(2003) 04 CEGAT CK 0001

CUSTOMS, EXCISE AND GOLD (CONTROL) APPELLATE TRIBUNAL (WEST ZONAL BENCH), MUMBAI

Case No: E/S/2603, 2603-A AND 2603-B/02-MUM; E/2789, 2789-A AND 2789-B/02-MUM

Commissioner of Central Excise		APPELLANT
	Vs	
Hindustan Composite		RESPONDENT

Date of Decision: April 28, 2003

Hon'ble Judges: Archana Wadhwa, S. S. Sekhon

Advocate: S. S. Bhagat, T. C. Nair, M. H. Patil

Judgement

Smt. Archana Wadhwa, Member (J)

1. The short question required to be decided in the present appeal of Revenue is that whether Cashew Nut Shell Liquid (CNSL) based binder manufactured and used captively for the manufacturer of friction materials, is an excisable product or not.

2. Commissioner (Appeals) vide his impugned order has held that since the CNSL has a short shelf life of only 24 hrs and the same cannot be marketed in that condition in which it comes into the existence in the appellants factory, the same is not a marketable product and hence not excisable. For the above finding Commissioner (Appeals) had relied upon the Supreme court''s decision in the case of Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad - 1995 (76) ELT 241 (SC) and also on the Board''s Circular No. 464/30/99-CX dated 30.06.99. For better appreciation we are reproducing the relevant paragraphs from the Commissioner (Appeals) Order.

"Cashew Nut Shell Liquid is naturally occurring liquid obtained from spongy layer between nut and outer shell of Cashew Nuts. The raw Cashew Nut Shell Liquid known as Natural CNSL contends 90% Anacardic Acid and 10% Cardol. The natural occurring CNSL as organic compound having a degree of polymerisation between

20-24% depend upon the type of CNSL cultivating climate condition. Due to variation in the degree of polymerization the viscosity of CNSL varies. It is not the case of the appellant that the natural CNSL cannot be used in the manufacture of their final product. The question however, is the time period when naturally occurring CNSL would acquire a viscosity of desired level. To overcome this hindrance, the natural CNSL is heated along with small quantities of Hexamine a tetramine which is a heterocyclic fused ring structure having formula (C112) 6N4 and Sulphuric Acid. The heating of natural CNSL along with Hexamine and Sulphuric Acid in small quantities changes the degree of polymerization from initial value of 22 to 24% to 24 to 28%. This standardisation process of making standard viscosity gives a standard CNSL which can be used in their process of mixing without problem but the standard CNSL has to be stored at a high temperature i.e. 80 to 90%C. According to the appellant unlike a phenol formal dehyde which has a complete cross linking and property of insolubility in any organic solvents, the standardized CNSL has no complete cross linking and thus it is not a Resin as it is soluble in solvent. This standarisded CNSL is an intermediate form of Resin known as Resinoid would not have the same properties as it was having at 80 to 90%C. Further heating it to 80 to 90% again, the product would not possess the same characteristics as it was having initially. This is thermosetting resin as against that of thermoplastic resin, wherein, product after heating to particular temperature and when again cooled down and then subjected to reheating would carry the same properties.

Mc Graw - Hill Dictionary of Scientific and technical term Fifty Edition, Page No. 2019 defines thermosetting resins & thermoplastic resin. The definition of the former is a plastic that solidifies when first heated under pressure and which cannot be remelted or remoulded without destroying its original characteristics. The definition of the later is a material with a liner macromolecular structure, that will repeatedly soften when heated and hardened when cooled.

