

Collector of Central Excise Vs. Noel Pharmaceuticals

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-24-1999

Reported in : (1999)(113)ELT66Tri(Mum.)bai

Appellant : Collector of Central Excise

Respondent : Noel Pharmaceuticals

Judgement :

1. This is the department's appeal against the impugned order dated 8-12-1994 of the Collector of Central Excise (Appeals), Mumbai, praying for setting aside the same.

1. The facts of the case in brief are that the respondents have availed Modvat credit on the input bulk drugs received by them. The range Superintendent has observed that the original copy of the gate pass for the input is stamped to the effect that they are availing exemption under Notification 31/88, dated 1-3-1988 and the respondent has got no option to pay duty (that is determined according to law) on his volition and therefore the Modvat credit availed by the respondents amounting to Rs. 44,389.74 is required to be reversed. No declaration was filed in respect of the availment of the Modvat under GP 1 No.8058, dated 19-11-1992. Show cause notice was issued on 3-5-1993 against the respondent calling upon him to explain why he wrongly availed Modvat credit and the amount and utilised should not be got reversed under Section 11A of the Central Excise Act and Rule 57(1) of the Central Excise Rules. Another notice was issued on 2-6-1993 for Rs. 20,364.37 on the same ground that the original copy of the said input is stamped to the effect that they are availing exemption under Notification 31/88 dated 1-3-1988 and the respondent has no option to pay the Central Excise duty on his volition than determined according to law. The respondent filed the reply to the said show cause notices on 21-6-1993 and 24-1-1993. Personal hearing was held on 20-7-1993.

After hearing representative of the respondent and going through the records the Assistant Collector Divn.-H Mumbai-I has confirmed the demand of Rs. 59,178.11 and allowed the Modvat credit amounting to Rs. 5,576/-. The respondent preferred the appeal against the said order and it was allowed. Hence this appeal.

2. The learned JDR has submitted on behalf of the department that as per the Trade Notice No. 12/91, dated 8-2-1991 paragraph 2, party has no option to pay duty on his own volition than the one under Notification 31/88 of 5% which is the correct duty, as against 15% paid by the supplier of the respondent. The other manufacturers have paid 5% correct duty. When the input is exempted from duty or there is a fixed duty, the Modvat credit is not available on the excess duty paid voluntarily by the supplier of the goods. It amounts to deposit and not a duty, as per the decision in the case of Jain Spinners Ltd. The gate passes were stamped with the Notification 31/88 which has fixed the effective rate of basic excise duty on goods in question @ 5% but the supplier of the respondent had preferred to pay 15% of the duty to the respondent and some other manufacturers and this dual charging of duty on the same product is not correct, which violates the Trade Notice No.12/91 dated 8-2-1991. The excess payment is only a deposit and Modvat credit is not available on it. Under Rule 57A if the input is exempted either partially or fully from duty under notification issued no credit can normally be availed. The Supreme Court has upheld the Board directions in the case of Jain Spinners Ltd. in paragraph 25 that the excess payment of the amount than the prescribed duty is only a deposit of money

and not payment of duty. The learned counsel for the respondent has contended that the duty was paid at Rajkot. The RT 12 returns are accepted. The gate pass under which the goods were received shows 15% duty which is cleared by the jurisdictional Central Excise officer. So the Modvat credit availed by the respondent as per the duty paying documents of the supplier is proper and correct. Judgments in 1996 (84) E.L.T. 44 - Kerala State Electronic Corpn. v. C.C.E., Kochi and Rock Stone Industries v. C.C.E., Jaipur are cited. The case of Jain Spinners Ltd. deals with the refund and question of unjust enrichment. The same Assistant Collector has allowed credit and dropped the show cause notice on 5-1-1993 and 27-10-1993. In the reply, it is urged that the subsequent order of the Assistant Collector allowing the credit deal with the end use certificate and so it is not applicable to this case.

3. Perused the Trade Notice No. 12/91 dated 8-2-1991, the judgment in the case of Union of India and Ors. v. Jain Spinners Ltd. and Anr. in Civil Appeal Nos. 3576-77 of 1992 1992 (61) E.L.T. 321 (S.C.), orders of the lower authorities, appeal memorandum and cross objection filed in this case. Also perused the judgment in 1996 (84) E.L.T. 44 - Kerala State Electronic Corpn. v. C.C.E., Kochi under Rule 57A, G & E of the Central Excise Rules read with Sections 11A and 11B of the Central Excise Act, Notification 177/86 wherein it is held in paragraph 4 of the order that the Modvat credit is to be allowed as per the amount of duty indicated in the duty paying documents and the duty whether short paid or excess paid on inputs not relevant for the factory and the Excise authorities have no jurisdiction to re-assess the duty on inputs received, and 1995 (77) E.L.T. 341 - Rock Stone Industries v. C.C.E., Jaipur under Rule 2(xi), 57G and 173B of the Central Excise Rules. In para 10 of the said judgment it is held that before the classification of inputs for Modvat classification of goods is determinable by proper officer having jurisdiction over manufacturing factory and not by officer in charge of factory receiving the duty paid inputs under Modvat Scheme. Also perused the GP 1 Nos. 254 and 246 and RT 12 return of M/s. Pharma Chem Laboratories, Rajkot.

4. From the reply to the show cause notice it is seen that the respondent has contended that the goods have been assessed to duty on the tariff rate, and not as per effective rate of Notification 31/88, dated 1-3-1988 as per the gate passes copies and the department has accepted such assessed amount of duty and the goods are not fully exempted, but chargeable to duty and the question of payment of duty on a declaration of the respondent regarding the input is proper under Rule 57G. The Modvat credit cannot be limited to the effective rate of duty leviable in terms of Notification 31/88 when the Assistant Collector had an occasion to look into the approved classification list of the supplier of the inputs as well as the RT 12 returns and since the goods are received under gate passes showing the rate of duty which in fact had been paid by the supplier. The reasoning adopted by the Collector (Appeals) is proper and correct as per the Modvat Scheme. As per para 13 of the judgment in the civil appeal before the Supreme Court it is the case of refund claim and the question of unjust enrichment is also involved as per para 15 of the judgment. Para 26 of the judgment has held that the deposit made by the respondent in the court has held to be one towards the duty. As contended by the respondent this in no way helps the appellant in this case, as in this case there is a fixed duty on the bulk drugs and it was paid by the supplier and it is accepted by the department and the Modvat credit availed by the respondent is upheld in the impugned order. It is based on the duty paying documents and the classification list and RT 12 returns of the supplier of the inputs. As contended by the respondent Trade Notice No. 12/91 cannot apply to this case. So under these circumstances the contention of the respondent has to be accepted in view of the ruling in 1996 (84) E.L.T. 44 which supports the impugned order. So I pass the following order: For the reasons stated above, the appeal cannot be allowed and it is rejected.