

**Amco Batteries Ltd. Vs. Cce**

**Amco Batteries Ltd. Vs. Cce**

**SooperKanoon Citation :** [sooperkanoon.com/16021](http://sooperkanoon.com/16021)

**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jun-11-1999

**Reported in :** (2003)(89)ECC730

**Judge :** Author: P Jain

**Appellant :** Amco Batteries Ltd.

**Respondent :** Cce

**Judgement :**

1.1 The appellants are engaged in the manufacture of lead acid electric storage batteries and parts thereof (final products) falling under Tariff Heading 85.07 in their two factories. Lead in the form of ingots is the main raw material required for manufacture of the said parts.

1.2 During the course of manufacture of the parts, certain quantities of waste and scrap (W & S) of lead are generated. W & S, so arising, is sent to the job workers who manufacture ingots out of that and send back those ingots to the appellants who use the same in manufacture of their final products.

1.3 Proceedings were initiated by issuing two show-cause notices demanding duty. Allegations, in sum and substance, are as follows: (a) The appellants had cleared from the factory W & S to the job workers without payment of duty and without following the central excise procedures, and (b) The appellants had not filed the classification list with regard to the clearance of W & S leading to

suppression of facts from the department, with an intention to evade payment of duty.

1.4. Show cause notices, on adjudication, have resulted in the following demands of duty and imposition of penalties: 2.1 Ld. Advocate Shri V. Sridharan for the appellants has urged that the adjudicating authority has erroneously denied the benefit of Notification No. 186/84-CE, dated 1.8.1984 to such W & S by assuming that the appellants have admitted using non-duty-paid lead ingots by admitting that lead ingots partly used by them and (i) purchased from refiners, and (ii) received back from the job-workers after conversion of W & S into ingots, are not duty paid since they do not take Modvat credit of duty paid on them. Ld. Advocate submits that the adjudicating authority has misunderstood the submission made by the appellants before the said authority. It was only in the context of not taking the Modvat credit that the appellants admitted their non-duty paid character. But actually the lead ingots of the two varieties i.e. (i) from refiners, and (ii) from job-workers, are exempted from duty under Notification No. 37/81 (as amended).

2.2.1 In order to appreciate this contention, we note at this stage that the appellants obtain their main raw material -- lead ingots from the following sources: (iv) ingots received from job-workers to whom W & S of lead was sent without payment of duty to convert them into lead ingots. Ingots at Sl. Nos. (iii) and (iv) are claimed to be exempted by the Ld.

advocate under Notification No. 37/81-CE.2.2.2 We also reproduce the Notification No. 37/81-CE only relevant extracts. "The Central Government hereby exempts lead unwrought, falling under heading No. 78.01 of the Schedule to the Central Excise Tariff Act, 1985(5 of 1986), if such lead unwrought is produced out of one or more of the following materials, from the whole of the duty of excise livable thereon, namely: (b) scrap obtained from lead unwrought on which appropriate amount of duty of excise, or, as the case may be , the additional duty livable under Section 3 of the Custom Tariff Act, 1975 (51 of 1975), has been paid; (c) lead waste and scrap, falling under Heading No. 78.02 on which appropriate amount of duty of excise, or, as the case may be, the additional duty leviable under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), has been paid; 2.3 Ld. Advocate

submits that the lead ingots at Sl. Nos. (iii) and (iv) above are obtained from scrap arising from lead unwrought on which appropriate amount of duty of excise has been paid. He submits that it is well known that refiners recover lead from old scrap of lead or other type of duty paid lead W & S. Therefore, none of the refiners pays duty being exempted under Notification No. 37/81. Similarly the job-workers of the appellants receive W & S from the appellants arising out of duty-paid lead ingots i.e. duty paid ingots imported by the appellants and duty paid ingots obtained from MMTC, exempted lead ingots purchased from refiners and exempted lead ingots received from job-workers (out of the appellant's own scrap). Therefore, such lead ingots (i.e. obtained from refiners and job-workers) are exempted under Notification No. 37/81-CE. He submits that it is settled law that goods exempted from duty are to be treated as goods on which duty has already been paid in view of Apex Court's judgment in the case of Collector v. Usha Martin Industries, 2.4 Once that the lead ingots from refiners and job-workers, even though exempted under Notification No. 37/81-CE, become duty paid in view of Usha Martin (supra) W & S, benefit of Notification No. 186/84-CE, dated 1.8.1984, as it stood before 2.11.1987 (when the said Notification No. 186/84-CE was amended by Notification No. 246/87-CE, cannot be denied because proviso (i) of the said Notification No. 186/84-CE, dated 1.8.1984 is fully satisfied.

