

Supreme Court of India

Espi Industries And Chemicals ... vs Collector Of Central Excise, ... on 9 March, 1995

Equivalent citations: 1996 (82) ELT 444 SC, 1995 Supp (3) SCC 210

Bench: A Ahmadi, S Bharucha, K Paripoornan

ORDER

1. By Notification No. 393/86-C.E., dated 22-8-1986 issued in exercise of powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government exempted "Barrier Creams" falling under sub-heading No. 3304.00 of the Schedule to the Central Excise Tariff Act, 1985 from so much of the duty of excise leviable thereon specified in the Schedule, as is in excess of the amount calculated at the rate of twenty per cent ad valorem. The proviso to that notification further stated that the exemption contained in the said notification shall apply to only such barrier creams which are manufactured under and in accordance with a licence issued for such a purpose under the Drugs and Cosmetics Act, 1940. The appellant contends that the cream in question which includes the composition of Oil of Olay is a barrier cream and since the appellant also holds a licence for the manufacture thereof as such under the Drugs and Cosmetics Act, 1940, it was entitled to exemption under the aforesaid notification. The Department, however, contested this contention and it appears the contest was based on a market inquiry carried out by the Department which revealed that Oil of Olay is a beauty fluid and not a mere cream for treatment of skin irritants. The advertisement label used by appellant gave the following description :

Discover a secret...shared by women all over the world. The secret of Oil of Olay...the mysterious fluid that cares for your skin in a very special way. Oil of Olay is a delicate moist oil blend, that acts in a way similar to the skin's own natural fluids. With each precious drop, Oil of Olay helps replace those essential fluids that time and environment steal away. It's light, non-greasy, and penetrates quickly to help soften the traces of age, and smooth away dryness. Just a few drops of Oil of Olay gently massaged in every morning and night, under make-up or otherwise, will help your skin stay soft, smooth and younger looking.

It would appear from the said advertisement that the cream was intended to care for the skin in a very special way by acting in a manner similar to the skin's own natural fluids. It further states that it replaces the essential natural fluids that time and environment steal away. It is claimed that it is non-greasy and penetrates quickly to help soften the traces of age and smooth away dryness. A gentle massage every morning, claims the label, would help the skin to stay soft, smooth and younger looking. The Extra Pharmacopoeia, Twenty-eighth Edn., at page 1065 entitled "Barrier Creams" gives the following description :

The term 'barrier creams' is used to describe ointments, creams, or lotions that are applied to prevent damage to the skin. Barrier creams vary widely in composition. They should be easy to apply easily washed off with soap and water, bacteriostatic, non-hygroscopic, non-transferable, non-sticky, and stable (to avoid the necessity of frequent application), and they must not act as heat insulators.

Barrier creams are used to prevent damage to the skin by mechanical, chemical, or bacteriological action. The bases are usually slightly absorbed by the skin and fill the hair follicles with inert material.... As these creams are in daily use over long periods, they must not contain substances that are deleterious to the skin.

The claim made in the label to which reference has been made by the Tribunal meets with the description of Barrier Creams given in the Extra Pharmacopoeia referred to above.

2. It is not in dispute, the appellant's product has been classified under Heading 3304, which includes barrier creams. On the application made by the appellant for classification it was specifically stated to be a barrier cream. The Department accepted this classification without demur. Having done so it is difficult to understand how the Department could take a somersault and contend to the contrary. But that apart, we find that the appellant applied for a licence for the said product describing it as a barrier cream under the Drugs and Cosmetics Act, 1940. The appellant secured a licence in Form No. 32-A for the period from 12-6-1987 to 31-12-1988 for the product "Oil of Olay (Barrier Cream)", as is evident from the letter of the Director dated 12-6-1987. When one turns to Form 32-A, this product is shown as Barrier Cream Oil of Olay. In the classification list also it is described as Oil of Olay (Barrier Cream). In the label referred to in para 13 of the Tribunal's order the printed material on the left side is omitted where the description of the product is shown to be a barrier cream. That was brought to our attention by the learned Counsel for the appellant, producing a Xerox copy of the label. The mere fact that it is also described as a beauty cream does not necessarily exclude it from being a barrier cream.

3. In view of the above, we are satisfied beyond any manner of doubt that the product in question is a barrier cream and since it is being manufactured under and in accordance with a licence issued by the Department concerned under the Drugs and Cosmetics Act, [it attracted] the notification. We are, therefore, of the opinion that the appellant was entitled to the benefit of the Notification dated 22-8-1986.

4. In the result, we allow this appeal, set aside the impugned order of the Tribunal and hold that the appellant was entitled to the benefit of the exemption under Notification dated 22-8-1986. The order of the Department as well as the Tribunal imposing penalty will also stand set aside and consequential relief will be granted to the appellant. The appellant will also be entitled to the cost of this appeal.