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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. C/682, 685, 691 /2009 - CU[DB] Date **20/07/2011**

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

To : C.C.(PREVENTIVE)
NEW CUSTOM HOUSE,
NEAR I.G.I. AIRPORT,
NEW DELHI 110037.

C.C.(PREVENTIVE) Appellant

Vs

M/S VEE KAY POLYCOATS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/320-322/ 2011 CU[DB]** dated 14.07.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
M/S VEE KAY POLYCOATS LTD.
7-D 7TH FLOOR, HANSALYA
BUILDING-15, BARAKHAMBA
ROAD, NEW DELHI.

2. Adv. / Consult

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

14. M/S GLOBAL ASSOCIATES,
1/24, WHS KIRTI NAGAR,
NEW DELHI.

15. M/S SUSHI CHEM AND PLASTIC INDUSTRIES ,
307/1, 72-B, SHAHZADA BAGH EXTENSION,
OLD ROHTAK ROAD, DELHI.

Assistant Registr
(Customs Appeal Branc

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
COURT NO. IV

Date of Hearing : 24.5.2011
Date of Pronouncement : 14-07-11

Custom Appeal No. 682, 685, 691 of 2009

[Arising out of common Order-in-Original No. 15/Commr./HKT/09 dated 29.7.2009 passed by the Commissioner of Customs (Prev.), New Delhi]

Coram:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

CC, New Delhi — Appellant

Vs.

M/s Vee Kay Polycoats Ltd.
M/s Sushi Chem and Plastic Industries
M/s Global Associates — Respondents

Appearance:
Appeared for Appellant : Shri Sonal Bajaj, SDR
Appeared for Respondent : Shri K.K. Anand, Advocate with Shri Prabhat Kumar, Advocate

Coram:
Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

Final Order No. C/320-322/11 dated 14.7.11

Per Mathew John:

Revenue made a case against three importers namely, (i) Vee Kay Polycoats Ltd, (ii) M/s Sushi Chem and Plastic Industries and (iii) Global Associates, regarding undervaluation of imports of certain plasticizers imported from M/s LG Chem , Korea, during the period the period 2003-04. The Show Cause Notice issued, alleging undervaluation and demanding duty to the tune of Rs. 62,54,899/-, Rs. 1,10,99,357/-, Rs.1,66,82,521/- respectively from the three importers above said, along with appropriate interest and penalties, was adjudicated by the Commissioner who dropped the proceedings initiated by the SCN against the importers and the concerned CHAs. Aggrieved by the order the Revenue has filed these Appeals.

2. The case in brief is that the importer was importing goods declared as Di-Octylphthalate (DOP) for a few years up to about July 2003. From July-August, 2003 they started importing goods declared as Di-2-Ethyl Hexyle Phthalate (DEHP) at a lower price than that of DOP. The case of the revenue is that both DOP and DEHP are the same compound and they started importing the goods adopting a new name with the purpose of undervaluing the goods with an intention to evade customs duty.

3. The main evidence relied upon by Revenue are detailed in para 21 of the SCN which is technical literature in Journals, Reference Books, Chemical Dictionary and information on internet to the effect that the names DOP and DEHP are synonymous names. Some of these are,-

(i) Study prepared by ECOBILAN, Member company of Price Water House Coopers, France for the European Council of plasticizers and Intermediates (ECPI)

(ii) The Condensed Chemical Dictionary, Tenth Edition, Revised by Gesser G. Hausley

(iii) The handbook of Polyvinyl Chloride Formulating edited by Edward j. Wickson 1993 edition

(iv) MSDS (Material Safety Data Sheet) of Di-Octyl Phthalate (DOP) from the official website of LG.

