

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

Appeal No. E/2903/2004-2904/2004 - EX[DB]

Date 01/07/2009

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

To :
C.C.E.BHOPAL

178, BHAGYA BHAWAN ZONE-II, M.P. NAGAR
BHOPAL M.P
C.C.E.BHOPAL

M/S HERBAL HOUSE

Appellant

Vs

Respondent

2009 EX[DB] dated 15.5.09

I am directed to transmit herewith a certified copy of Final order No. 438-439

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


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S HERBAL HOUSE

16-B, INDUSTRIAL AREA ADHARTAL JABALPUR M.P

2. Adv. / Consult

MR. BIPIN GARG & CO.

60/03, VINDHYACHAL, KAUSHAMBI, GHAZIABAD-201012.

3 S.D.R

4 J.C.D.R.

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)

11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

12 Taxindiaonline.com Pvt Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

14 Easy Service Tax Online Dot Com Pvt Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

15 LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)

16 Office Copy

17 Guard file

18. SPS to Honble President


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi

COURT-I

Date of hearing/decision: 15.05.2009

Excise Appeal Nos. 2903-2904 of 2004

[Arising out of order-in-appeal Nos. 117-122 CE/BPL/2004 dated 12.03.2004 passed by the Commissioner (Appeals-II), Customs & Central Excise, Bhopal].

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President

Hon'ble Shri M. Veeraiyan, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	See
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

CCE, Bhopal

Appellant

Vs.

M/s Herbal House

Respondent

Appearance:

Appeared for the Appellant – Sh. S. N. Srivastava, DR

Appeared for the Respondent – Sh. Bipin Garg, Advocate

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President

Hon'ble Shri M. Veeraiyan, Member (Technical)

FINAL Oral Order No. 438-439/09-EX

Per: Justice R.M.S. Khandeparkar:

Since common question of facts and law arise in both these appeals as well as the cross-objections filed by the assessee, they were heard together and are being disposed of by this common order.

2. We have heard at length the learned Advocate for the assessee as well as the learned DR for the Revenue in these matters. We have perused the records.

3. Both the appeals arise from a common order passed by the Commissioner (Appeals) on 12.03.2004 in the matter of dispute pertaining to the classification of the products namely Brahmi Amla Oil and Ayur natural hair wash. In relation to the issue pertaining to the classification of the said products, two show cause notices came to be issued to the assessee, one on 15.05.1997 and another on 20.06.2001. Under the said show cause notices, the assessee was called upon as to why the duty should not be confirmed by classifying the products to be cosmetics, and therefore classifiable under tariff entry No. 3305.10 and not under tariff entry No. 3003.31 as claimed by the assessee. The adjudication in the said show cause notices was disposed of under order dated 09.02.2001 and 11.01.2002 respectively. Being dissatisfied, the assessee filed the appeals being Appeal No. 126/2001 and 49/2001 before the Commissioner (Appeals). Those appeals were disposed under order dated 12.03.2004 declaring both the products to be Ayurvedic medicines. As against the Order-in-Appeal No. 126/01, the Department has preferred the Appeal No. 2004/04 and against the Order-in-Appeal No. 49/2002, the Department has preferred Appeal No. 2090/04.

4. Learned DR referring to the said tariff entries and the decisions of the Tribunal in CCE, Mumbai vs. Quality Herbal Pvt. Ltd., reported in 2003 (153) ELT 552 (Tri.-Mumbai), and B.P.L. Pharmaceuticals Ltd., vs. CCE, Vadodara reported in 1995 (77) ELT 485 (SC) submitted that the

Commissioner (Appeals) erred in interfering with the order passed by the adjudicating authority and holding the product to be Ayurvedic medicaments inspite of evidence available on record disproving the said claim of the assessee. According to the learned DR materials on record clearly disclose that the products were classifiable under entry No. 3305.10 and hence the products are not Ayurvedic medicines.