In the light of the above, the observation by the Assistant Commissioner that there is a change in degree of polymerization in the natural CNSL and the technical CNSL has no meaning when the degree of polymerization changes by addition of Hexamine (Sulphuric Acid Act as a catalyst). This itself amount to saying that a chemical reaction takes place but the answer to the question whether this chemical reaction transforms CNSL into totally different compound is "absolute no". The CNSL remains the same subject to the change in degree of polymerization. Therefore, I agree with the appellant''s view that the addition of Sulphuric Acid and Hexamine is used to get a standard viscosity which can be further used in the manufacture of final product i.e. break lining etc. It may be worth while to note that the Deputy Chief Chemist test report does not come out specifically with any findings. It only says that it is a sticky mass of phenolic resin. The CNSL is a naturally occurring

phenol and have polymer content is not under dispute. Therefore, mere increase or decrease in the degree of polymerization would not change properties of CNSL and give rise to any other product. I also find substance in the argument advanced by the appellant that after drawal of samples in the year 18.6.82 the item was tested by Deputy Chief Chemist after 2 to 3 months to observe that it was a sticky mass containing phenolic resin. That it is a phenolic resin is not disputed by the appellant. Besides, they also agree that after the passage of time the product that is heated when allowed to cool would turn into a sticky mass. Not only this they also agree that CNSL, as such can be used for the purpose of obtaining a certain degree of viscosity for the manufacture of brake lining. The question however, is how much time the naturally occurring. CNSL would take as batch to batch the viscosity of the naturally occurring CNSL changes. To get the standard viscosity and to overcome this hindrance, natural CNSL is therefore subjected to heating with hexamine (which is a tetramine and not a aldehyde) and Sulphuric Acid.

Since shelf life of this product is only 24 hrs and which cannot be marketed in that particular condition, I find that ratio of the Supreme Court Judgment in the case of Moti Laminate is applicable in the present case too."

3. The Board''s Circular relied upon by the Commissioner (Appeals) is to be following effect:-

1. "This is with reference to manufacture of particle boards (plain and pro-laminated) made from sugarcane bagasse and other agricultural waters. During the process of manufacture specially developed binders and mixed with the agricultural residues like dried sugarcane bagasse. These binders/resin/glues are specifically developed and made by the industry only for captive consumption and not for external sale. These binders have a very short shelf life of a few hours only and can neither be bottled nor transported nor stored for long.

2. A doubt has been raised regarding excisability of such binder/resign/glues.

3. In this context, your attention is drawn to the Supreme Court judgment in the case Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad (1995 (76) ELT 241 (SC) wherein it was held that intermediate goods produced and used for captive consumption were not liable to duty, if not marketable, notwithstanding the fact of their being specified in Tariff schedule.

4. The matter has been examined. In view of the above judgment it appears that these intermediate products viz. Binder/resin/glues which are captively consumed are not chargeable to excise duty owing to their short shelf lift, provided that they are not marketed or sold commercially as such."

4. Against the above findings of the Commissioner (Appeals), the Revenue in the memo of appeal have contended that since the standardised CNSL of desired level of viscosity become suitable for use in the factory for manufacture of Brake Liners/Clutch Facings, the same is an excisable product; that the Board''s Circular is to the effect that intermediate products viz. binders/resins/glues which are captively consumed are not chargeable to duty owing to their short shell life. In the instant case the product is stored in a heated storage tank 75?C to 90?C and withdrawn for use as and when required. Therefore the said Circular is not applicable to the product CNSL; that the Supreme Court''s decision in the case of Moti Laminates is not applicable in this case and the question of limitation decided by the Commissioner (Appeals) in favour of the respondents has been decided erroneously in an asmuchas the assessee failed to furnish the requisite information on time.

5. From the above, we find that the Revenue is accepting the fact that the product is stored by the assess in the heated storage tank, in which case it is not possible to bring the said product in the market for being bought and sold. The Commissioner (Appeals) has also observed that the product has a short shelf life of only 24 hrs. Further more the Revenue has not placed any evidence to counter the finding of the lower authority that the product in question is not marketable. it is well settled that the ones to prove marketability is on the Revenue and in the absence of any evidence, the findings of the Commissioner (Appeals) can be upsetted. On the contrary, we find that the Revenue has accepted that the CSNL can be used only at the high temperature being maintained by the respondents. Accordingly we accept the order passed by the Commissioner (Appeals) and do not find any merit in the Revenue''s appeals. The same is accordingly rejected.