IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/1979/2012-EX[DB]

(Arising out of Order-in-Appeal No. 159-CE/APPL/KNP/2012 dated 27/04/2012 passed by Commissioner of Customs & Central Excise (Appeals), Kanpur)

Commissioner of Customs & Central Excise, Kanpur **Appellant**

Vs.

M/s Shanti Surgicals (P) Ltd. **Respondent**

Appearance:

Shri Mohd. Altaf, Assistant Commissioner (AR), for Appellant
Shri A. K. Dixit, Advocate, for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision : 08/05/2018
FINAL ORDER NO. **71026/2018**

Per: Anil G. Shakkarwar

The present appeal is filed by Revenue is arising out of Order-in-Appeal No. 159-CE/APPL/KNP/2012 dated 27/04/2012 passed by Commissioner of Customs & Central Excise (Appeals), Kanpur.

2. The brief facts of the case are that the respondents were engaged in the manufacture of Absorbent Cotton Wool, Carded Cotton/Non-absorbent Cotton, Handloom Gauze, Handloom Bandages and Bandages, etc. under the Product License No.1/97 dated 13/01/1997 issued by the Drug Controller, Lucknow. The respondent believed that the said goods were classifiable under Chapter 52 & 56 of Schedule to Central Excise Tariff Act, 1985 and did not attract any

Central Excise duty. Therefore, they did not registered themselves with the Central Excise Department. It appeared to Revenue that the respondent should have registered with the Central Excise Department since it appeared to them that the goods manufactured by the respondents were classifiable under Chapter 3005 and were attracting Central Excise duty. Therefore, the respondents were issued with series of Show Cause Notices. The respondents were issued with a Show Cause Notice dated 29/07/2011, Revenue has stated that earlier a Show Cause Notice, for the period 2007-08, was issued to the respondent on 22/09/2008 for demanding Central Excise duty of Rs.20,43,256/- under Section 11A of Central Excise Act, 1944. On similar lines through the said Show Cause Notice dated 29/07/2011 the respondents were called upon to show cause as to why Central Excise duty amounting to Rs.6,59,783/- should not be demanded from them under Section 11A of the Central Excise Act, 1944 by denying them the benefit of Notification No. 8/2003-CE dated 01/03/2003. The said Show Cause Notice was adjudicated through Order-in-Original dated 30/01/2012, wherein the Original Adjudicating Authority had confirmed the demand. Aggrieved by the said order respondent preferred appeal before Commissioner (Appeals). The ld. Commissioner (Appeals) decided the appeal through impugned Order-in-Appeal ld. Commissioner (Appeals) has held that the Original Authority's views regarding exclusion of Absorbent

Cotton Wool through Chapter 56 and Classifying the same under Chapter 30 are liable to be set aside on the wrong appreciation of facts. He therefore, set aside the said Order-in-Original dated 30/01/2012. Being aggrieved by the said order, Revenue has preferred present appeal.

3. The joint statement of facts and grounds of appeal raised by the Revenue is stated in the appeal are reproduced below for ready reference:-

> "1. The Commissioner (Appeals) has accepted that entire range of products being manufactured by the party were supplied to hospitals, CGHS and defence establishments but decided that hospitals or defence establishments cannot be regarded as the retail sales agencies or similar other instrumentalities from where the sales to ultimate consumers as ultimate consumers as individual or group of individuals or any other consumers have been affected.
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> The Commissioner (Appeals) has erred in the aforesaid findings as Hon'ble Supreme Court on identical issue in the case of M/s Jayanti Food Processing Pvt. Ltd. 2007 (215) E.L.T. 327 has in Para-38 of the order ruled that Section 4A will be applied on such goods. The relevant portion of Para-38 is as under:-
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> *"38. The factual scenario is that though the MRP was declared on the package of 12 bottles, the bottles did not have any MRP instead it was written : (a) not for re-sale;*

