

Avery India Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-04-1998

Reported in : (1998)(62)ECC325

Appellant : Avery India Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. Appellants Precision Scales, an SSI Unit are engaged in manufacture of electronic weighing machines. On 13-7-1994 Central Excise Officers visited their factory and found 12 weighing scales supplied to appellant Avery India and received back from them for repairs. They also found 4 weighing scales ready for despatch which did not have any trade/brand name on them. At the registered office of this Appellants the officers found another quantity of 3 weighing machines similarly received back from Avery India for repairs. These were seized for action under Central Excise Rules as duty paid goods had been received back without following Central Excise procedure prescribed for the purpose. The weighing scales ready for clearance were seized as the officers found that upon switching on the scales the visual fluorescent display of the machine displayed the words "AVERY" for a few seconds before displaying ready to use "00" position. "AVERY" is the brand name of the other Appellant herein. So the officers took the view that Appellants Precision Scales have manufactured weighing scales with AVERY brand name, and since Avery India is not a Small Scale Unit eligible for exemption under Notification No. 175/86 and its successor Notification No. 1/93, the

Appellants Precision Scales have wrongly availed of the exemption. This is because para 7 of Notification No.175/86 and para 4 of Notification No. 1/93 barred the exemption under the Notification to the specified goods where the manufacturer affixes the specified goods with the brand name/trade name of another person who is not eligible for the exemption under the Notification. After further investigation show cause notice was issued for demanding duty Rs. 14,80,576/- for the period 1992-93 up to June 1994 as Appellants Precision Scales are not entitled to the exemption. The notice also proposed to demand duty Rs. 93,000/- on account of notional interest on advance of Rs. 10 lakhs received from Appellants Avery India. Penalty was also proposed to be imposed on both the Appellants. After considering the replies thereto and hearing them in the matter the Commissioner of Central Excise, Nagpur, passed the impugned order dated 2-11-1995 confirming duty demand from Precision Scales and imposing penalty on them of Rs. One lakh. The goods in question were confiscated with option to clear them on fine in lieu of confiscation. A penalty of Rs. 50,000/-was imposed on appellant Avery India under Rule 209 A of Central Excise Rules for having knowingly received goods manufactured by Precision Scales and cleared without payment of duty thereon.

2. Learned Counsel Shri Shiva Dass argued the case for the Appellants and Learned S.D.R. Shri V.K.Puri made submissions for the Revenue.

3. Submissions made by both the parties have been duly considered.

Taking up first the question of eligibility of Appellants Precision Scales to exemption under Notification. No. 175/86 and its successor Notification No. 1/93, in the first Notification para 7 thereof bars the exemption to the specified goods with a brand name/trade name of another person who is not eligible for the exemption under the Notification. The corresponding provision contained in para 4 of Notification No. 1/93 continued to be identically worded till its amendment as on 1-4-1994 when it read, "The exemption contained in this Notification shall not apply to the specified goods bearing a brand name or trade name (registered or not) of another person". The period relevant to this case is April 1992 to June 1994. The Learned Counsel for the Appellants has urged that the Commissioner in

the impugned order has noted that the weighing scales supplied to appellant Avery were not cleared from the factory of Appellants Precision Scales affixed with the brand name of Avery. The brand name is already available in the software that is contained in the E-PROM supplied by M/s. Hanna Instrumentation Technology, Korea. Therefore, it is argued, in the absence of physical affixation of Avery brand name on the weighing scales by Appellants Precision Scales at the time of clearance from their factory, the Department cannot invoke provisions of the Notification barring the exemption to the weighing scales cleared by Appellants Precision Scales. Reliance in this regard has been placed on Tribunal decision in the case of Trimurti Weld Mesh v. C.C.E. -1994 (64) E.L.T. 419 and it was submitted that appeal against it by the Revenue has been dismissed by the Supreme Court 1996 (82) E.L.T. A-168.

4. We find that in the Tribunal's decision the Department had denied exemption Notification No. 175/86 in terms of para 7 thereof because the SSI unit therein manufactured motor vehicle parts out of forgings on which already the brand name of a trader was embossed. In the order of the Commissioner (Appeals), which was set aside by the Tribunal, it was noted that Notification 175/86 did not originally have the provision as in Para 7 which was added later by an amendment Notification No. 223/87, dated 22-9-1987 and the Commissioner (Appeals) observed that it was clear that the object of the provision was to prevent misuse of the exemption by ineligible persons by getting their branded goods manufactured by an SSI Unit, and because of this discernible objective of the permission the Commissioner (Appeals) held that the wording of para 7 needs to be interpreted giving wider connotation to the wording thereof so as to cover a situation in which the goods leave the factory premises of the SSI manufacturer affixed with brand or trade name of an ineligible person to the Notification.

The Tribunal set aside the order holding that it was doing violence to the language of the Notification and held that when the wording thereof is unambiguous, there is no need to look to its objective. The Tribunal held that exclusion under para 7 of the Notification applies only to manufacturers who actually affixed the brand name on specified goods and not to goods already affixed with brand or trade name. The text of the Supreme Court judgment dismissing the appeal against the Tribunal

decision has however not been made available.

