary apart from curing dandruff by applying on the scalp. Therefore, the product cannot be brought under the heading preparation for use on the hair. The Court further noted the fact that the contents of the labels and the literature would show that the assessee had nowhere indicated that the product is to be used as a cosmetic or toilet preparation nor have they held it as a cosmetic product. Another reason given by the Tribunal in support of its conclusion namely that the product is sold with a pleasant odour, was also rejected by the Supreme Court. It was held that the addition of insignificant quantity of perfume to suppress the unpleasant odour of selenium sulfide would not take away the character of the product as a drug or medicine. We find that reasoning of the Supreme Court in the above case would apply on all fours in the present case.

19. Learned Senior counsel for the appellant has submitted that the show cause notice was issued to the appellant demanding duty by classifying the product in question under Chapter 33 of the Tariff as here are. No show cause notice was ever issued to the appellant that the goods in question are Ayurvedic medicine classifiable under Chapter 30 of the tariff and, therefore, the matter has to be remanded to the Original / Adjudicating Authority for deciding the issue a fresh. We cannot accept such proposal of the learned Senior counsel for the assessee because in reply to show cause notice dated 21.7.2009, the appellant specifically challenged the classification as proposed in the said show cause notice and claimed the same under Chapter 30 of the tariff as medicament. The appellant also gave the details of the use of the product and ingredients in support of their claim. The Adjudicating Authority had not given any finding in respect of claim in reply to the show cause notice and, therefore, the order impugned therein was set aside and the matter was remanded to the Adjudicating Authority to decide a fresh, after affording an opportunity of hearing to the appellant. This is evident from paras 6 and 7 of order dated 24.1.2012 of the Customs Excise and Service Tax Appellate Tribunal, which we have quoted in the preceding paragraph. As per order dated 24.1.2012 of the learned Tribunal, the matter was remitted to the Original Authority for fresh decision on all issues including classification. Except the aforesaid, no other arguments was advanced by the learned Senior counsel.

20. For the above mentioned reasons, we agree with the view expressed by the learned Tribunal (CESTAT) in its Final Order No. A/52024 - 52030/2017-EX[DB], dated 1.3.2017 that the product of the appellant "Keshyog Ayurvedic/Herbal Hair Oil and Keshyog Ayurvedic Shampoo" has to be classified as Ayurvedic medicine under Chapter 30 of the Central Excise Tariff Act, 1985. No substantial question of law arise in these CEA No.102/2017, CEA.No.103/2017 and CEA.No.104/2017 and they are, accordingly, dismissed.

s.k.j.

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*In favour of revenue.