5. On the other hand, learned Advocate appearing for the assessee placing reliance in the decision in the matter of CCE, Pune vs. Ram Krishna Vidyut reported in 2000 (125) ELT 748 (Tribunal), CCE, Calcutta vs. Sharma Chemical Works reported in 2003 (154) ELT 328 (SC), CCE, Nagpur vs. Vicco Laboratories reported in 2005 (179) ELT 17 (SC), Pankajakasthuri Herbals India (P) Ltd., vs. CCE, Thiruvananthapuram reported in 2006 (194) ELT 90 (Tri., Bang.), Herbal Products vs. CCE, Calicut reported in 2002 (146) ELT 126 (Tri. Bang.) and in Meghdoot Gramodyog Sewa Sansthan vs. CCE, Lucknow reported in 2004 (174) ELT 14 (SC) submitted that the evidence produced by the assessee clearly establishes the products to be Ayurvedic medicine and therefore no fault can be found with the orders passed by the Collector (Appeals) in the matter in hand. He further submitted that the materials placed on record by the assessee clearly disclose the license issued by the Drug Controller which was issued pursuant to the satisfaction arrived at by the authorities in terms of the provisions of Section 3(a) read with the first schedule of the Drugs and Cosmetics Act, 1940 about the ingredients of the product which revealed the same to be ayurvedic medicament.

6. The dispute in the matter relates to the classification of the products manufactured by the assessee. While it is the contention of the Department that the products are cosmetics, the assessee insists the same to be ayurvedic medicines. It is settled law that in such cases the twin test approved by the Apex Court in *Collector vs. Richardson Hindustan Limited* reported in 1989 (42) ELT A100 = 2004 (9) SCC 156 and further reiterated by the Apex Court in *Puma Ayurvedic Herbal Pvt. Ltd., vs. Commissioner* reported in 2006 (196) ELT 3 (SC) as well as in the recent decision in *CCE, Nagpur vs. Shree Baidyanath Ayurved Bhawan Ltd.*, reported in 2009 (237) ELT 225 (SC) has to be applied and followed. The twin test as approved by the Apex Court reads thus:-

- i) Whether the item is commonly understood as medicament which is called the common parlance test. For this test it will have to be seen whether in common parlance the item is accepted as a medicament. If a product falls in the category of medicament it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer towards the product is very material. One may buy any of the ordinary soaps available in the market. But if one has a skin problem, he may have to buy a medicated soap. Such a soap will not be an ordinary cosmetic. It will be medicament falling in Chapter 30 of the Tariff Act.
- ii) Are the ingredients used in the product mentioned in the authoritative textbooks on Ayurveda?"

7. The Apex Court has repeatedly warned the department about the test to be applied for classification of products in order to ascertain whether the same is ayurvedic medicine or not. It clearly requires the Department to primarily find out whether the product is medicament as is understood in

common parlance. While dealing with this aspect, the Apex Court has also laid down certain guidelines to apply the said test. Resort should be had to popular meaning and understanding attached to such products by those using the products and not to be had to the scientific and technical meaning of the terms and expression used. The approach and understanding of the consumer about the product has great significance in such matters. Therefore, what is relevant is to ascertain as to how the consumer looks at the product and what is his perception about such product. The consumers' perception about the product is a strong factor in the determination of classification of products. The Department therefore while observing as to whether the particular product is ayurvedic medicament or not by applying the common parlance test had to find out whether the product is of common use or it issued for treatment of any particular ailment.

8. Perusal of the impugned order as well as that of the order of the adjudicating authority apparently discloses that the authorities have not applied their mind to the twin test as approved by the Apex Court and quoted herein above. The entire exercise by the adjudicating authority and Commissioner (Appeals) is totally superfluous in the matter of classification of the product.

9. It was strenuously argued on behalf of the assessee that the certificate of registration under the Drugs and Cosmetics Act, 1940 clearly disclose that the product is duly certified to be the Ayurvedic medicine under authoritative books. In that regard attention was drawn to the copies of those certificates and the title of the books placed on record. Attention was also drawn to the first schedule of the Drugs and Cosmetics Act, 1940, while

contending that the title of the books clearly reveal that they bear the same name as disclosed in the said schedule.

