

M/S. MENTHA AND ALLIED PRODUCTS LTD. A
v.
COMMISSIONER OF CENTRAL EXCISE, MEERUT

MAY 5, 2004

[RAJENDRA BABU, CJ. AND G.P. MATHUR, J.] B

Central Excise Act, 1944 :

S.11-A—'Bulk Drugs'—Menthol IP—Manufactured for use in manufacture of tooth paste, powder and shaving cream—Classified by assessee under the head 'Bulk drugs'—Held, Menthol cleared by assessee is not used as such or as an ingredient in any formulation as provided under Drugs and Cosmetics Act, 1940—Assessee not entitled for benefit of Exemption Notification No. 31/88-CE dated 1.3.1988—However, application of extended period of limitation for levy of penalty invoking s.11-A is not justified—Drugs and Cosmetics Act, 1940—Drugs (Prices Control) Order, 1987—Central Excise Tariff Act, 1985. C D

Words and Phrases :

Expression 'Bulk Drugs' as occurring in Notification No. 31/88-CE dated 1.3.1988—Meaning of. E

'Formulation' as occurring in Drugs (Price Control) Order, 1987—Connotation of.

Assessee-Company was engaged in manufacture, inter alia, of Menthol IP as per the licence granted to it under the Drugs and Cosmetics Act, 1940. It cleared the product availing benefit of exemption Notification No. 31/88-CE dated 1.3.1988 classifying the same under the head 'Bulk drugs'. Later the Collector, Central Excise issued a show cause notice to the assessee that it had wrongly availed the benefit under the said Notification. Ultimately the assessee was asked to pay differential demand of excise duty as also a penalty. The appeal of the assessee was dismissed by the Customs, Excise and Gold (Control) Appellate Tribunal holding that Menthol cleared by the assessee was not used as such or as an ingredient in any formulation as provided F G H

A under the Drugs and Cosmetics Act, 1940 and, therefore, the assessee was not entitled to the benefit of Notification No. 31/88.

In the appeal filed by the assessee it was contended that the question of ascertaining end use of the product was irrelevant.

B Allowing the appeal in part, the Court

C HELD :1. In view of the Explanation after the Table in Notification No. 31/88-CE dated 1.3.1988, the expression 'bulk drugs' shall have the same meaning assigned to it in the Drugs (Prices Control) Order, 1987. The substance has to be used as such, or as an ingredient in any formulation in terms of the Drugs (Prices Control) Order, 1987. Further, the expression "formulation" is only with reference to a medicine processed out of bulk drug. Therefore, when the ingredient used by the appellant, namely, Menthol IP, in the manufacture of tooth paste, powder and shaving cream is not in the use of any formulation which is a medicine processed out of or containing one or more bulk drugs, the view taken by the Tribunal cannot be assailed. [162-A; D]

E *Union of India v. Citric India Ltd.*, (2002) 146 ELT SC; *Calibre Chemicals v. Commissioner of Central Excise, Surat*, (1998) 98 ELT 755, distinguished.

2. So far as application of s. 11-A for the purpose of levy of penalty is concerned, in the circumstances, invoking of s.11-A is not called for. **F** Levy of penalty in the instant case would not be appropriate and the application of extended period of limitation is not justified. [162-E-F]

Citric India Ltd. v. Union of India, (1993) 66 ELT 566 Bom, referred to.

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 922 of 1998.

From the Judgment and Order dated 4.11.97 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. No. **H** 560/97-C in A. No. E/4748 of 1992-C.

Joseph Vellapally, Thomas Vellapally and K.V. Mohan for the Appellant.

Sanjiv Sen and B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

RAJENDRA BABU, C.J. : The appellant before us is a company engaged in the manufacture of Menthol IP, Menthol BP, Menthol U.S.P. and Mentha Oil IP. The appellant was carrying on its activities under a licence granted by the drug control authorities constituted under the Drugs and Cosmetic Act, 1940. The licence enabled the appellant to manufacture Menthol IP, Menthol BP, Menthol U.S.P. and Mentha Oil IP.

On 1.3.1988 a notification No. 31/88-CE was issued by the Department which reads as under :-

“In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods of the description specified in column (2) of the Table thereto annexed and falling under Chapter 28, 29 or 30 as the case may be, of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1985), from so much of the duty of excise leviable thereon under the said Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (3) of the said Table.

THE TABLE

S. N.	Description of the Goods	Rate of Duty
1	Bulk drugs (including salts, esters and derivatives, if any) specified under the First Schedule to the Drugs (Price Control) Order, 1987, as amended from time to time	NIL
2	Other bulk drugs	5% ad valorem

A	3	Medicinal grade oxygen	NIL
	4	Medicinal grade Hydroxgen Peroxide	NIL
	5	Anaesthetics	NIL

B *Explanation* - In this notification, the expression "bulk drugs" shall have the same meaning assigned to it in the Drugs (Prices Control) Order, 1987.