(b) specially packed for Jet Airways. No retail price was written on 200ml. Bottle. There is further no dispute that the assessee has entered into a contract with Jet Airways dated 13-2-2002 and the contracted price of sale for the goods was Rs.2.61. It was the condition in the contract that each bottle to be supplied shall have a printed label "specially packed for Jet Airways". On the basis of these facts Shri Subba Rao urged that this case, if it was identical with Jayanti Foods case, then it was bound to be held that the MRP based assumption could not be the correct assessment and it should be under Section 4 of the Act. The contention is incorrect and as in fact the "package" cannot be viewed as a "wholesale package". It does not come within the definition of Rule 2(x)(i) as the "package" was not intended for sale, distribution or delivery to an intermediary. On the other hand it is sold directly to Jet Airway and the Jet Airways supplied the said bottles to their passengers and thus there is no further sale by the Jet Airways of these bottles. Therefore, it is obvious that after the first sale bottles go directly to the "ultimate consumers". There would be, therefore, no question of application of Rule 2(x)(i). Rule 2(x)(ii) will also not apply as this does not amount to a commodity sole to an intermediary in bulk so as to enable such intermediary to sell, distribute or deliver, the said commodity to the consumer in smaller quantities. The concerned period

regarding which the show cause notice was given is April, 2002 to September, 2002. Therefore, Rule 2(x)(iii) which came by way of an amendment into 2000 would also have to be considered. However, even that clause is not applicable as the said "package" though contains more than 10 bottles, those bottles cannot be viewed as the "retail package" nor is there any rule requiring labelling the said "retail package" and declaring the price thereof. In fact there is no price involved as it is specifically written on the package "not meant for sale". It is, therefore, obvious that the "package" containing 12 bottles cannot, therefore, be viewed as a "wholesale package". Once that position is clear, there is no question of the applicability of Section 4 of the Act as the "package" as it is a retail sale of the package to the Jet Airways which supplies the same to the passengers on demand. Therefore, the contention of Shri Subba Rao has to be rejected that we should draw a parallel in this case with the appeal of Jayanti Foods and hold that Section 4 is applicable to the transactions. Once that position is clear, the "package" will be covered under Section 6 requiring the declaration of "retail sale price" which appears on the package. In this behalf we must take into consideration the definition of "commodity in packaged form" as provided in Section 2(b) of the SWM Act. The definition is as under:

"2(b) "commodity in packaged form" means commodity packaged, whether in any bottle, tin, wrapper or otherwise, in units suitable for sale, whether wholesale or retail".

Twelve bottles were packed in a wrapper and the wrapper contained the MRP price though the bottles themselves did not have the price. Therefore, we accept the view taken by the Commissioner (Appeals) and the Tribunal that the MRP was correctly mentioned and as such the assessment should have been under Section 4A of the Act and not for the reasons given by the Tribunal that we uphold the ultimate verdict of the Tribunal that the valuation should be under Section 4A of the Act. We accordingly dismiss the appeals filed by the Department but without any order as to costs."

From the above, it is clear that goods supplied by the party to hospitals, CGHS, defence institutions do not fall under the category of wholesale package. It is also worth mentioning that the Commissioner (Appeals) has not commented on the cited case law quoted in the captioned Order-in-Original dated 01.09.2011 and passed the order ignoring the cited case law of Hon'ble Apex Court which is against the Judicial Discipline as ruled by Hon'ble Supreme Court in the case of UOI vs. Kamlakshmi Finance Corporation Ltd. [1991 (55) E.L.T. 433].

2. The Commissioner (Appeals) has observed as under:

"It is a well known fact that for dressing purposes material should at least be sterilised, if not coated or impregnated with pharmaceutical substances"

The Commissioner (Appeals) has again ignored the rulings given by Hon'ble Supreme Court in the case of Chamanlal Jagjivandas Sheth vs. State of Maharashtra [1963] Supp 1 SCR 344, opined that even absorbent, cotton wool, roller bandages and gauze would be drugs within the meaning of the provisions of the Act, stating:

