

Hico Products Ltd vs C.C.E on 22 April, 1994

Equivalent citations: 1995 AIR 400, 1994 SCC (4) 578

Author: M.M. Punchhi

Bench: M.M. Punchhi, A.M. Ahmadi

PETITIONER:
HICO PRODUCTS LTD.

Vs.

RESPONDENT:
C.C.E.

DATE OF JUDGMENT 22/04/1994

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
AHMADI, A.M. (J)

CITATION:
1995 AIR 400 1994 SCC (4) 578
JT 1994 (3) 309 1994 SCALE (2) 644

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by PUNCHHI, J.- This is an appeal under Section 35-L of the Central Excises and Salt Act, 1944 against the judgment and order of the Customs, Excise and Gold (Control) Appellate Tribunal, Special Bench, New Delhi, dated 29-5-1990 whereby the appeal of the Revenue stands allowed and the appellate order of the Collector (Appeals), Bombay, in favour of the appellant-company set aside.

2.The case of the appellant is that under a licence to manufacture drugs obtained on 27-7-1982 from the Food and Drugs Administration, Maharashtra, it manufactured thenceforth medicinal Silicone products named Dimethicone of the description Dimethicone - 20, Dimethicone - 350, Dimethicone

- 2000, Dimethicone - 1000 and Dimethicone - 100, and Simethicone. These products were stated to be manufactured strictly in accordance with pharmaceutical standards, requirements and specifications. Between August 1982 to January 1983, the appellant filed classification lists in respect of Dimethicone and Simethicone, terming them as drugs and pharmaceutical preparations classifiable under the residuary Tariff Item 68 of the Central Excise tariff but exempt otherwise from levy under some Government notifications starting from 22-2-1982 onwards reference to which would be made later. On 24-9-1983, the Superintendent of Central Excise informed the appellant that the drugs on the contrary were classifiable under Tariff Item 15-A and not under Tariff Item 68 and that the benefit of exemption under the last of notifications being No. 234 of 1982 dated 1-1-1982 was not available to the appellant in respect of the said products. As directed by the Superintendent of Central Excise, the appellant filed the revised classification, but under protest, in respect of those products under Tariff Item 15-A. The appellant thereafter successfully persuaded the Assistant Collector of Central Excise to obtain a report of the Deputy Chief Chemist Bombay as to whether or not the products conformed to pharmaceutical standards. The report received stated that Dimethicone of the varieties were poly siloxane compounds (silicone oils) stated to have defoaming properties and Simethicone a form of jelly like mass composing of silicone oil and silicone. Beforehand on 22-11-1983, a notice had been issued by the Department to the appellant to show cause why the products be not classified under Tariff Item 15-A. The appellant in reply pointed out that the products were "bulk drugs" as defined in the up-to-dated notification No. 234 of 1982, dated 1-1-1982. The Department did not relent and on receipt of the report of the Deputy Chief Chemist Bombay, issued a second showcause notice to the appellant. Finally on contest, the Assistant Collector passed an order on 4-1-1985 rejecting the contention of the appellant holding that the products were classifiable under Tariff Item 15-A. The Collector of Central Excise, Bombay, on appeal by the appellant set aside the order of the Assistant Collector. He took the view that both the products were drugs and pharmaceutical preparations and conforming to pharmacopoeial standards, classifiable under Tariff Item 68 and exempt from excise duty. Further appeal of the Revenue before the Tribunal was allowed and the order of the Assistant Collector was restored. The Tribunal's view was that both the products were silicone and it was immaterial whether they were conforming as drugs, hence the classification under Tariff Item 15-A. Therefore, this appeal.

3. Before we go on to deal with the diverse contentions raised by Mr S. Ganesh, learned counsel for the appellant, we deem it prudent to give a broad outline of the interplaying of the charging Section 3 of the aforesaid Act and its Schedule 1 embodying the tariff items. Section 3 mandates that there shall be levied and collected, in such manner as may be prescribed, duties of excise on all excisable goods other than salt produced or manufactured in India, and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates set forth in the First Schedule. Sub-section (2) allows the Central Government, by means of a notification to fix for the purpose of levying the said duties, tariff values of any articles enumerated either specifically or under general headings, in the First Schedule, as chargeable with duty ad valorem and to alter any tariff values for the time being in force. Schedule 1 has three columns, first containing item numbers, the second containing description of goods and the third containing rate of duty. A quick glance through Items 1 to 67 shows that under each item certain goods are specified for levy of duty and to the goods which have not been so specified or have been left out Item 68 is attracted, the latter known as the residuary item. Rule 8 of the Central Excise Rules, 1944, as it then stood, empowered the Central