C The Notification provides that the expression "Bulk drugs" shall have the same meaning assigned to it in the Drugs (Prices Control) Order, 1987. The Drugs (Prices Control) Order, 1987 defines 'bulk drug' as under :-

D "Bulk Drug" means any substance including pharmaceutical, chemical, biological or plant product or medicinal gas conforming to pharmacopoeial or other standards accepted under the Drugs and Cosmetics Act, 1940 (23 of 1940), which is used as such, or as an ingredient in any formulation."

E The appellant claimed that he had been manufacturing and supplying Menthol as falling under the expression "bulk drugs" as set out in the Notification referred to above and filed classification list. Returns also were filed in appropriate forms and goods were also cleared. The appellant was availing of the exemption till 27.6.1990. On 27.6.1990 the Assistant Collector, Central Excise, Rampur proposed that the appellant should pay the excise duty without availing of the benefit of the exemption referred to earlier and issued a show cause notice proposing imposition of penalty. Objections were raised by the appellant that the Assistant Collector was not competent to issue a show cause notice claiming excise duty for the past period exceeding six months. Thereafter, the Collector, Central Excise, Meerut, issued a show cause notice alleging that the appellant had wrongly availed of the benefit of the Notification No. 31/88 dated 1.3.1988 during the period from April 1988 to December 1988 and January 1990 to 5 April 1990. After hearing the appellant and examining the replies filed by the appellant to the show cause notice, the Collector ultimately decided that the appellant was liable to pay differential demand of excise duty and also imposed penalty of Rs. 2 lakhs.

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The matter was carried in appeal to the Custom, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as the Tribunal) which dismissed the appeal on the basis that Menthol cleared by the appellant is not used as such, or as an ingredient in any formulation as provided under the Drugs and Cosmetics Act, 1940 and, therefore, the appellant was not entitled for the benefit of Notification No. 31/88-CE dated 1.3.1988.

The basis upon which the Tribunal proceeded is that as per the definition of "bulk drug", the substance mentioned in the definition must be used as such, or as an ingredient in any formulation and the expression "formulation" means a medicine processed out of, or containing one or more bulk drugs. The Tribunal, therefore, took the view that Menthol IP cleared by the appellant is not being used as such, or as an ingredient in any of the formulation mentioned under the Drugs (Prices Control) Order, 1987 and thus the appellant was not entitled for the benefit of Notification No. 31/88-CE dated 1.3.1988.

It is urged on behalf of the appellants before us that this Court in *Union of India v. Citric India Ltd.*, (2002) 146 ELT 259 SC, held that for the purpose of similar notification the question of ascertaining end use of the product is irrelevant. This Court in an appeal arising out of an order of the Tribunal in *Calibre Chemicals v. Commissioner of Central Excise, Surat*, (1998) 98 ELT 755, held in Civil Appeal No. 4790 disposed of on 8.12.1997 that for the purpose of exemption Notification No. 8/95-CE an end use certificate is not necessary for potassium iodate so as to exempt it from duty as bulk drug in terms of the notification and that potassium iodate had been used in the manufacture of iodized salt and there was no dispute that potassium iodate possessed therapeutic properties.

All these decisions turn only on the basis of the notification which was put forth before the Courts. It is not very clear from the judgments in any of these cases as to whether any expressions are used or the attention of the Court was drawn to the same as is set out in the notification No. 31/88-CE dated 1.3.1988 or not.

In the present cases, we will have to consider the expression "bulk drug" as specified under First Schedule to the Drugs (Prices Control) Order, 1987. In *Explanation* after the Table in the Notification No. 31/88-

- A CE dated 1.3.1988 it is clearly set out that the expression "*bulk drugs*" shall have the same meaning assigned to it in the Drugs (Prices Control) Order, 1987. It is clear that substance has to be used as such, or as an ingredient in any formulation in terms of the Drugs (Prices Control) Order, 1987. Further, the expression "*formulation*" has also been defined in the following terms"—

“a medicine processed out of, or containing one or more bulk drugs or drugs with or without the use of any pharmaceutical aids, or internal or external use for.....”

- C Hence, expression "*formulation*" is only with reference to a medicine processed out of bulk drug.

- D Therefore, when the ingredient used by the appellant, namely, Menthol IP, in the manufacture of tooth paste, powder and shaving cream is not in the use of any formulation which is a medicine processed out of, or containing one or more bulk drugs, the view taken by the Tribunal cannot be assailed.

- E However, so far as the application of Section 11 for the purpose of levy of penalty is concerned, we must take note of the fact that different views have been expressed at different stages both by the Tribunal and the High Court of Bombay in *Citric India Ltd. v. Union of India*, (1993) 66 ELT 566 (Bom.), and by this Court also in one of the decisions cited above, it is not clear as to whether the law is absolutely clear on the matter or not and the authorities also had to issue clarifications from time to time. In the circumstances, we think, invoking of Section 11-A is not called for and levy of penalty in the present case would not be appropriate and the application of extended period of limitation is not justified. The order of the Tribunal is modified to this extent. In other respects the order of the Tribunal stands maintained.

- G Accordingly, the appeal is partly allowed.

R.P.

Appeal partly allowed.