3. For the period 2.11.1987 to 13.8.1989, Ld. Advocate has urged that the appellant has taken Modvat credit of duty paid on imported lead ingots or on ingots obtained from MMTC. But they have not taken any Modvat credit on ingots obtained from refiners and job-workers, because these were exempted and no credit was, therefore, possible to be taken.

The appellants would, therefore, be entitled to exemption under Notification No. 186/84-CE in respect of scrap attributable to such ingots received from refiners and job-workers. Confirmation of duty on the entire quantity of scrap is not justifiable.

4. Another plea of the Ld. Advocate for non-chargeability of duty on scrap is that the benefit of Notification No. 217/86-CE would be available to such scrap.

5. Removal of scrap has been made against serially numbered delivery challans on the strength of which the material has been returned by the customers (job-workers) also. These are authentic records maintained in the usual course of business. In fact, those challans have been resumed by the department and relied upon by it to create demand on the appellants. It is true that the appellants have not followed the procedure inasmuch as no permission has been obtained by the appellants under Rule 57F(2), nor they have issued delivery challans in the prescribed proforma. But these are only procedural deviations.

Therefore, no demand should have been raised at all on the scrap in question.

6. It is also urged by the appellants that the entire exercise is revenue neutral, except creation of scriptory work. If duty had been paid on scrap, it could be taken as Modvat credit by job-workers, and they would have adjusted the said credit against the duty payable on the ingots manufactured by such job-workers from such scrap. Again the appellants could have taken Modvat credit of duty paid on such ingots and could have availed the benefit of Notification No. 186/84-CE, at least prior to 2.11.1987.

7. It is also urged that certain quantity of scrap is removed from Hebbal Plant to Mysore Road Unit. Mysore Road unit captively consumes it or sends it to refiners (job-workers). When that quantity has been removed from Mysore Road Unit to the refiners, it has been included in the computation of demand for Mysore Road factory also. There is thus duplication of demand of duty which requires to be eliminated.

8. Ld. Advocate has also raised the pleas of limitation against demand of duty since the show cause notices to both units have been issued well beyond the normal limitation of six months for the entire period of demand, inasmuch as the entire exercise is revenue neutral and there could not be any intention to evade payment of duty. Non-following of procedure in such circumstances could not amount to suppression of any fact wilfully.

10.1 Opposing the contentions, Ld. SDR submits that the question of applicability of Notification No. 186/84-CE to the waste and scrap generated in the course of

manufacture of electric storage batteries and parts thereof has to be examined for two different periods namely (i) 1.3.1986 to 1.11.1987, and (ii) 2.11.1987 to 13.8.1989, because of very material change made by amending Notification No. 246/87-CE dated 2.11.1987 in the context of the facts and circumstances of this case.

10.2 He submits that the Ld. Advocate has taken support of Apex Court's judgment in Usha Martin (supra) to contend that lead ingots obtained from refiners and job-workers are duty paid because these have been cleared as wholly exempted from duty under Notification No. 37/81-CE. This is plea of fact taken for the first time at this stage and not taken before the adjudicating authority. In fact, he points out there is a clear admission in the reply to show cause notice that lead ingots obtained from the refiners and job-workers have not paid duty. Impugned order of the adjudicating authority proceeds on that admission. There is not a whisper of the plea now taken.

10.3 He further submits that benefit of Notification No. 37/81-CE is ex facie not available. He submits that that notification exempts lead unwrought from payment of duty if it is produced from one or more of the 4 types of materials mentioned in that notification (already extracted above in para 2.2.2). None of the said materials has been used by the appellants. Their submission that refiners and job-workers have used scrap obtained from lead unwrought on which appropriate amount of duty has been paid is not substantiated by any evidence. Ld.

Advocate Shri V. Sridharan intervenes at this stage and submits that W & S cleared by the appellants is to be treated as exempted under Notification No. 186/84-CE, and thus deemed to be duty-paid on the strength of Usha Martin (Supra). Ld. SDR submits that the entire argument of the appellants is in a vicious circle. The argument assumes the applicability of Notification No. 186/84-CE to the W & S generated in the factories and cleared therefrom which is precisely the question before the Bench. Such argument, submits the Ld. SDR, requires to be rejected out of hand. This submission of his, submits the Ld. SDR, applies to the entire period 1.3.1986 to 13.8.1989 relevant in these appeals.