(v) Website www.dehp-facts.com

(vi) www.evol.nw.ru/~spirov/hazard/di-sec-octyl_phthalate.html

(vii) www.inchem.org/documents/ehc/ehc/ehc131.htm

(viii) www.monographs.iarc.fr/htdocs/monographs/vol77/77-1.html

(ix) www.cerhr.niehs.nih.gov/CERHRchems/DEHP.html

4. Further statement of Shri. C. D. Anand, Executive Secretary of Indian Plastic Manufacturers Association, New Delhi as detailed in para 22 of the SCN and statement of Shri. D. H. Chung, Chief Representative of M/s LG International Korea in New Delhi as detailed in para 8 of the SCN were also relied upon.

5. The Respondents submitted their arguments enclosing an affidavit signed by Sh. Sang Mok Kim, Plant Manager of LG Chem Korea explaining that DOP is a product manufactured using Normal (linear) Octonol and this product is of superior quality and its cost is appreciably higher than that of DEHP which is made from 2-Ethyl Hexanol and of lower quality and cheaper. DEHP was more toxic and had a different molecular structure.

6. After considering the various arguments submitted by the Respondents, the Commissioner who adjudicated the SCN made some interesting observations in paras 34 and 35 excerpts of which are reproduced below;

> "It will be highly inappropriate to say that in commercial parlance a chemical product will have only one quality. It will amount to saying that water taken from a pond sea, river, rain Biselri Bottle etc will always be of the highest quality"
>
> "When there is a vide variations in the specifications of a commercial product it is expected that there will be several grades. For example all the categories of cotton fabrics will not fetch the same price because it depends upon so many factors, like cotton staple fibre length, spinning of yarn, reed-pick of the fabric etc. Similarly all the models of the same car made by a car manufacturer e.g. Maruti Suzuki will not be having the same commercial value. In the instant case of DEHP (DOP) there could be different commercial grades due to variations in colour, specific gravity, Acid Value, Ester Value, Refractive Index, Acid Value after

> heating etc. Therefore, the submissions of the manufacture M/s LG Chem Ltd., Korea, that inferior varieties of these plasticizers are sold as DEHP at lower price makes sense."

7. He gave his final conclusion as detailed in para 37 of the order which is reproduced below:

> "The assessed Bills of entry have not been appealed against by the Customs Commissionerates as both DOP and DEHP descriptions of a product were being assessed in the custom house at the same time and it will not be appropriate to say that only the importers should give all the synonyms of a product in the Bill of Entry. Even the assessing officer also have the knowledge as to what are the isomers/synonyms of a chemical being imported. It is possible that the assessing officer had this knowledge and that is why no objection was raised while assessing the bills of entry as both DOP & DEHP represent the same chemical but could have different grades and were being imported at the same time in same custom house. Showing a different CTH in the bill of entry is not a mis-declaration. It is the duty of the assessing office and not the importer to correctly classify a product. Secondly, when both the terminology DOP & DEHP have been held to be the same chemical there is no mis-declaration on the part of the importer because when the importers got superior variety of the plasticizer they declared it as DOP and when they got inferior variety of the same plasticizer they declared the same as DEHP. The initiative taken by the importer to import the inferior grade of a product in the country cannot be taken as a ground for misguiding, suppression and mis-declaration to evade Customs duty. In this regard the manufacturer's reply to the SCN, mentioned in para 25 (c) above, becomes highly relevant that DEHP is their off grade materials used for inferior application and in commercial parlance DEHP is known as off grade material otherwise both DOP & DEHP are synonyms."

8. The Committee of Chief Commissioners has not found this order legal and proper for the following main reasons:

> "20.2 In para 32 of Order-in-Original, read with para 26, the adjudicating authority has relied heavily on the affidavit filed by one Mr. Sang Mok Kim, Plant Manager and thus has come to the

conclusion that the workd "DOP" in plasticizer trade parlance is very loosely used and that there is another DOP of a very high quality which is manufactured by using n-octanol and that this category of DOP is not manufactured by M/s LG Chem and LG International. The conclusion drawn by the adjudicating authority is erroneous and appears to be without any basis and it is not the case of the Department that the impugned goods are DnOP. It is not disputed that M/s LG Chem and M/s LG International are in the business of manufacture and supply of DOP. Invoice Nos. 20014439 dated 27.12.02, 20030163 dated 14.7.03, 20042592 dated 5.12.03 and 20053921 dated 27.3.04, all issued by LG International, Korea contains the description which is as follows : "PLASTICIZER, DI-OCTYL-PHTHALATE (DOP)". The invoices issued are in favour of M/s Veekay Polycoats Ltd. which are relied upon by the Department. The affidavit of the Plant Manager reads, "All over the world, as an accepted commercial practice, the trade understands DEHP as DOP and market also understands DEHP as DOP." Certificate of analysis filed along with the invoices of impugned DEHP contains the description of commodity as DOP.

