CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing/decision: 18.04.2017

Excise Appeal Nos. 1751 of 2011
(Arising out of order-in-appeal No. 63/BPL/2011 dated 17.03.2011 passed by the Commissioner (Appeals), Central Excise, Bhopal)

M/s Drytech Processes (I) Pvt. Limited — Appellant

Vs.

CCE, Bhopal — Respondent

AND

Excise Appeal No. 1415 of 2011
(Arising out of order-in-appeal No. 63/BPL/2011 dated 17.03.2011 passed by the Commissioner (Appeals), Central Excise, Bhopal)

CCE, Bhopal — Appellant –Revenue

Vs.

M/s Drytech Processes (I) Pvt. Limited — Respondent-assessee

Appearance:

Sh. J. M. Sharma, Consultant for the assessee
Sh. H. C. Saini, AR , AR for the Revenue

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order Nos. 52980 – 52981/ 2017

Per: Justice (Dr.) Satish Chandra:

Both the appeals are cross appeals filed against the order-in-appeal No. 63/BPL/2011 dated 17.03.2011 passed by the Commissioner (Appeals), Central Excise, Bhopal. The period of dispute is from December 2007 to July 2009.

2. Brief facts of the case are that during the period under consideration, the assessee was engaged in the manufacture of "Lever Ayush Poshak Rasayana" and were classifying the same under sub-heading No. 2104.10 and / or tariff item 2104 20 00 as homogenous composite food preparation. But the department has classified the said item under tariff item 2106 90 99. So, the department has demanded the duty and also levied penalty. The Commissioner has reduced the penalty from Rs. 24,81,193/- to Rs. 2 lakhs. Being aggrieved, both the parties have filed cross appeals.

3. With this background, we heard Shri J. M. Sharma, ld. Consultant for the assessee and Shri H. C. Saini, ld. AR for the Revenue.

4. After hearing both sides and on perusal of record, it appears that in the assessee's own case vide Final Order Nos. 53007 – 53008/2016, the Tribunal observed that the subject items are in the category of 'food supplements' and are rightly classifiable under Chapter Heading 2106.90 99.

5. By following our earlier decision (supra), we classify the same under heading 2106.90 99. Hence, the assessee's appeal is dismissed pertaining to the classification.

6. Regarding the penalty, it appears that the issue has come up in assessee's own case vide Final Order No. 55740 – 55741/2016 dated 07.12.2016 before the Tribunal where it was observed that-

> "*After carefully considering the facts of the case, we observe that the dispute is one of classification where two views are possible. Under the circumstances, no malafide intention can be attributed to the assessee for claiming the classification which according to them, covers the*

> *goods in question. The fact that Revenue has taken a different view will not be sufficient ground to impose penalty on the assessee. Accordingly, the penalty imposed on the assessee is set-aside*".

7. By following our earlier order (supra), we set-aside the penalty. In the result, appeal filed by the department is dismissed and appeal filed by the assessee is partly allowed.

(Dictated and pronounced in the open Court).

(V. Padmanabhan)
Member (Technical)

(Justice (Dr.) Satish Chandra)
President

Pant