10.4 In any case contends the Ld. SDR, demand of duty for the period 2.11.1987 onwards to 13.8.1989 cannot be challenged on any ground because it is admitted to the appellants that they have taken Modvat credit on the duty paid lead ingots obtained by them from MMTC or by importation. There is no provision for allowing pro-rata benefit of the notification when credit of duty paid on any of the inputs has been taken. Nor it is the plea of the appellants that they have reversed the Modvat credit of duty paid on inputs taken by them.

11. As regards limitation, Ld. SDR has submitted that the pleas of the appellants are all vague such as that the Departmental Officers knew about the process of manufacture of their final product, about generation of the W & S and about its clearance but no evidence has been brought on record to show that the departmental officers knew about the removal of W & S. The appellants want to prove knowledge of the officers only because the C.E. Officers had been visiting their factories from time to time. Visits of the officers by themselves do not impart knowledge to them regarding removal of W & S without payment of duty.

12. Even the plea of bona fide belief is not justified without production of the material generating such a belief, as found by the adjudicating authority.

13. As regards the argument of revenue neutrality i.e. there is neither any gain or loss of revenue to the department, Ld. SDR submits that this plea is without substance. Duty on W & S becomes payable by the appellants. Refiners and job-workers, receiving such duty paid W & S could or would have taken Modvat credit only if they had been paying duty. It is the appellant's own case that they are not paying duty.

Therefore, the argument is hollow, submits the Ld. SDR.14. Notification No. 217/86-CE cannot also be extended to W & S treating that W & S as intermediate goods being utilized by the manufacturer (appellants) for manufacture of their final product because third person (job-worker) has intervened into manufacture of another intermediate product (lead ingots). Further the W & S in question arises not only from duty paid lead ingots but also from non-duty paid (exempted) ingots received from refiners and job-workers.

16.1 First question to be decided in this case is whether the benefit of Notification No. 186/84-CE can be extended to the W & S generated by the appellants in the course of manufacture of their final products out of lead ingots obtained by them from four sources -- two of which have paid duty and the other two have not paid duty. It is the admitted position that there is no possibility of segregation of W & S arising from duty paid lead ingots and non-duty-paid ones.

16.2 In order to appreciate the rival contentions on availability of the benefit of Notification No. 186/84-CE it is appropriate to set out the notification as it stood at the beginning of the period 1.3.1986 to 13.8.1989.

"The Central Government hereby exempts wastes and scrap of lead, falling under sub-heading No. 7802.00 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) from the whole of the duty of excise leviable thereon under Section 3 of the Central Excises and Salt Act, 1944(1 of 1994): (i) are manufactured from goods, falling under the Heading Nos.

78.01 to 78.05 of the said Schedule on which the duty of excise leviable under the said Section 3 or the additional duty leviable under the Customs Tariff Act, 1975 (54 of 1979), as the case may be, has already been paid; or (ii) arise from goods, falling under any Heading or sub-heading No. of the same Schedule other than Heading Nos. 78,01 to 78.05 thereof manufactured or produced in India.

Explanation: -- For the purposes of this notification all stocks of lead and products thereof in the country, except such stocks as are clearly recognizable as being non-duty paid shall be deemed to be lead and products thereof on which the duty has already been paid." 16.3 By Notification No. 246/87-CE, dated 2.11.1987, 2nd proviso to the Notification No. 186/87-CE (as amended) was added immediately before the existing Explanation. Said proviso is also reproduced below: Provided further that the exemption contained in this notification shall apply only if -- (i) no credit has been taken on the input from which such scrap has been generated under Rule 57A of the Central Excise Rules, 1944; or (ii) an amount equivalent to the credit taken, if any, on the input from which such scrap has been generated, has been debited back in the RG 23A account or the current account maintained by the assessee.

16.4 Ld. Advocate's contention is that W & S in this case is exempted under the said notification because it fulfils the condition No. (i) of the first proviso. This contention is plainly incorrect because lead ingots received from -two sources -- refiners and job workers -- have not paid any duty. Contention, however, is that ingots from these two sources is to be deemed to have paid duty because these have been cleared after availing exemption under Notification No. 37/81-CE and therefore, in view of Apex Court's judgment in Usha Martin (supra), these are to be deemed to have paid duty leviable on them. For this plea, we note, there is no evidence on record. As rightly pointed out by the Ld. SDR, this is a factual plea to the effect that the concerned refiners and job-workers have cleared the lead ingots from their refineries after availing the benefit of Notification No. 37/81-CE or some other exemption notification. In the absence of any evidence, as aforesaid, plea of the appellant's Ld. Advocate cannot be accepted.

