

IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. E/690/09

(Arising out Order-in- Appeal No. P-I/VSK/90/2009
dated 30.03.2009 passed by the Commissioner of
Central Excise (A), Pune I)

For approval and signature:

Hon’ble Shri Ramesh Nair, Member (Judicial)
Hon’ble Shri Raju, 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?	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?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

Alpha Foam Pvt. Ltd. Appellant

Vs.

CCE, Pune I Respondent

Appearance:

Shri Shrehik Gandhi, Advocate for the appellant
Shri H.M. Dixit, AC (AR) for the respondent

CORAM:

Hon’ble Shri Ramesh Nair, Member (Judicial)
Hon’ble Shri Raju, Member (Technical)

Date of hearing : 02.02.2018
Date of decision : 08.06.2018

O R D E R No: A/86727/2018

Per: Raju

This appeal has been filed by Alpha Foam Pvt. Ltd. The facts of the case are that four show-cause notices were issued to the appellant from December 1997 to November 1999 which were adjudicated by two order-in-original dated 05.07.1999 and 08.01.2000. The matter travelled to Commissioner (Appeals) disposed here vide two different Order-in-Appeal dated 31.12.2002 and 9.02.2003. Tribunal vide order dated 13.07.2005 remanded the matter to retest the product in question and furnished the appellant a copy of the report. However, it was noticed that the production of the said goods had stopped five years before the said order of Tribunal. The matter was adjudicated again by the order-in-original dated 18.01.2006. The matter reached the Commissioner (Appeals), who remanded the matter back with direction to consider all the facts and circumstances to verify the chemical structure and chemical process and product in dispute. The matter was decided on 31.01.2007 however, vide Order-in-Appeal dated 20.10.2007 the matter was remanded to obtain final view of the Dy. Chemist and after report of Dy. Chemist the matter should be again decided. The matter was once again decided by order dated 27.10.2008 which was confirmed by Order-in-Appeal dated 30.05.2009. Aggrieved by the said order, the appellant are before the Tribunal. The dispute related to classification of P-100. The revenue wanted to classify the product under 3824 whereas the appellant had sought

classification under heading 3823. The impugned order classifies the product under heading 3824 and aggrieved by the said order, the appellants are before the Tribunal.

2. Ld. Counsel for the appellant argued that the Industrial mono carboxylic fatty acids, acid oils from refining and industrial fatty alcohols were three separate types of goods which were covered by the said Chapter Heading. He argued that the Commissioner (A) seriously erred in relying upon the HSN description, and did not appreciate the fact that the Tariff heading 3824 of Central Excise Tariff Act, 1985 was not aligned fully with HSN during the raid period. He argued that his failure to appreciate the matter has vitiated the impugned order, which deserves to be quashed and set aside on this ground alone.

3. He further argued that the Dy. Chief Chemist report was submitted in 1997 but the same was given to the appellant in the year 2007. In these circumstances, the said report cannot be relied. He further argued that the said report is not final and had directed that additional material should be submitted to the chemist for further analysis. No further samples were submitted to Dy. Chief Chemist due to stoppage of production and the said report gets vitiated and cannot be relied as evidence. He further argued that at the material time, similar products were produced by the other manufacturers and were being classified in identical manner the appellant sought

classification. He further argued that the product P-100 is an industrial fatty alcohol manufactured by 20 Hydrosterile Acid derived from castor oil. He argued that the said product was based on 12 Hydroxy Steric Acid where the carboxyl group is blocked by reaction with Diethyl Ethanol Amine, which is then neutralised with an organic acid like Dimethyl Sulphate and brought back to neutral PH. He further argued that the alcohol group present in the fatty chain still prevails and therefore the said product is an industrial fatty alcohol. He further argued that in these circumstances, penalty should not have been imposed.

4. Ld. AR relies on the impugned order.

5. We have gone through rival submissions. A perusal of the test report shows that the test report is classified by a note which reads as follows:-

25 Any printed literature
 of assistance and value
 on anti-

26 Party's state

Training Fee,
 Encl - Releive

C.C. No. 20, The Headquarters District, 12 B
 Cantonment, Sec 10, P.O. Sec 10,
 Pune - 41.

No. printed literature,

No. stamped under 1200 No. 1212.

(Signature)

CB/32-PH-78/97
 27.5.97

Report: - The sample is in the form of cream white
 thick liquid composed of dimethyl and
 trimethyl fatty alcohols.
 As the material is dimethyl trimethyl
 same will not be classified with known
 known combustible fatty acids and fatty alcohols.
 It will be classifiable under subheading
 3824.40 as a miscellaneous chemical
 product.

1/12-12- Before the final classification is made
 the necessary may be asked to clarify in left
 page.

(Signature)

(7) The exact use of the material indicating its activity
where it is being put to use.

(8) Under page 3 of the booklet forwarded the transition
metal ions (Ce^{IV}) or reacted with 1 mole of 2-allylamine
amine, the formula should be corrected as

$OH-COOH + OH-SH_2 \xrightarrow{Ce^{IV}}$

instead of $OH-COOH + OH-SH_2 \xrightarrow{H^+}$

giving $CH_2=CH-O-SH_2-N \begin{matrix} /SH_2 \\ \backslash SH_2 \end{matrix}$

(9) Any book reference in the above reaction.

(10) The sample has it is answering tests for
Non-Ionic compounds when the compound
employed is only for identification and
not for amide linkage.

Remmed sample retained with the officer
concerned.

Sd/-
A.S.
Off Chemical Room No. 1

Copy to

1. Suptd/Cls/Room II Landward, Pune Dist. Hq.
2. A.C. Chem. Cu. Room I/H.V. Pune

6. The impugned order clearly recognises that the test report is not final. However, he continues to rely on the said report. He has relied on the fact that the original adjudicating authority has evaluated the product in terms of the technical literature available. We find that the office of the chemical laboratory is not sure of exact classification and has raised some doubts about classification, it is not open to original adjudicating authority to decide the issue *suo motu* without going back with the said clarification to the office of the chemical examiner. The Commissioner (Appeals) has in his order observed that the technical basis of the Dy. Chief chemist is quite clear whereas the report itself shows that the office of chemical examiner is not clear about the classification and needs further clarification before arriving at final decision. It is seen that the onus of establishing the change of classification is on revenue and from the records it is apparent that revenue has been unable to produce sufficient evidence to substantiate the claim.

7. In these circumstances, we are unable to uphold the impugned order. Consequently, the appeal is allowed.

(Pronounced in Court on 08.06.2018)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)