A M/S. QUINN INDIA LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, HYDERABAD

MAY 11, 2006

B [ASHOK BHAN AND LOKESHWAR SINGH PANTA, JJ.]

Central Excise Tariff Act, 1985—Tariff Headings 3402.90 and 3809.19—Classification—'Penetrator 4893' manufactured by assessee—Possessed surface active properties—Hence classifiable as wetting agent under Chapter Heading 3402.90 as claimed by assessee who adduced cogent and convincing C *evidence—Department failed to discharge its burden of proof by adducing contrary evidence—Tribunal erred in allowing the appeal of Department by ignoring the reports placed by Chemical Examiner and Chief Chemist as also the classification used by Department regarding use of wetting agents in textile industries under tariff no. 3402.90.*

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From 1980 to 1986, Appellant-assessee classified its product, namely 'Penetrator 4893' under old tariff item No. 68 attracting 15% ad valorem duty. With the introduction of new tariff in 1986, assessee started classifying its product as finishing agent under tariff heading 3801.19. Subsequently, assessee filed a new classification list classifying its product E **as wetting agent under heading 3402.90 attracting nil rate of duty on the basis of the Exemption Notification No. 101/66 dated 17.6.66 as amended from time to time. It was claimed that the earlier classification had been made under a wrong impression.**

The subsequent classification was approved by the Assistant Collector F **on the basis of the report given by the Chemical Examiner. But Respondent-Revenue issued show cause notice against the assessee. During pendency of the proceedings, Chief Chemist of the Central Revenue Control Laboratory (CRCL) gave report that 'penetrator 4893' had surface active properties. Adjudicating Authority relying upon report of** G **the Chemical Examiner discharged the notice and the proceedings were dropped. Aggrieved, Revenue filed appeal before the Collector (Appeals) which was rejected but the Tribunal allowed further appeal of the Revenue holding that 'Penetrator 4893' could not be considered as a surface active agent for excise purpose. Hence the present appeal.**

H **Allowing the appeal, the Court**

HELD : 1. On careful consideration of the Order-in-Original of the Collector as well as the Order-in-Appeal recorded by the Collector (Appeals), it is clear that the Chief Chemist, CRCL vide his letter had given clear and positive opinion that the Penetrator 4893 manufactured by the assessee and forwarded to the Laboratory by Assistant Collector, Hyderabad, was "composed of organic solvent, non-volatile residue having surface active properties and water". From the said opinion of the Chief Chemist, it cannot be disputed that the goods manufactured by the assessee possessing surface-active properties are classifiable under tariff item No. 3402.90. [339-D-E]

Reliance Silicon (I) Pvt. Ltd. v. *Collector, Central Excise, Chennai,* [1977] 1 SCC 215, referred to.

2. The Tribunal has completely ignored the Report of the Chemical Examiner and the Final Opinion of the Chief Chemist coupled with the classification issued by the Department regarding use of wetting agents in the textile industries falling under tariff item No. 3402.90. Test Report of the Chemical Examiner and Chief Chemist of CRCL unless demonstrated to be erroneous, cannot be lightly brushed aside. The Revenue has not made any attempt to discredit or to rebut the genuineness and correctness of the Reports of the Government, Chemical Examiner and Chief Chemist. Thus, the Reports are to be accepted along with other documentary evidence in the form of classification issued by the Department regarding use of wetting agents in the textile industries to hold that the product Penetrator 4893 possessed surface active properties and, therefore, is covered by Exemption Notification No. 101/66 dated 17.6.66 as amended from time to time. [339-G-H, 340-A-B]

3. The assessee had adduced cogent and convincing evidence to show that the expression occurring in tariff item No. 3402.90 of the Act should be understood in the sense in which the persons who deal in such goods understand it normally. The Revenue has failed to adduce contrary evidence in support of its claim that the classification of the penetrator manufactured by the assessee is not covered under tariff item No. 3402.90. It is also settled law that the onus or burden to show that the product falls within a particular tariff item is always on the Revenue. [340-C]

Commissioner of Central Excise, Calcutta v. *Sharma Chemical Works,* [2003] 5 SCC 60 and *Commissioner of Central Excise, Nagpur* v. *Vicco Laboratories,* [2005] 4 SCC 17, relied on.

A **4. The impugned judgment of the Tribunal is clearly erroneous and unsustainable. The Tribunal erred in interfering with the order-in-appeal of the Collector (Appeals) and order-in-original of the Assistant Collector.** **[340-D-E]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3354 of
B 2001.

From the Judgment and Order No. 1860/2000 dated 22.12.2000 of The Customs, Excise & Gold (Control) Appellate Tribunal, South Zonal Bench, Chennai in Appeal Nos. E/1299/94-C.