Government from time to time, by notification in the Official Gazette, to exempt, subject to such conditions as specified in the notification, any excisable goods from the whole or any part of the duty leviable on such goods. Such exemption by means of notification issued under Rule 8 does not take away the levy or have the effect of erasing levy of duty. The object of the exemption notification is to forgo due duty and confer certain benefits upon the manufacturer or the buyer, or the consumer through the manufacturer, as the case may be. We must also bear in mind that the period with which we are concerned relates to the period prior to the introduction of the Central Excise and Tariff Act, 1985, which came into force on 1-3-1986.

4. Leaving aside the case of salt, with which we are presently not concerned, Section 3 of the Act authorises levy and collection of excise duty on all goods produced or manufactured in India. If the goods are specified in one or the other item contained in Items 1 to 67, the duty payable is referable to the item concerned. Should any goods be not specified in any of those Items 1 to 67, excise duty would be leviable on those remaining goods under the residuary Item 68. When by an exemption notification under Rule 8 of the aforementioned rules, any excisable goods get exempted from payment of duty under a particular item it only implies that the levy and collection of excise duty on those goods would have been there under the said item but for the exemption. The case of the appellant is that its products aforementioned being "bulk drugs" have been exempted by notifications reference to which shall presently be made. The argument presupposes that but for the exemption excise duty was leviable.

5. Now the dispute between the Revenue and the appellant has diametrically opposite dimensions. Mr S. Ganesh, learned counsel for the appellant, in the first instance urged that though Silicone was a product specified in Tariff Item 15-A, the product meant to be covered therein was industrial Silicone, and since the products in question were in contrast medicinal Silicone bearing the names Dimethicone and Simethicone, those were not covered under Tariff Item 15-A. Pursuant thereto it was urged that medicinal Silicone fell in the residuary Item 68 attracting a lesser ad valorem duty and having found its place there stood exempted from payment of excise duty under the notifications. The case of the Revenue on the other hand is that Silicone, be it termed medicinal or industrial, in all forms was covered in Tariff Item 15-A and it having been specified there got stuck up in that item and thus in no event could it slide down to the residuary Item 68. Sequently it was urged that when the products in question could never come to the residuary Item 68, the question of exemption notifications applying to the products did not arise. Thus the question which primarily falls for consideration is how do we interpret the exemption notifications. But before we do that we take note of Tariff Items 15-A and 68, reproduced one after the other:

	Item No.	Tariff description	Rate of duty
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(1)	(2)	(3)	
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15-A. 50%ad valorem Artificial or Synthetic resins and plastic materials; and other materials and articles specified below:

(1)Condensation, polycondensation and polyaddition products, whether or not modified or polymerised, and whether or not linear (for example, pheno-plasts, amino-plasts, alkyds, polyallyl esters and other unsaturated polyesters, silicones); polymerisation and copolymerisation products (for example, polyethylene polytetrahaloethylenes, polyisobutylene, poly-styrene, polyvinyl chloride, polyvinyl acetate, polyvinyl chloroacetate and other polyvinyl derivatives, polyacrylic and polymethacrylic derivatives, coumaroneindene resins); regenerated cellulose; cellulosenitrate, cellulose acetate and other cellulose esters, cellulose ethers; and other chemical derivatives of cellulose, plasticised or not (for example, collodions, celluloid);

vulcanised fibre; hardened proteins (for example, hardened casein and hardened gelatin); natural resins modified by fusion (run gums); artificial resins obtained by esterification of natural resins or of resinic acids (ester gums);

chemical derivatives of natural rubber (for example, chlorinated rubber, rubber hydrochloride, oxidised rubber, cyclised rubber); other high polymers, artificial resins and artificial plastic materials, including alginic acid, its salts and esters, linoxyn.

(2) Articles of materials described in sub-item (1), the following, namely:

Boards, sheeting sheets and films,whether lacquered or metallised or laminated or not; Jay flat tubing not containing any textile materials.

	50% ad valorem
(3) Polyurethane foam.	75% ad valorem

(4) Articles made of polyurethane 75% ad valorem foam.