20.3 In their various statements the representatives of the liaison office of M/s LG Chem in India have accepted that they were not aware of DEHP being manufactured by M/s LG Chem and that they never undertook any market survey for the product. Neither is there any product catalogue of M/s LG Chem mentioning the product DEHP.

20.4 M/s LG Chem and M/s LG International remain the same entity, is irrefutably proved by documentary evidence. By indulging in undervaluation they stood to gain. Therefore, it is not surprising that they both actively and tacitly allowed the switch in nomenclature.

20.5 Of the two synonyms, that is DOP and DEHP, the latter happens to be more commonly used internationally. Since the product itself is very widely used in the medical industries, certain health issued cropped up, which led to extensive scrutiny of the product from safety angle. Though nothing conclusively has been proved there remains an uncertainty regarding its potential health hazards. This has prompted several European countries, along with USA, to ban the import of DEHP by a certain date.

Naturally, trading activities of DEHP with the western countries have decreased, giving an opportunity to the unscrupulous elements in India to exploit the situation where the product has been known as DOP and not DEHP. They saw an opportunity to change the nomenclature of the product and undervalue it in the context of widely publicized health ramification of the product DEHP. This intention on their part is more than evidenced by the fact that from a certain date they never had a single import of DOP, which then would have been impossible to undervalue.

20.6 The finding of adjudicating authority that the onus remains on the department to prove that DEHP is identical in all respects with DOP suffers from inherent infirmity. The law of appreciation of evidence is clear that affidavits need not be accepted at face value and secondly that the onus keeps on shifting till a supporting evidence is produced. In the instant case there is sufficient evidence to prove that the onus on the department has been discharged. The department had invoices of previous imports of DOP issued by the same manufacturer/supplier and certificates of analysis of the manufacturer/supplier indicating that DOP and DEHP are one and same. On the contrary, the importers have not produced any material piece of evidence to support their contention that DEHP is an prime off grade quality of DOP. Infact, none of the import invoices or other import documents indicated the goods to be off grade. The adjudicating authority appears to have imported the concept of manufacture of DOP with n-octanol on the basis of submissions made by the importers. It is never the case of the department that M/s LG Chem manufacture DnOP. Therefore, to make an attempt to compare DEHP with DnOP is fallacious and that is not the case of the department as well. While DEHP is chemically described in the invoices as Di Ethyl Hexyl Phthalate and DOP as Di-Octyl Phthalate, DEHP (CAS No. 117-81-7) is also known as Di-octyl Phthalate, (DOP). It is the phthalate ester of the alcohol 2-ethyl hexanol, (Source: DEHP information centre). The contentions of the importers to the contrary are at best an after thought and need not be accepted on their face value."

8. The Ld DR arguing in support of the Appeal reiterates the grounds in the Appeal Memorandum and the main thrust is that large volume of technical literature produced show that the two

products are the same. Even the statement of Shri C.D. Anand, Executive Secretary of Indian Plastic Manufacturers Association referred to in para 4 above show that the two names are synonymous. According to him the only reason for introducing the new name, DEHP, was to declare a lower price for the product than the price they were declaring for DOP in the past. He argues that since there were imports of identical goods by a different name, ie, DOP, at about the same time the values declared for DOP should be adopted for assessing duty on all impugned consignments of goods declared as DEHP and the duty demanded as per the SCN should be confirmed by setting aside the order of the Commissioner.