C G. Tushar Rao for B.Y. Kulkarni for the Appellant

K. Radhakrishnan, Mohit Chaudhary for P. Parmeswaran for the Respondent.

The Judgment of the Court was delivered by

D **LOKESHWAR SINGH PANTA, J.** : M/s. Quinn India Limited - the appellant-assessee has filed the present Statutory appeal under Section 35L of the Central Excise Act, 1944 (for short "the Act") against the Final Order No. 1860/2000 dated 22.12.2000 recorded by the Customs, Excise, Gold (Control) Appellate Tribunal, South Zone Bench, Chennai (hereinafter
E referred to as "the Tribunal") in Civil Appeal Nos. E/1299/94-C and E/CO/366/94-C. By the impugned order, the Tribunal has allowed the appeal filed by the Commissioner of Central Excise, Hyderabad (hereinafter referred to as "the Revenue") and set aside the order - Appeal No. 2/94(H)(D) CE dated 28.2.1994 of the Collector of Central Excise (Appeals).

F The assessee was engaged in the manufacture of Penetrator - 4893 falling under tariff item No. 68 of the old tariff since 1980 to 1986. The assessee was paying the excise duty on the product till the new tariff was introduced. After the new tariff, the product was being cleared under sub-heading No. 3801.19 as finishing agents, Dye Carriers to accelerate the dying
G or fixing of dyestuff and other products and preparations of kind used in textile, paper leather or like newspapers not elsewhere specified or included. On 6.5.1986, the assessee filed a new classification list under the Chapter - sub-heading No. 3402.90 and claimed that the earlier classification was under a wrong impression. The classification list dated 6.5.1986 was approved by the Assistant Collector on the basis of the note given by the
H Chemical Examiner in his Report dated 6.10.1981 which came to the

knowledge of the assessee in the year 1986. Therefore, the assessee changed the classification to the appropriate tariff item.

A Show Cause Notice (SCN) dated 4.6.1991 was issued by the Revenue directing the assessee to pay a sum of Rs. 1,24,094.45p. as central excise duty for the period May, 1986 to September, 1990 invoking larger period under Section 11A of the Act. During pendency of the proceedings, the Revenue drew another sample of the product of the assessee and sent it to the Central Revenue Control Laboratory (CRCL) at Delhi to the Chief Chemist for his opinion. The Chief Chemist vide his Report dated 2.4.1992 opined that the samples had surface active properties. The assessee filed its reply to the show cause notice, *inter alia*, contending that prior to 28.2.1986 they were classifying their product Penetrator 4893 under tariff item No. 68 and with the introduction of new tariff it was classified under heading 3801.19 On 5.5.1986, the assessee filed a fresh classification list based on the Report of the Chemical Analyst classifying the product under item No. 3402.90. They explained the process of manufacture of the product clarifying that the product is a wetting agent. Further, it was contended that the product was only an auxiliary aid for improving the penetration process of dye solvent. The Adjudicating Authority vide order dated 4.6.1991 relying upon the opinion of the Chemical Examiner's Test Report came to the conclusion that the classification of Penetrator manufactured by the assessee would fall under heading 3402.90. The show cause notice was, accordingly, discharged and the proceedings initiated in OR No. 74/91 Adjn. were dropped.

Being aggrieved by the order of the Adjudicating Authority, the respondent-Revenue filed an appeal before the Collector (Appeals), who vide his order dated 28.2.1994 rejected the said appeal relying upon the documentary evidence produced by the assessee in its defence. The Revenue then filed an appeal before the Tribunal challenging the correctness and validity of the order of the Collector (Appeals). The Tribunal, however, allowed the appeal of the Revenue and set aside the original order in appeal as also the Order-in-Original holding that the goods manufactured by the assessee were not commercially and popularly known as surface active agents and they were different products, commercially having different names, character and use than the surface active agents from which the goods were produced. It was observed that the surface active agents were one of its raw materials and the finished penetrator could not be considered for

A excise purpose as surface active agents.

In the present appeal, it is contended by Mr. Tushar Rao, the learned counsel for the assessee that the Tribunal has ignored the Reports of the Chemical Examiner dated 6.10.1981 and that of the Chief Chemist, CRCL dated 2.4.1992 without assigning any cogent reason in the absence of any rebuttal evidence overriding the said Reports. He next contended that the Tribunal has not appreciated the well-settled law that the burden is laid upon the Revenue to prove by convincing evidence that the product falls under a particular classification. The Tribunal has also ignored Chapter Note 3 to the Chapter Heading 34 where under the products of the assessee would fall and wrongly relied upon the dictionary meaning of the product which has no relevance to the goods of the assessee. He also contended that the Tribunal has ignored the fact that the assessee had also filed the classification list of the other like industries which were considered by the Collector in his Original Order as also by the Collector (Appeals).

On the other hand, the learned senior counsel for the Revenue sought to support the order of the Tribunal to contend that the classification of excisable goods under different excise items involved a question of highly technical nature requiring scrutiny of the chemical characteristics of the goods, therefore, the order of the Tribunal cannot be lightly interfered with unless the finding are perverse or otherwise erroneous in law or based on no evidence. In support of this submission, reliance is placed on the decision of this Court in *Reliance Silicon (I) Pvt. Ltd.* v. *Collector, Central Excise, Chennai,* [1977] 1 SCC 215.