Explanation 1- Sub-item (1) does not include-

(i) polyurethane foam;

(ii) artificial waxes;

(iii)starches (including dextrin and other forms of modified starches).

Explanation II.- In sub-item (1), "condensation, polycondensation, polyaddition, polymerisation and copolymerisation products"

are to be taken to apply only to goods of a kind produced by chemical synthesis answering to one of the following descriptions:

- (a) Artificial plastics, including artificial resins;
- (b) silicones;

(c) resols, liquid polyisobutylene, and similar artificial polycondensation or polymerisation products.

Explanation III.- Sub-item (1) is to be taken to apply to materials in the following forms only-

- (a) liquid or pasty (including emulsions, dispersions and solutions);
- (b) blocks, lumps, powders (including moulding powders), granules, flakes and similar bulk forms;
- (c) waste and scrap.

ITEM NO. 68 - ALL OTHER GOODS, N.E.S.

----- Item No. Tariff description Rate of duty

68. 8% ad valorem All other goods, not elsewhere specified but excluding-

- (a) alcohols, all sorts, including alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics; and
- (c) dutiable goods as defined in Section 2(c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).

Explanation.- For the purposes of this item, goods which are referred to in any preceding item in this schedule for the purpose of excluding such goods from the description of goods in that item (whether such exclusion is by means of an Explanation to such item or by words of exclusion in the description itself or in any other manner) shall be deemed to be goods not specified in that item.

6. The explanation occurring in Item 68 is significant. It is the key to understand the nature of the exclusion of goods from the description of goods in any particular item within Items 1 to 67. The Explanation clarifies that such exclusions could be demonstrated either by clear exclusion, or by explanation, or in any other manner. Once such exclusion of goods is manifest from the description of goods, then the goods excluded shall be deemed to be goods not specified in that item. By this deeming provision the excluded goods are taken for the purposes as if not specified in that item and have, for the purposes of Item 68 to be treated to be goods not specified elsewhere falling under Item 68. So such of those specified goods which get excluded from the description of goods in a particular tariff item in whatever manner, those goods shall be deemed to be goods not specified in that item and thus becoming goods not specified elsewhere for the purposes of Item 68.

7. Now in order to proceed further, let us take note of the exemptions by means of the notifications pressed into service by the appellant. The first is the notification No. 104/82-C.E., dated 28-2-1982, which reads as follows:

"Exemption to certain specified goods.- In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance, (Department of Revenue and Insurance), No. 55/75 Central Excises, dated the 1-3-1975, the Central Government hereby exempts goods of the description specified in the schedule annexed 6 hereto, and falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from the whole of the duty of excise leviable thereon."

The schedule annexed thereto contains Serial Nos. 1 to 34, giving description of goods.

Relevant entry in the schedule being 21, reads as follows:

" 21. All drugs, medicines, pharmaceuticals and drugintermediates not elsewhere specified."

8. Then by notification No. 197/82-C.E., dated 22-6-1982, the Central Government exercising the same powers made an amendment to the earlier notification of 28-2-1982 in this manner:

"In this notification:

(a) in the schedule for Serial Number 21 and entries relating thereto, the following serial number and entries shall be substituted, namely:

21. All bulk drugs, medicines and drug-

intermediates not elsewhere specified;'

(b) after the proviso, the following Explanation shall be inserted namely:

Explanation.- In Serial Number 21, "bulk drugs" mean any chemical or biological or plant product, conforming to pharmacopoeial standards, used for the diagnosis, treatment mitigation or prevention of diseases in human beings or animals and used as such or as an ingredient in any formation.'" Lastly by Notification No. 234/82-C.E., dated 1-11-1982, the Central Government again in supersession of the notification dated 28-2-1982 provided as follows:

"In exercise of the powers conferred by sub- rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 104/82-Central Excises, dated

28-2-1982, the Central Government hereby exempts goods of the description specified in the schedule of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from the whole of the duty of excise leviable thereon under Section 3 of the said Act, Relevant entry in the annexed schedule containing Entries 1 to 41 is No. 21: '21 All bulk drugs medicines and drug- intermediates not elsewhere specified. Explanation.- In this notification, "bulk drugs" means any chemical, biological or plant product, conforming to pharmacopoeial standards, used for the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals, and used as such or as an ingredient in any formulation.'"

