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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/2725/2007&3836/06 Date 13/08/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S IND SWIFT LTD., UNIT-II
LOT NO-17-B, SECTOR-2, PARWANOO
M/S IND SWIFT LTD., UNIT-II

2. M/S. IND-SWIFT LTD., PLOT NO. 23, SECTOR-2, PARWANOO (HP)

Appellant
Vs
Respondent

C.C.E. CHANDIGARH

I am directed to transmit herewith a certified copy of **Final order No**. 597-598/08-EX **Excise** dated 25-

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH 160017
2. Adv. / Consult
MR.NAVEEN MULLICK
B-388, MERA BAGH, NEW DELHI-63.
3. C.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Deffence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Appeal Nos.2725/2007 & 3836/2006 -DB(BR)

(Arising out of order in appeal No.249 & 607/CE/CHD/07 dated 11.7.07 and 7.7.2006 passed by the Commissioner of Central Excise (Appeals), Chandigarh)

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member(Technical)
Hon'ble Mr.P.K. Das, Member(Judicial))

1. Whether Press reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? — no.
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ? — no
3. Whether Their Lordships wish to see the fair copy of the Order ? — no
4. Whether Order is to be circulated to the Departmental authorities? — yes

M/s Ind Swift Ltd, Unit II — Appellant
(Rep. by Shri N. Mullick, Advocate)

Vs

CCE, Chandigarh — Respondent
(Rep. by Shri Sanjay Kumar, DR)

Coram: Hon'ble Mr. M. Veeraiyan, Member(Technical)
Hon'ble Mr P.K. Das, Member(Judicial)

Date of Hearing: 25.6.08

FINAL Order No. 597-598 /2008-~~SM~~ Ex (BR)

Per P.K. Das:

Common issue is involved in both the appeals and therefore, these are

2. The issue involved in these appeals is as to whether the products Toss (Strongtium Chloride 10% w/w) and Toss-K (Potassium Nitrate B.P. 5% w/w) are classifiable under sub-heading 3003.39 Pharmaceutical products as claimed by the appellants or sub-heading 3306.10 Cosmetic or toilet preparation as claimed by the Revenue.

3. The learned Advocate on behalf of the appellants submits that the product Toss and Toss-K are medicated toothpaste, Pharmaceutical product. He further submits that the Revenue classified the said products under sub-heading 3306.10 as Toothpaste Toilet preparation on the basis of Chemical Examiner report by ignoring several evidences placed by the appellants. He relied upon the decision of the Hon'ble Supreme Court in the case of B.P.~~M.~~ L Pharmaceutical Ltd Vs CCE Baroda reported in 1995 (77) ELT 485 (SC).

4. The learned DR on behalf of the Revenue submits that as revealed from the Chemical Examiner report, New Delhi, both the items should be classified under sub-heading 3306.10. He also drew the attention of the Bench to Chapter Note of Tariff. He relied upon the decision of the Larger Bench of the Tribunal in the case of Shri Baidyanath Ayurved Bhavan Vs CCE Patna reported in 2002 (140) ELT 459 (T-LB).

5. After hearing both the sides and on perusal of the record, it is seen that the Revenue proposed classification of the said products under Chapter 33 on the basis of Note 1(d) of Chapter 30 and Note 2 of Chapter 33 of the Schedule to the Central Excise Tariff Act, 1985. For the purpose of proper appreciation of the case, the relevant portion of the Chapter Note and Tariff heading are reproduced below:-

"Chapter 30

Pharmaceutical Products

Notes: 1. This Chapter does not cover:

a). . . . . .

x x x x x

d) Preparation of Chapter 33 even if they have therapeuhic or prophylactic properties;

Tariff Item	Description of goods
x x x	x x x
30.03	Medicament (including Veterinary Medicaments)
3003.39	Other"

Chapter 33

Essential Oils and Resinoids, Perfumery, cosmetic or toilet preparations

"Tariff Item	Description of goods
x x	x x x
3306	Preparation for oral or dental hygiene, including denture fixture Panties and powders; yarn to clean between the teeth (dental flos), in individual retail packages
3306.10	Dentifrius:"

6. The learned Advocate on behalf of the appellants in support of his contention that the said products are medicaments, made submission and produced the evidences as under:-

