

VK

C.A.No. 3122-3123 OF 1998
ITEM No.102

Court No.5

SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NOS. 3122-3123/1998

M/S.METROPARK LTD.

Appellant(s)

VERSUS

COMMISSIONER OF CENTRAL EXCISE, CALCUTTA Respondent (s)

(with appln. for stay and with Office Report)

Date : 15/01/2004. These Petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.N. VARIAVA
HON'BLE MR. JUSTICE H.K. SEMA

For Petitioner (s)
Mr.Jaideep Gupta,Sr.Adv.,
Ms.Shipra Ghose,Adv.

For Respondent (s)
Mr.M.L. Verma,Sr.Adv.,
Ms.Vibha Datta Makhija,Adv.,
Mr.B.Krishna Prasad,Adv.

UPON hearing counsel the Court made the following
O R D E R

Heard the learned counsel for the parties for about one and half hours.

The appeals are dismissed. There will be no order as to costs.

(Vijay Kumar Sharma) (Jasbir Singh)
AR cum PS to Hon.Judge Court Master

Signed order is placed on the file.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.3122-3123/1998

M/S. METROARK LTD... Appellant

Versus

O R D E R

These appeals are against the judgment of the Customs, Excise & Gold (Control) Appellate Tribunal (for short 'the Tribunal') dated 27.8.1997. The question for consideration is whether the product manufactured by the appellant-assessee namely Dimethicone is classifiable under Tariff Item No. 3003.20 (as claimed by the Appellant) or under Tariff Item No.3910.00 (as claimed by the Respondent-Revenue). The Assistant Collector held that the product was classifiable under Tariff Item No.3910.00. The Collector (Appeals) allowed the Appeal and held that the product was classifiable under Tariff Item No.3003.20. The Tribunal by the impugned judgment has reversed the order of the Collector (Appeals) and has held that the product is classifiable under Tariff Item No.3910.00.

For consideration of the question, it is necessary to note the Tariff Items. They read as follows:-

4.1.1 Heading No.Sub-headingDescription of goods
39.103910.00 Silicones in primary forms

4.1.2Note 6 to Chapter 39.

6. (a)In heading Nos.39.01 to 39.14, the expression "primary forms" applies only to the following forms:-

- (i) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;
- (ii) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms.

(b) Notwithstanding anything contained in Note 3 to this Chapter, heading Nos.39.01 to 39.14 shall also include primary forms obtained from conversion of another primary form, falling under the same heading, and such conversion shall amount to "manufacture".

4.1.3. Heading 38.23 & sub-heading 3823.00

38.23 3823.00Prepared binders for foundry 20%
moulds or cores; chemical products
and preparations of the chemical
or allied industries (including
those consisting of mixtures of
natural products), not elsewhere
specified or included; residual
products of the chemical or
allied industries, not elsewhere
specified or included.

4.1.4Note 1 to Chapter 38

"This chapter does not cover :

- (a)
- (b)
- (c) Medicaments (heading No.30.03)"

4.1.5Heading No.30.03 & sub-heading 3003.20

30.03Medicaments (including veterinary medicaments)

3003.20Medicaments (other than patent or Nilproprietary) other than those
whichare exclusively used
in Ayurvedic, Unani, Siddha,
Homeopathic or Bio-chemic
systems.

4.1.6 Note 2(i) to Chapter 30

2. For the purposes of heading No. 30.03:

(i) 'Medicaments' means goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages) not falling within heading heading NO. 30.02 or 30.04 which are either:-

- (a) products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; or
- (b) unmixed products suitable for such uses put up in measured doses or in packings for retail sale or for use in hospitals."

At this stage, it must be mentioned that the question whether the product Dimethicone is a Silicone or not came up for consideration before this Court in Hico Products Ltd. vs. Collector of Central Excise reported [(1994) 4 SCC 578]. This Court after considering the then Tariff Items came to the conclusion that it was a Silicone and inter alia held as follows:- "The products of the appellants as specifically classified in the lists and described as such separately are not noticed and classified as such in the Pharmacopoeia as drugs by themselves or drugs intermediate. Rather the products of the appellant are found by expert opinion to be Silicones in the primary form, of the grades specified. There is thus no basis herein to distinguish Silicone as industrially used or medicinally used."

The Tribunal in the impugned judgment has held that the judgment of this Court was not applicable as it was based on different tariff items. Undoubtedly, the judgment was in respect of different tariff items. But the fact remains that this Court has given a categorical finding that this product is a "Silicone in primary form". This finding would therefore continue to be binding. Tariff Items may change but it cannot now be urged that this product is not "Silicone in primary form". Of course even though this product is a "Silicone in primary form" by virtue of Note 1 to Chapter 38, it would not be covered by Entry 39.10 if it is "Medicament". The question therefore is whether it can be considered to be a Medicament. The Tribunal, with out the aid of the Hico Products case (supra), came to the conclusion that the product is a Silicone in primary form. In doing so, it has recorded that "it is not denied that Dimethicone BPC is otherwise a Silicone in primary form". It was submitted that this observation was not correct. It was submitted that it was always disputed that the product was a "Silicon in primary form". However, we find that there is no ground in the Memo of Appeal that this finding of the Tribunal has been wrongly recorded. Even otherwise, it is a settled law that if a Court or Tribunal records something then that has to be taken as correct unless the party gets the same clarified from that Court or Tribunal itself. As the Appellants have not made any effort to get this position clarified from the Tribunal nor taken any ground in the Memo of Appeal it is not possible to accept this submission.

The submission on behalf of the Appellant is that their product is a Medicament inasmuch as it falls under Note 2 (1) (a) of Chapter 30. It is claimed that it is a product comprising of two or more constituents which have been mixed or compounded together. The Tribunal has not accepted this. Before, we consider reasoning of the Tribunal it must be noted that the Assistant Collector had given a categorical finding that Dimethicone BPC was an unmixed product and that it was a Silicone in primary form. The Collector (Appeals) has not dealt with the finding that it is an unmixed product. The Collector (Appeals) has proceeded on the footing that as the product has therapeutic or prophylactic use it would be a Medicament. Of course, the Collector (Appeals) notes that the product has two or more constituents but has not noticed that the Appellants themselves have shown this product to be an unmixed product in the classification list filed by them.

The Tribunal which is a final fact finding authority has considered both these opinions. It has observed that the Appellants themselves filed the classification list showing this product to be an unmixed product. If the product is an unmixed product merely because a process of hydrolysis of two or more chemicals is involved the product would not fall within Chapter Note 2(1) (a) of Chapter 30. With this finding of the Tribunal we are in full agreement.

Even otherwise, the law on the subject is clear. The Tribunal is final fact finding authority. Unless it is shown that there is something perverse in its finding, this Court would not interfere. No authority is required for this purpose. But as a large number of authorities are cited, we refer to them: Pragati Computers Pvt. Ltd. vs. Collector of Customs, Madras [(2000) 10 SCC 150], Reliance Silicon (I) Pvt. Ltd. vs. Collector, Central Excise, Thane [(1997) 1 SCC 215], M/s. Asian Paints India Ltd. vs. Collector of Central Excise [(1988) 2 SCC 470] and Collector of Customs, Bombay vs. Swastic Woollens (P) Ltd. & Ors. [1988 (Supp.) SCC 796]. For the above reason, we see no reason to interfere with the impugned Judgment. The Appeals s

tand dismissed. There will be no order as to costs.

.....J
(S.N. VARIAVA)

.....J
(H.K. Sema)

New Delhi,
January 15, 2004