9. In the first notification of 28-2-1982, specific reference of Section 3 of the Act was not made, though it was innately there. In the last notification dated 1- 11- 1982 there is such a reference. Thus what was implicit has been made explicit. The levy of excise duty as a whole has been foregone insofar as goods of the description as mentioned in the annexed schedule to each notification are concerned if falling under Item 68. This is the thrust of the language of the notifications exempting goods of the description specified in the annexed schedule. The word "and" employed in connecting those scheduled goods to Item 68 of the First Schedule to the Act makes it explicit The principle governing is that if the case does not fall under any of those specific items mentioned in the tariff either expressly or by means of exemptions, explanations, or otherwise, then place can be found in the residuary Item 68. Now here the Revenue insists that Silicone as such specifically is covered under Tariff Item 15-A and since the products of the appellant have a Silicone element in it the products get stuck up in Item 15-A and cannot be permitted to slide down to the residuary item.

10. The argument of the Revenue was further buttressed with the aid of Tariff Item 14-E which is to the following effect:

ITEM NO. 14-E - PATENT OR PROPRIETARY MEDICINES Item No. Tariff description Rate of duty (1) (2) (3) 14-E. Patent or proprietary medicines not 12.5% ad containing alcohol, opium, Indian hemp or valorem other narcotic drugs or other narcotics other than those medicines Which are exclusively Ayurvedic, Unani, Siddha or Homoeopathic Explanation 1.- 'Patent or Proprietary Medicines' means any drug medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in human beings or an] which bears either on itself or on its container or both, a name which is specified in a monograph in a Pharmacopoeia, formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person, having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person.

Explanation 11.- 'Alcohol', 'Opium', 'Indian Hemp', 'Narcotic Drugs' and 'Narcotics' have the meanings respectively assigned to them in Section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Notification No. 47163-CE, dated 1-3-1963 In pursuance of the Explanation to Item No. 14-E of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) and of the Explanation to Item No. 28-A of the First Schedule to the Indian Tariff Act, 1934 (32 of 1934), the Central Government hereby notifies all editions of the following Pharmacopoeia, formularies and other publications for purpose of the said Explanation, namely:

1. The Indian Pharmacopoeia, 2. The International Pharmacopoeia 3. The National Formulary of India, 4. The British Pharmacopoeia, 5 The British Pharmaceutical Codex, 6. The British Veterinary Codex, 7 The United States Pharmacopoeia, 8. The National Formulary of the U.S.A., 9. The Dental Formulary of the U.S.A., and 10. The State Pharmacopoeia of the U.S.S.R.

11. According to the Revenue, if the exempted goods are bulk drugs medicines and drug-intermediates not elsewhere specified then those, would justly have to fall under the residuary Item 68 so as to alter that duty to 8% ad valorem and be exempt from payment by the thrust of the notification, only if those goods did not have Silicone element in them. Besides, it was urged that the products in question were neither patent nor proprietary medicines so as to attract Item 14-E in which, in certain events Pharmacopoeia, formularies and other publications are put to use for the purpose of the explanation thereunder. It was also added that Item 14-E was never invoked by the appellant in the Tribunals below and that the debate cannot be enlarged. On this objection of the Revenue, even though Mr Ganesh made an attempt in that direction, we think that it would be appropriate to leave out the involvement of Item 14-E altogether and keep confined the controversy as it was before the Tribunal, between Item 15-A on the one side and Item 68 and the notifications on the other.

12. The explanation in the schedule annexed to the last notification provides that 'bulk drugs' meant any chemical or biological or plant product conforming to pharmacopoeia] standards used for the diagnosis, treatment, mitigation or prevention of any diseases in human beings or animals, and used as such or as an ingredient in any formulation. It is thus clear from the explanation that drugs which may be called "bulk drugs" needed only to conform to pharmacopoeial standards and used as such or as an ingredient in any formulation in order to get exempted from payment of excise duty. The appellant's case before the department was that its products were bulk drugs and were of pharmacopoeial standards as evidenced by their names finding way in Pharmacopoeia of major drug-producing countries of the world. Reference was made to British Pharmacopoeial Codex of the year 1973 and in particular to the following extract:

"Dimethicones are used in industrial barrier creams for protecting the skin against irritant substances. Creams, lotions, and ointments containing 10 to 30 per cent of a dimethicone are employed for the prevention of bedsores and to protect the skin against trauma from urine or faecal discharge. Dimethicones are also used in conjunction with antacids to assist the expulsion of flatus prior to radiographic examination of the gastrointestinal tract."