10. At the outset, it is to be noted that the first schedule to the Drugs and Cosmetics Act, 1940 and list about 84 items under Part 'A' and 13 items under Part 'B', part 'A' refers to Ayurvedic and Siddha Systems whereas part 'B' refers to Unani Tibb system. The schedule is prepared in terms of Section 3(a) of the Drugs and Cosmetics Act, 1940. The said provision of law explains the expression "Ayurvedic, Siddha or Unani Drugs". It says that the ayurvedic, siddha or unani drugs includes all medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, manufactured exclusively in accordance with the formulae prescribed in the authoritative books of Ayurvedic, Siddha and Unani Tibb systems of medicine, specified in the First Schedule. Apparently, therefore, the items mentioned in the First Schedule relates to Ayurvedic Siddha and Unani Tibb Systems of medicine. In other words, the items under first schedule by themselves would not necessarily be the names of books on ayurvedic or unani tibb system but they would refer to the subject on which the authoritative books are required to establish the formulae as referred to in Section 3(a) of the Drugs and Cosmetics Act, 1940, for the purpose of obtaining licence under that Act. Even the schedule itself specifies the items to be "ayurvedic system" as far as part 'A' of the schedule is concern.

11. The Apex Court in Shree Vaidyanath Ayurved Bhawan Ltd., (supra) has clearly held that-

“We endorse the view that in order to determine whether a product is covered by ‘cosmetics’ or ‘medicaments’ or in other words whether a product falls under Chapter 30 or Chapter 33: twin test noticed in Puma Ayurvedic Herbal (P) Ltd., continue to be relevant. The primary object of the Excise Act is to raise revenue for which various products are differently classified in New Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used. The approach of the consumer or user towards the product, thus, assumes significance. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user’s understanding is a strong factor in determination of classification of the products”.

12. Referring to facts of the case before the Apex Court in Shree Vaidyanath Ayurved Bhawan Ltd., the Apex Court clearly observed that-

“We find it difficult to accept the contention of the learned senior counsel for Baidyanath that because DML is manufactured exclusively in accordance with the formulae described in Ayurveda Sar Sangrah which is authoritative text on Ayurvedic system of treatment and is notified in the First Schedule to the Drugs and Cosmetics Act, 1940 and the said product is sold under the name ‘Dant Manjan Lal’ which is the name specified for the said product in Ayurveda Sar Sangrah, the common parlance test is not applicable. As a matter of fact, this contention is based on misplaced assumption that Chapter Sub-heading 3003.31 by itself provides the definition of Ayurvedic Medicine and there is no requirement to look beyond”.

13. As observed above, perusal of the order passed by the lower authority apparently discloses a casual approach in the matter of classification and failure on their part to apply the twin test in the manner acquired to be applied while classifying the product.

14. Considering the view that we are taking in the matter, it would be premature to refer to the various decisions sought to be relied upon on behalf of assessee as well as the Revenue. It would be appropriate to set aside both the orders and remand the matter to the adjudicating authority to decide the issue of classification afresh by applying the twin test and the observation made herein above. Needless to say that since the matter relates to the period prior to eight years, the authorities shall decide the same as expeditiously as possible after hearing the parties, and on analogies of the entire materials on record in proper perspective.

15. Before we are part of the matter, it is necessary to deal with one of the issue sought to be raised on behalf of the appellants and that is relating to burden of proof in the matter of classification of the product. Undoubtedly, it is settled law that burden in that regard primarily lies upon the department. But concept of burden of proof in this regard should not be construed to mean that mere failure to produce evidence by the Department will prevent the Department from relying upon the evidence produced by the assessee in order to enable it to discharge its burden. In another words, the burden regarding the proof pertaining to the classification of the product can be discharged by the Department not only by producing evidence by the Department itself but also by relying upon the evidence produced by the assessee and to point out therefrom as to how the contentions sought to be

canvassed on behalf of the Department stand established. The contention of the appellant that merely because the Department has failed to produce any material as regards to exact nature of the product in question that itself will not be sufficient for the adjudicating authority to reject the contention of the Department regarding the classification of the product as the cosmetic. The adjudicating authority will have to analyze the entire evidence placed on record by both the parties in that regard and arrive at the correct finding.

16. In the circumstances, therefore without expressing any opinion on the merits of the case, the impugned orders alongwith orders of the adjudicating authority are hereby set aside and the matters are remanded to the adjudicating authority to decide the same afresh within a period of four months from the date of receipt of this order and preferably prior to 31.12.2009, bearing in mind the law laid down by the Apex Court and the observations made hereinabove. The appeals stand disposed of in the above terms.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member (Technical)

/Pant/