"...The expression "substances", therefore, must be something other than medicines but which are used for treatment. The part of the definition which is material for the present case is "substances intended to be used for or in the treatment." It cannot be disputed, and indeed it is not disputed, that absorbent cotton wool, roller bandages and gauze are "substances" within the meaning of the said expression. If so, the next question is whether they are used for or in "treatment". The said articles are sterilized or otherwise treated to make them disinfectant and then used for surgical dressing; they are essential materials for treatment in surgical cases. Besides being aseptic these articles have to possess those qualities which are utilized in the treatment of diseases. Thus, for instance, in the case of gauze-one of the articles concerned

in this appeal – it has to conform to a standard of absorbency in order that it might serve its purpose, otherwise the fluid which oozes is left to accumulate at the site of the wound or sore. The legislature designedly extended the definition of "drug" so as to take in substances which are necessary aids for treating surgical or other cases. The main object of the Act is to prevent sub-standards in drugs, presumably for maintaining high standards of medical treatment. That would certainly be defeated if the necessary concomitants of medical or surgical treatment were allowed to be diluted: the very same evil which the Act intends to eradicate would continue to subsist."

3. It is well settled that in cases like this what is of primary importance is not how a product is described in Pharmacopoeias or in scientific works, but how it is regarded in common parlance pertaining to the relevant trade. In the present case, Absorbent Cotton of the carded variety manufactured by the party and sold by them in retail sale packing is regarded as "Absorbent Cotton Wool" in the trade. In the first place, there is no specific denial of the averments to this effect made in the case. Apart from this, the certificate given by the end users during the enquiry conducted by the officers from them clearly indicates that the said product manufactured by the party was regarded as Absorbent

Cotton Wool of the Pharmacopoeial Variety complying with the necessary standards. This may not constitute a promissory estoppel, but it would certainly constitute evidence of the fact that in the pharmaceutical trade the product manufactured by the party was regarded as Absorbent Cotton Wool. There is, therefore, enough evidence to show that in the common parlance of the trade, namely the pharmaceutical trade in this case, the said product manufactured and cleared by the party was regarded as "Absorbent Cotton Wool". It thus clear that the absorbent cotton wools, carded cotton etc. manufactured by the party will fall within the description of the goods mentioned under Chapter 30 and not under the chapter meant for 'Textile and Textile Articles' as claimed by the party through their party in their defense reply.

4. Shri Shubhash Kheria in his statement recorded under Section 14 of the Central Excise Act, 1944 has stated that before introduction of eight digit tariff they were classifying their product under Chapter heading 3004 and after introduction of eight digit tariff they were classifying the same in Chapter 56. There was no change in manufacturing process prior and post introduction of eight digit tariff. The only basis that new Chapter 56 has absorbent cotton wool as new entry does not form any basis for classifying their product under Chapter 56.

Hon'ble Tribunal in the case of CCE, Calicut vs. Kerala Chemicals & Proteins Limited wherein on the similar facts Hon'ble Tribunal observed as under:

"Di-calcium Phosphate of Animal Feed Grade- Obtained by crushing animal bone-it was classifiable as preparation used in animal feed under Heading 2303 of Central Excise Tariff attracting nil rate of duty, as it existed prior to introduction of 8 digit tariff effective from 28.02.2005, and thereafter under 2309 ibid- In absence of any change in notes to Section VI or Chapter 28 or Heading No.2835 ibid, both prior to and on or after 28.02.2005, impugned product could not be reclassified from Chapter 28/ Tariff Item 28352500 merely because it referred to di-calcium phosphate-Furthermore, there was no change in manufacturing process prior and post 01.03.2005."

5. Hon'ble Supreme Court in Civil Appeal No.783-803 of 2004 in the matter of M/s Wockhardt Life Sciences Limited has observed as under:

"The Tribunal after referring to the Explanatory Notes under heading 30.04 of the Harmonized System of Nomenclature relating to medicament, which covers Povidone Iodine as Polyvinyl Povidone Iodine and, the test laid down for classification of the product as medicament: has concluded that the product is purchased primarily for its therapeutic or prophylactic qualities and not for its qualities as organic surface active preparation. In conclusion, the Tribunal, while allowing the appeal, has held that the product in question is, primarily intended and also actually, used for its antiseptic properties, therefore, it is classifiable as medicament under Chapter 30 of the Schedule to the Act."