13. Our attention was also invited to the United States Pharmacopoeial of 1-1-1985 and in particular to the following paragraph:

The preface of the Pharmacopoeial of 1820 reads in part:

"it is the object of a Pharmacopoeial to select from among substances which possess medicinal power, those, the utility of which is most fully established and best understood; and to form from them preparations and compositions, in which their powers may be exerted in the greatest advantage. It should likewise distinguish those articles by convenient and definite names, such as may prevent trouble or uncertainty in the intercourse of physicians and apothecaries. The value of a Pharmacopoeial depends upon the fidelity with which it conforms to the best state of medical knowledge of the day.

Its usefulness depends upon the sanction it receives from the medical community and the public and the extent to which it governs; the language and practice of those for whose use it is intended."

14. Our attention was also invited to Martindale, "The Extra Pharmacopoeia" wherein Simethicone tablet and Dimethicone emulsion are mentioned as drugs of human and veterinary preparations. Pharmacopoeia references to Dimethicone and Simethicone may be urged as satisfying the explanation letting fall the products within the expression "bulk drugs medicines and drug intermediates". Still the point remains whether these bulk drugs, medicines and drug intermediates are anywhere exempt so as not to fall in Item 15-A of the Tariff, where silicone is mentioned as covered by it. It cannot be denied that the medicinal products as described in Item 21 of the annexed schedule to the notification are comprehensive enough to cover products having silicone as its content as well as those having no such content. Here the intention of the Central Government will have to be discerned as to what it intended to derive when exempting all bulk drugs etc. when covered under Item

68. The object is not far to seek. It was thought that such of those chemicals, biological or plant products which had gained recognition by Pharmacopoeial standards and were capable of use for diagnosis, treatment, mitigation or prevention of diseases in human beings and animals and used as such as an ingredient in any formulation should be exempt from the payment of excise duty, because of its beneficent use to human and animal life, but only if duty thereon was leviable under residuary Item 68. Support though was sought by Mr Ganesh from a decision of a learned Single Judge of the Bombay High Court in *Rakesh Enterprises v. Union of India*, wherein was put to use Pharmacopoeia of various countries to determine that phenol was a drug, or in any event a drug intermediate, so as to fall in the residuary Item 68 attracting the exemption notification concerned of an identical value. It appears to us that the conclusion of the learned Single Judge in the given situation might have been possible in the facts and circumstances but not as a general rule that whatever is put to medicinal use automatically takes it out from industrial use. The products on 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.

15. It has already been taken note of that the manufacture and production of all goods in India attract excise duty. Those may be goods specified or goods not specified elsewhere. When specific goods are made exempt from payment of excise duty by a notification under Rule 8 and falling under a particular item, it presupposes that they are exempt from payment of excise duty under that item. Those goods may be failing under any of the Items 1 to 67, or instead in the residuary Item 68 attracting ad valorem duty as due 1 1986 25 ELT 906 Bom thereon. Those goods are exempt from payment of excise duty because of the language of the notification binding it to a particular item and not universally. It is the clarity of the language which governs the issue, not involving any purposive approach. Interpreted in this manner, the benefit of the notifications, in our view, was rightly denied to the appellant.

16. For the view above taken, we do not consider it necessary to go into the question as to whether Silicone as a product would fall under Item 15-A only if it is resinous in character or containing elasticity on the supposed similarity of Item 15-A of the excise tariff with entry in heading No. 39.01/06 in the Customs Tariff or to go into the supposed identity of the two tariffs on this aspect. We also do not feel obliged to comment upon a string of decisions of the Tribunal cited at the bar relating to silicone oil or products thereof in the context of its industrial use merely because present is a case to contrast medicinal use of Silicone. We do not further feel obliged to discuss the illustrative case law cited at the bar regarding competing entries in the excise tariff relating to a specific item and the residuary item. We are equally not obliged to go into the question of discrimination as raised by learned counsel for the appellant raising the plea that within the department some Regional Collectorates had taken the view as propounded by the appellant. All these aspects have been rendered academic because of the manner in which we have interpreted the scope and importance of the notifications and their applications.

17. For the foregoing reasons, we dismiss this appeal, affirming the judgment and order of the tribunal. No costs.