(a) Drug Controlling-cum-Licensing Authority issued license for manufacturing of the said products under Drugs and Cosmetic Rules, 1945.

b) Both the products are included as a drug in the British Pharmacopia

c) Strontium choride is used as 10% tooth paste for relief of dental hyper sensitivity

d) It is revealed from the said literature of the products that mode of usage 'Toss-K should be used three times a day for a minimum of two to four weeks with a soft toothbrush or using one's own finger tips.It is further reveled from the said literature that the said products are recommended for relief from pain in patients with dental hypersentivity.

e) The packing of the said products indicated Medicated dental paste.

f) Composition of Toss is as under:-

Strontium Chloride	10% w/w
Formaldehyde Solution BP	0.2% w/w
Zinc Sulphate IP	0.2% w/w
Sodium Monofluorophosphate USP	0.625% w/w

g) The said products are available in the drug stores as duly recorded in the adjudication order.

h) The price of the dental toothpaste is much cheaper than that of the said products.

i) The literature indicates that the said products are not fit for regular use.

8. The contention of the Revenue that in view of Chapter note, the said products are used as Cosmetics or Toilet preparation and as they have therapeutic or prophetic properties. The Revenue relied upon the report of CRCL New Delhi, a Central Government Agency. The Chemical Examiner observed that the sample was packed in printed flexible tube. Further, it is packed in printed card board packet. It is composed of potassium nitrate, surfactant, thickening agent and flowing compound.

9. The Hon'ble Supreme Court in the case of BPL Pharmaceutical Ltd (Supra) held that to attract Chapter 33, the product must first be a cosmetic and used as cosmetic or toilet preparation. The relevant portion of the said decision is reproduced below:-

> 31. The contention based on Chapter notes is also not correct. One of the reasons given by the Authorities below for holding that Selsun would fall under Chapter 33 was that having regard to the composition the product will come within the purview of note 2 to Chapter 33 of the Schedule to Central Excise Tariff Act, 1985 is without substance. According to the Authorities the product contains only subsidiary pharmeceutical value and, therefore, notwithstanding the product having a medicinal value will fall under Chapter 33. We have already set out Note 2 to Chapter 33. In order to attract Note 2 to Chapter 33 the product must first be a cosmetic, that the product should be suitable for use as goods of Headings 33.03 to 33.08 and they must be put in packing as labels, literature and other indications showing that they are for use as cosmetic or toilet preparation. Contrary to the above in the present case none of the requirements are fulfilled. Therefore, Note 2 to Chapter 33 is not attracted. Again it is without substance the reason given by the Authorities that the product contains 2.5% w/v of Selenium Sulfide which is only a subsidiary curative or prophylactic value. The position is that therapeutic quantity permitted as per technical references including U.S. Pharmacopoeia is 2.5%. Anything in excess is likely to harm or result in adverse effect. Once the therapeutic quantity of the ingredient used, is accepted, thereafter it is not possible to hold that the constituent is subsidiary. The important factor is that this constituent (Selenium Sulfide) is the main ingredient and is the only active ingredient.

10. In the present case, on perusal of Chapter Notes, Labels, Literature, composition of the product, we find that the products in question cannot be equated with the toothpaste used as cosmetic. There is no material that the products are to be used as a cosmetic or toilet preparations. On the other hand, the materials placed before us are clearly indicating that it is a medicated dental paste. It is seen that the products are intended to be used for curing the disease. The learned DR relied upon the Chemical Examiner report which is not giving any impression that the product is cosmetic or toilet preparation. The learned DR further emphasized that the appellants on earlier occasion, declared the product other than medicament. It is settled that there is no estoppel in the classification of the goods. The case law relied upon by the learned DR is not applicable in the instant case

11. In view of the above discussion and after considering the composition of the product, labels, literature, character, usage and drug license issued by the Competent Authority, we hold that the said products are classifiable under heading 3003.10 of the Schedule to the Central Excise Tariff Act

1985. The demand of duty and penalty is not sustainable. Accordingly, the impugned orders are set aside and the appeals are allowed with consequential relief.

(Order dictated and pronounced in the open Court).

(M. Veeraiyan)
Member(Tech)

(P.K. Das)
Member(Judl)

MPS*