16.5 Apart from the foregoing, benefit of Notification No. 37/81-CE to job-workers converting appellant's W & S under consideration before us into lead ingots would not be available unless we presume such W & S as exempted under Notification No. 186/84-CE (as amended) and apply again Usha Martin. Then only, such W & S would be deemed to be duty paid fulfilling the terms of Clause (b) of Notification No. 37/81-CE (reproduced earlier). Such a presumption is untenable as rightly pointed out by the Ld. SDR since that would mean presuming the answer to the question before us in favour of the appellants. Such a presumption would be plainly illogical.

16.6 Further, even if we presume this illogical fact to be true, we are still left with lead ingots from refiners purchased by the appellants.

We do not know as to what type of scrap they have used. There is not an iota of evidence at all about the scrap used by the concerned refiners from whom the appellants have purchased lead ingots during the relevant period.

16.7 We, therefore, hold that benefit of Notification No. 186/84-CE has been rightly denied to the W & S removed by the appellant during the entire relevant period.

17.1 In view of the above finding, it is unnecessary to examine the period 2.11.1987 to 13.8.1989 separately vis-a-vis availability of Notification No. 186/84-CE as amended by Notification No. 246/84-CE dated 2.11.1987. We may, however, record our acceptance of the submission made by the Ld. SDR in this respect in view of the admitted position that the appellants were availing the benefit of Modvat credit of duty-paid on lead ingots from two sources and that they have not reversed such credit.

17.2 Plea of pro-rata benefit made by the Ld. Advocate for the appellant is not sustainable because it is admitted to the appellant that the W & S is not segregable to different types of ingots.

18.1 Plea of revenue-neutrality on a closer examinations is also unsustainable. Argument of the Ld. Advocate is that if the W & S removed to the job-workers is charged to duty, the job-worker would have taken the Modvat credit of duty paid on such W & S and would have had adjusted the duty payable on lead ingots manufactured by him out of such W & S. This assumes that job-workers would be simultaneously working under exemption as well as paying duty in respect of lead ingot manufactured by him out of his own W & S and those out of duty-paid W & S supplied by the appellant to such a job-worker respectively. This would be an unworkable proposition would any job-worker undertake such type of job-work. These are all the questions which would arise in considering the plea of the appellant regarding revenue neutrality.

Appellants have only raised a hypothetical plea without reference to the facts and circumstances of this case.

18.2 For the reasons cited by the Ld. SDR, benefit on Notification No.217/86-CE would not be available because of the intervention of third person a (job-worker) in this case.

19.1 We are now left now left with the last plea regarding the show cause notices being barred by time. In this regard, the appellants have made two fold pleas: (i) the department was fully aware about the W & S being sent to job-worker without payment of duty, and there is no question of any suppression of facts; (ii) the

appellants were under the bona fide belief that the W & S was exempted under Notification No. 186/84-CE. The appellants are latching on to the first plea on the ground that they had declared certain private records maintained by them. One of the records listed by the appellants is 'challans' which according to them also include 'challans' under which the W & S was cleared by them to the job-workers. Ld. SDR's plea 'in rebuttal' is that it is a vague plea. To show knowledge of the department, they should have produced copies of those challans, issued by them during the relevant period and that those challans were checked by any proper officer of the department. We agree with the submission of the Ld. SDR. Knowledge on the part of the department of clearance of such W & S the appellants should be proved by some positive evidence on records. It cannot be presumed merely by visit of officers or by checking of records other than the relevant challans by visiting central excise officers.

19.2 Plea of bona fide belief in exemption Notification No. 186/84-CE is also without any material on record. Such a bona fide belief must emerge as it happened in the case of Padmini Products, 1989 (24) ECC 62 (SC): 1989 (43) ELT 195 (SC) on some contemporary documents/records or judgment of a judicial forum in this respect which led them to believe that they were entitled to benefit of Notification No. 186/84-CE. No such evidence has been adduced in support of this plea. On the other hand, on plain reading of Notification No. 186/84-CE, it is obvious that it could not be available to the appellant using inter alia, not-duty paid ingots. Hence, larger limitation of five years has been rightly invoked by the authorities below in confirming the demand of duty.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**