The Supreme Court further observed that medicaments are products which can be used either for therapeutic or prophylactic usage. Since the product in question is basically and primarily used for the prophylactic uses, the Tribunal was justified in coming to a conclusion that the adjudicating authority and the first appellate authority were not right in classifying the products under Chapter sub-heading 3402.90 and, therefore, had classified those products under chapter sub-heading 3003.

The Supreme Court further observed,

"There is no fixed test for classification of a taxable commodity. This is probably the reason why the 'common parlance test' or the 'commercial usage test' are the most common. Whether a particular article will fall within a particular Tariff heading or not has to be decided on the basis of the tangible material or evidence to determine how such an article is understood in 'common parlance' or in 'commercial world' or in 'trade circle' or in its popular sense meaning. It is they who are concerned with it and it is the sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted. One of the essential factors for determining whether a product falls within Chapter 30 or not is whether the product is understood as a pharmaceutical product in common parlance. Further, the quantity of medicament used in a particular product will also not be a relevant factor for, normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body.

However, there cannot be a static parameter for the correct classification of a commodity. *The process of manufacture of a product and the end use to which it is put, cannot necessarily be determinative of the classification of that product under a fiscal schedule like the Central Excise Tariff. What is more important is whether the broad description of the articles fits in with the expression used in the Tariff…"*

Moreover, the functional utility and predominant or primary usage of the commodity which is being classified must be taken into account, apart from the understanding in common parlance."

From the above, the combined factor that requires to be taken note of the purpose of the classification of the goods are the composition, the product literature, the label, the character of the product and the use to which the product is put. However, the miniscule quantity of the prophylactic ingredient is not a relevant factor. In the instant case, it is not in dispute that this is used by the hospitals for the purpose of cleaning or placing over wounds in order to protect it. The purpose is to prevent the infection or disease. Therefore, the product in question can be safely classified under chapter sub-heading 3005 which is a specific entry.

In view of the above, the said Order-in-Appeal dated 27.04.2012 of the Commissioner (Appeals), Central Excise, Kanpur may be appealed against before the Hon'ble CESTAT with a prayer that it may be set aside. Accordingly, the said Committee directs the Dy. Commissioner (Review), Central Excise, Kanpur to file appeals before the Hon'ble CESTAT on the Committee's behalf against the said Order-in-Appeal in terms of Sub-section 2 of Section 35B of the Central Excise Act, 1944."

4. Heard the ld. A. R. for Revenue, who has presented above stated statement of facts and grounds of appeal.

5. Heard the ld. Counsel for the respondent, who has stated that the issue involved herein are part of the various Show Cause Notices and ultimately settled through the Final Order No. A/70546-70551/2017 dated 15/05/2017 passed by this Tribunal. He has submitted that under the said order, the appeal arising out of Commissioner (Appeals) order which

was outcome of the said Show Cause Notice dated 22/09/2008 is dealt with in Appeal No. E/1911/2009. He has further submitted that the said Appeal No. E/1911/2009 was filed by Revenue challenging Order-in-Appeal No. 59-CE/APPL/KNP/2009 dated 25/03/2009 and he has further submitted that appeal filed by Revenue bearing Appeal No. E/1911/2009 was dismissed by Revenue through above stated Final Order dated 15/05/2017.

6. Having considered the submissions of both the sides and perusal of the facts on record, we find that the findings by the ld. Commissioner (Appeals) in the present Order-in-Appeal and that in Order-in-Appeal dated 25/03/2009 are same and on same grounds and this Tribunal has found that the said findings by the ld. Commissioner (Appeals) in said Order-in-Appeal dated 25/03/2009 were sustainable. We, therefore, hold that the findings of ld. Commissioner (Appeals) in the impugned Order-in-Appeal are sustainable. Therefore, we dismiss the appeal filed by Revenue.

(Dictated in Court)

Sd/-	**Sd/-**
(Anil Choudhary)	**(Anil G. Shakkarwar)**
Member (Judicial)	**Member (Technical)**

Ansari