We have gone through the ratio of the said decision. In our opinion, this judgment can be of little assistance to the Revenue. As noticed in the earlier part of the judgment, the assessee has classified the goods in question, under tariff item No. 68 of the old tariff from 1980 to 1986 attracting 15 per cent *ad valorem* being regularly paid by it. With the introduction of new tariff in 1986, the assessee started clearing Penetrator 4893 under heading 3801.19, as finishing agents, Dye Carriers to accelerate the dying or fixing of dye stuff and other products and preparation of a kind used in textile, paper, leather or like industries not elsewhere specified or included. The assessee on 5.5.1986 sent an intimation to the Revenue regarding the new classification list filed by it under the heading 3402.90 attracting nil rate of

duty on the basis of the Exemption Notification No. 101/66 dated 17.6.66 w.e.f. 1980 and amended by the Notification No. 78/76-CE dated 10.2.1986. The classification lists dated 6.5.1986 and 10.4.1987 submitted by the assessee were supported by the Chemical Examiner's Report dated 6.10.1981 opining that the goods possessed surface active properties under Chapter Heading No. 3402.90 attracting nil rate of duty on the basis of the above-said notifications. The classification list were approved by the Assistant Collector with effect from 28.2.1986. The Assistant Collector, Hyderabad - VIII Division drew the sample of Penetrator 4893 manufactured by the assessee and sent the sample to the Chief Examiner, CRCL, New Delhi for his opinion. In relation to the classification of the goods, the Collector vide Order in Original No. 191/91, dated 26.12.91 on the basis of the Report of the Chemical Examiner and Chief Chemist and other material on record came to the conclusion that the goods have rightly been classified under tariff item 3402.90 and declined to invoke the larger period under Section 11A stating that there has been no suppression of material facts by the assessee in filing the classification lists. On careful consideration of the Order-in-Original of the Collector as well as the Order-in-Appeal recorded by the Collector (Appeals), it is clear that the Chief Chemist, CRCL vide his letter dated 2.4.1992 had given clear and positive opinion that the Penetrator 4893 manufactured by the assessee and forwarded to the Laboratory by Assistant Collector, Hyderabad, vide letter dated 20.7.1991 was "composed of organic solvent, non-volatile residue having surface active properties and water". From the said opinion of the Chief Chemist, it cannot be disputed that the goods manufactured by the assessee possessing surface-active properties are classified under tariff item No. 3402.90. The Collector (Appeals) in his order observed that the evidence has been led by the Revenue to show that Penetrator 4893 manufactured by the assessee acts as a finishing agent to be classified under Chapter heading 38.09 and the contention of the Revenue that the product is not wetting agent was not found supported by any evidence. The Tribunal has completely ignored the Report of the Chemical Examiner dated 6.10.1981 and the Final Opinion of the Chief Chemist dated 2.4.1992 coupled with the classification issued by the Department regarding use of wetting agents in the textile industries falling under tariff item No. 3402.90. Test Report of the Chemical Examiner and Chief Chemist of the Revenue unless demonstrated to be erroneous, cannot be lightly brushed aside. The Revenue has not made any attempt to discredit or to rebut the genuineness and correctness of the Reports of the Government, Chemical

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A Examiner and Chief Chemist. Thus, the Reports are to be accepted along with other documentary evidence in the form of classification issued by the Department regarding use of wetting agents in the textile industries to hold that the product Penetrator 4893 possessed surface active properties and, therefore, is covered by Exemption Notification No. 101/66 dated 17.6.66 B as amended from time to time.

The assessee has adduced cogent and convincing evidence to show that the expression occurring in tariff item No. 3402.90 of the Act should be understood in the sense in which the persons who deal in such goods understand it normally. The Revenue has failed to adduce contrary evidence C in support of its claim that the classification of the penetrator manufactured by the assessee is not covered under tariff item no. 3402.90. It is also settled law that the onus or burden to show that the product falls within a particular tariff item is always on the Revenue, (See : *Commissioner of Central Excise, Calcutta* v. *Sharma Chemical Works,* [2003] 5 SCC 60 and *Commissioner* D *of Central Excise, Nagpur* v. *Vicco Laboratories,* [2005] 4 SCC 17.

In our view, the impugned judgment of the Tribunal is clearly erroneous and unsustainable. In the circumstances, we find merit in the contentions urged on behalf of the appellant-assessee. We are also of the E view that the Tribunal has erred in interfering with the Order-in-Appeal No. 2/94(H)(D) CE of the Collector (Appeals) dated 28.2.1994 and Order-in-Original No. 191/91 of the Assistant Collector dated 26.12.1991.

In the result, we allow this appeal and set aside the impugned judgment of the Tribunal. Parties shall bear their own costs.

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B.B.B. Appeal allowed.