5. It has on the other hand been contended before us by the Id. SDR that the Supreme Court has expounded the philosophy behind introduction of para 7 in the Notification in its judgment in the case of U.O.I. v.Paliwal Electricals - 1996 (83) E.L.T. 241 (S.C.). We find that the Supreme Court has construed the scope of the para 7 of the Notification also with reference to the Explanatory Note appended to the amending Notification incorporating the provision in para 7. It will be useful to extract relevant portion of Supreme Court's judgment in para 5 thereof which is as follows : "5. On September 22,1987, Notification No. 175 of 1986 was amended by Notification No. 223 inserting Para 7 and Explanation VII therein. The inserted provisions read as follows : '7. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixed the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification : Provided that nothing in this paragraph shall be applicable in respect of the specified goods cleared for home consumption before the 1st day of October, 1987.

Explanation VII - Brand name or trade name shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identify of that person.' Now, what does para 7 provide and why It provides that the benefit of Notification No. 175 shall not be available to a small manufacturer, who affixes the brand-name or trade-name (registered or not) of another person, who is not eligible for the grant of exemption under the said notification. Explanation VIII defines the expressions "brand-name or trade-name". The Explanatory Note appended to the notification states that "(T)his amendment seeks to deny small scale exemption in respect of specified goods affixed with the brand name/ trade-name of a person who is not eligible for the exemption under Notification No. 175/86-C.E., dated 1-9-1986." The object underlying Para 7 is self evident. If a small manufacturer who affixes the brand-name or trade-name of an ineligible

manufacturer (a convenient expression to denote a manufacturer outside the purview of Notification No. 175 of 1986 and who owns or entitled to use a brand-name or trade-name), the very *raison d'être* for granting the exemption disappears. The exemption is designed to enable the small manufacturer to survive in the market in competition with the ineligible manufacturer but if he joins, or identifies himself with, the ineligible manufacturer his goods become one with the goods of such ineligible manufacturer. They become indistinguishable. In the market, they will all be understood as one and the same goods. They no longer need the benefit under the Notification. It must be remembered that by extending the benefit of exemption, the State is foregoing public revenue to which it is entitled under the Act. The loss to public revenue is supposed to be compensated by helping along the small manufacturers to survive in the market and continue to produce. Once he becomes one with his competitor, the need for supporting crutches disappears. There is no reason why in such a case the State should forego the revenue due to it under the Act." 6. As has been laid down by the Supreme Court, the exemption is designed to enable the small manufacturer to survive in the market in competition with the ineligible manufacturer. But if he joins or identifies himself with the ineligible manufacturer, then the need to extend the benefit of the exemption to such manufacturer ceases to exist. It is also evident from the explanatory note to the Notification incorporating this exemption - barring provision, that the emphasis was not so much on the act of affixing of brand name on the specified goods by the SSI manufacturer, but the object was to deny the exemption to specified goods bearing the brand-name or trade-name of an ineligible person. This object has been made plain and beyond doubt by the April, 1994 amendment to the Notification whereafter paragraph 4 has been reworded to deny the exemption to the specified goods bearing a brand-name or trade-name (registered or not) of another person.

Therefore in the present case the observation by the Commissioner in the impugned order that the SSI units have been granted the exemption with a view to encouraging them to be competitive with the large-scale units and that the condition regarding brand name is designed to prevent misuse of the exemption by ineligible person, finds full support in Supreme Court judgment *supra*. In this background, and in the light of the Supreme Court judgment *supra*, we do not find

substance in the argument that since appellant Precision Scales have not physically affixed the brand name of Avery at the time of clearance of the scales, the provisions of Para 7 will not be attracted. Even otherwise, it is evident from the records that in respect of PS-7 model scales manufactured by appellant Precision Scales, the scale and head up display are cleared together and on the head-up display of these scales monogram of AVERY is printed which clearly would show clearance of the scales affixed with Avery brand name. We also find no substance in the argument of the Appellant that the letters appearing in the weighing scale display is not the same as the registered brand name of Avery.

This is because in their own printed instruction manual of the scales for use by their customers, it has been indicated, that on pressing the key Avery Scale will be displayed before the scale sets to zero. In the result, we hold that the Appellant Precision Scales has been rightly held to be ineligible for exemption under Notification No. 175/86 and its successor Notification No. 1/93 as amended.

7. The Department, we find is also justified in invoking the longer period Under Section 11A of Central Excise Act to demand duty as the display of Avery brand name on the scales had been the result of a conscious arrangement between these two Appellants and the Korean supplier Hanna Instrumentation, and these Appellants cannot claim to be totally ignorant of the implications of such an arrangement vis-a-vis para 7 of Notification No. 175/86 which they have been claiming over the years. Moreover, the Department came to know of the management regarding the display of brand name only on their visit to Appellants factory and offices on 13-7-1994 and Appellants had not disclosed it earlier.

8. As regards demand of Rs. 93,000/- as duty on notional interest on advance received by Appellants Precision Scales from Avery, the Ld.

Counsel's contention is that the advance is received as security deposit as compensation against cancellation of orders by Avery, and that the amount received can be added to assessable value only if it is shown to have influenced the pricing of the product. This argument is well founded and needs to be accepted as it is in line with the settled law. The Department in this case has not shown that there has been any depression of price of the product charged to any

extent because of the advance received. This demand is hence set aside.

9. The other charges regarding breach of Central Excise Rules in relation to the goods under confiscation are established by satisfactory evidence and hence the order of confiscation of the goods and penalty on the Appellants is sustainable. However, as regards the quantum of penalty on the Appellants, having regard to the facts and circumstances of the case, we reduce the penalty from Rs. One lakh to Rs. 50,000/- in the case of Appellants Precision Scales, and in respect of Appellants Avery India the penalty is reduced from Rs. 50,000/- to Rs. 25,000/-.

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