9. The Ld. Counsel for Respondents produced a copy of Report prepared by NTP-CERHR Expert Panel Report on DI n OCTYL PHTHALATE under the National Toxicology Program of US Department of Health and Human Services during October 2000 downloaded from http://cerhr.niehs.nih.gov/phthalates/DnOP-final-inprog.pdf. This report, while discussing toxic effects of DnOP, mentions that when the isomer of this compound is not specified it is referred to also as DOP. The report says "There is sometimes confusion reporting data for DnOP because DEHP is often referred to in the literature as Dioctyl Phthalate (DOP). It further discusses "Dioctyl Phthalate (DOP, isomer not specified) excluding DEHP". The contention of the counsel is that though the chemical formula for the two substances are the same these are two different isomers of the compound and further that in trade these words are used interchangeably, but LG Chem has been using DOP for product of higher quality and DEHP for product of lower quality. He further points out that during the period in question, both the products were being imported in the same Customs House and no testing of the goods was done to establish that the two products are the same. He has also a contention that his clients have sold DEHP to buyers at a lower price and the consumers who brought the product were using it for producing low quality items and these aspects have not been investigated at all.

10. Considered arguments on both sides.

11. Technical literature produced shows Di-octyl phthalate (DOP) and Di-Ethyl Hexyl Phthalate (DEHP) are used interchangeably. Extracts form the commonly used Wikipedia website is re-produced below:

> "Bis (2-ethylhexyl) phthalate, commonly abbreviated DEHP, is an organic compound with the formula $C_6H_4 (C_8H_{17}COO)_2$. It is sometimes called dioctyl phthalate and abbreviated DOP. It is the most important "phthalate" being the diester of phthalic acid and the branched-chain 2-ethylhexanol. This colourless viscous liquid is soluble in oil, but not in water. It possesses good plasticizing properties. Being produced on a massive scale by many companies, it has acquired many names and acronyms, including BEHP and di-2-ethyl hexyl phthalate"

12. The literature on this site also shows these to be different isomers of the same substance. When such technical literature exists it is not possible to brush aside the contention of the manufacturer who produced the goods and the importer who imported the goods stating that the products that were imported under the two names were different in the matter of quality and price. It is patently wrong to rely on evidence of Shri Viswanathan Sathapan, indentor of L G Chem, who states that he had never dealt with DEHP to prove the case ignoring the evidences of Shri. Vinod Kumar Garg, Director of M/s V. K. Polycoats, one of the importers, given during the investigation stage itself explaining "that L.G. Chem was manufacturing DOP & DEHP and supplying it to them through M/s L.G. International; that DOP was Di-Octyl Phthalate and DEHP was Di-Ethyl-Hexyl-Phthalate; that DOP and DEHP were internationally accepted as different products; that DEHP was more toxic and had a different molecular structure; that DOP and DEHP were plasticizers used in the same plants but used differently by manufacturers of PVC products depending on the quality of the final product cleared, the customers were also the same; that for superior quality manufacture of Shoes/Cables/PVC Sheeting DOP

was used and for lower quality DEHP was used; that DOP was more widely used in India" etc. This statement stand supported by Affidavit of the Production Manager of the manufacturer. Since veracity of these contentions is not verified by investigations we do not find merit in the argument of Revenue that the Commissioner, while adjudicating the SCN, erred in studying the literature on DnOP and then concluding that DOP and DEHP were different products.

13. The evidences produced by Revenue can at best create a doubt but cannot prove a case of undervaluation because of three main reasons. Firstly, the case is made about quality of goods which are already cleared and there are no samples of goods available to prove or disprove the rival submissions about quality. Secondly, no investigations are carried out about the claim that the goods in question were in fact sold at low prices, corresponding to the import prices, to end users. Thirdly, there is no proof of remittance of any additional amount by the importer to the supplier abroad.

14. In the circumstances we do not find any reason to interfere with the order passed by the adjudicating authority and the same is upheld and the Appeal filed by Revenue is dismissed.

(Pronounced in open Court on 14/7/11)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM