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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-08-2000

Reported in : (2000)(69)ECC317

Appellant : KingwIn Universal (India)

Respondent : Commissioner of C. Ex.

Judgement :

1. The brief facts of the case are that acting on information that M/s.

Kingwin Universal, M/s. Kingwin Chemical, M/s. Kingwin International, M/s. Kingwin Johnson (hereinafter referred to as KWU, KWC, KWI, KWJ respectively and also jointly referred to as 'KINGWIN' were engaged in the manufacture and clearance of Industrial cleaners, polishes, speciality chemicals for machine cleaning, water treatment and preventive maintenance, as well as cosmetics, falling under Chapter Headings 3823, 3305, 3405 without obtaining Central Excise licence/registration and without payment of Excise duty, officers of the Central Excise, Jaipur visited the factory premises on 25-10-1997 and seized certain records and recorded the statement of Dr. S.N.Chadha, Prop, of M/s. KWC who stated inter alia that all the four units were engaged in the manufacture of common products in the same plot and that records of all the four units were maintained in the same plot; that Proprietors of all the four firms were, himself (Dr. Chadha), his wife Amita Chadha and his two sons Shri Ajay Chadha and Shri Sanjay Chadha); that the word 'Kingwin' is used to identify the company's product; that there was only one power connection in the name of M/s.

KWC which was utilised by all units; that factory premises belongs to M/s. KWC and rent is being charged from other units etc.

2. Statement of Shri Sanjay Chadha was recorded on 26-10-1993 on which date, the statement of Mrs. Susheela S. Kutty, Accountant of M/s. KWI, was also recorded. A further statement of Dr. Chadha was recorded on 26-10-1993 and on 1-2-1994, investigation revealed that all the raw materials for all four units were purchased by Dr. Chadha; raw material was jointly stored without any unit-wise maintenance of raw material stock accounts and that inter-unit transfer of raw materials was carried out without making any chemical analysis or without receiving any payment which indicated that the four units are not separate but are one single entity; that the units had been formed separately on paper with a view to fradulently avail SSI benefit. The factory premises were searched on 16-7-1996 when a further statement of Dr.

Chadha was recorded. Enquiry further revealed that during 1995-96 with effect from 8-6-1996, four units had sold all the goods manufactured by them to M/s. Kingwin Hydrochem Ltd. (referred to as KWHCL) created in February, 1995 by Dr. Chadha and his family at a very low and suppressed prices when compared to the prices at which the four units had sold goods directly to their customers. It appeared to the Department that the idea behind this arrangement was to drastically reduce the clearance value so as to individually remain within the exemption limit under SSI notification. Further, the Department was of the view that sulphonated castor oil based speciality chemicals manufactured by the units were not classifiable under CET Sub-heading 3402.10 as declared in the SSI declarations filed by the units but under Chapter Heading 3823 as Miscellaneous chemicals not elsewhere specified. Due to the existence of the common infrastructure, common financial involvement, common pricing, common control and provisions in respect of five units, the Department was of the view that the separateness of the five units was only a facade and therefore, the exemptions individually sought under Notification 175/86 and No. 1/93 by filing separate SSI declaration was not admissible and the clearance of all the five units were required to be clubbed together. As a result of clubbing, the Department charged them with having fradulently evaded Excise duty of Rs. 1,15,20,972/- during the period from

1-4-1992 to 31-1-1997.

3. Based on the above investigation, a show cause notice dated 1-5-1997 was issued to all the five units, proposing clubbing of clearance by denying separate unit-wise exemption, recovery of duty on the amount above mentioned and proposing imposition of penalty. The show cause notice also called upon Dr. Chadha to show cause against imposition of penalty upon him under Rule 209 of the Central Excise Rules.

4. The notice was adjudicated by the Commissioner of Central Excise, Jaipur who confirmed the demand jointly and severally against all the five units, imposed a penalty of amount equal to duty under Section 11 AC and Rule 173Q and also imposed a penalty of Rs. 11,50,000/- on Dr.

Chadha. He also ordered recovery of interest under Section 11AB of the Central Excise Act. The Commissioner held that clearance of all the units of Kingwin are liable to be clubbed for denying exemption under SSI notification; that forwarding charges, insurance charges and consultancy charges are to be included in the assessable value of the goods cleared by the units; that w.e.f. 8-6-1996, the prices at which KWHCL has sold the goods to customers should be taken as the normal price for determining the assessable value of goods sold by KWI and other 3 units in the beginning to M/s. KWHCL and that the process of dilution with water/or addition of soda as filler to herbicides/fungicides, castor oil, and organic or inorganic chemicals amounts to manufacture and that the products are classifiable under Chapter 38. Hence these appeals.

5. We have considered the rival submissions and perused the records.

Let us first take up the issue as to whether dilution of herbicides/fungicides, sulphonated castor oil and inorganic and organic chemicals amounts to manufacture in terms of Section 2(f) of the Central Excise Act, 1944. It is the case of the appellants that in addition to manufacture of goods falling under Chapter 38 of the Schedule to the CETA, 1985, they also carry on the activity of trading in dilutions of herbicides/fungicides by addition of water, dilutions of sulphonated castor oil by addition of water as dilutent and addition of soda ash as filler (for

powder form) and dilutents of organic and inorganic chemicals by adding water as dilutent and add soda as filler for powder form). They contend that the process of dilution does not amount to manufacture and that herbicides/fungicides, viz. ALGIWIN liquid and powder manufactured by adding water to sodium pentachlorophenate (CET Sub-heading 3808.10) do not fall for classification under CET Sub-heading 3823.00 as claimed by the Revenue.

6. We find that the Adjudicating authority has not disputed the factual position that water is added as dilutent and soda ash is added as filler. He has not recorded any finding that any process other than the above, has been carried out by the appellants on the products on which duty has been demanded. However, he has held that the appellants are engaged in the manufacture of formulation products. Relevant extract from his findings are reproduced below : "As per Dr. Chadha's own version, who has developed the formulations and is doing R & D work, they are engaged in the manufacture of formulation products in which two or three basic chemicals are mixed and sold under brand names for different applications and not simply as diluted chemicals under their chemical names. For example, what is claimed to be merely sodium pentachlorophenate, diluted, has not been sold as a diluted chemical by its name but as Algiwin, a branded product for various applications as claimed. Similarly sulphonated castor oil has been sold in various brand names such as Coolwin, Corowin, Foamwin etc., the buyer of which has no idea whatsoever that it is simply sulphonated castor oil. What has therefore, emerged is a new product for different applications and not merely a diluted chemical marketed by its chemical or commercial name. Moreover, the chemical names of the products are not indicated anywhere on the packages of the products. The argument, therefore, that nothing new has been manufactured is unacceptable.

The products based on sulphonated castor oil (SH 3402.10) have been marketed under different brand names like Coolwin, Corowin, Softwin.

Sodawin as corrosion inhibitor. Scale softener for boilers etc.

which the concentrated sulphonated castor oil certainly is not. Thus starting from a chemical a new product for altogether different uses and applications has emerged

which definitely is covered within the meaning of manufacture under the Central Excise law. Thus the products even if obtained by dilution, are fit for some specific end purpose for which sulphonated castor oil itself cannot be put.

Since new products with distinct names and uses have emerged, the activities conducted by the noticees definitely tantamount to manufacture in terms of Section 2(f). Thus the products based on sulphonated castor oil are classifiable under Heading 38.23.

Similarly, the activity of producing formulations even by dilution of inorganic/organic chemicals which are sold under different names and for specific end uses amount to manufacture in terms of Section 2(f) and such products are correctly classifiable under CH 38.23.

Dr. Chadha in his statement dated 13-2-1996 has admitted that the products declared by them under Sub-headings 28.51 and 29.42 are formulations manufactured out of 2-3 different basic chemicals and fall under Chapter Heading 38.23.

Similarly dilution of chemical Sodium Penta Chlorophenate claimed to be classifiable under Chapter Heading 3808.10 to obtain Algiwin, a herbicide definitely amounts to manufacture of a new product as it is sold under different brand name for different uses. They are not selling Sodium Penta Chlorophenate as such. The activity of dilution undertaken by them only proves that for being usable and marketable as a herbicide, the active ingredient Sodium Penta Chlorophenate needs to be obtained as a formulation in diluted form in requisite strength. Therefore, the process of manufacture of Algiwin definitely amounts to the manufacture of the goods chargeable to Central Excise duty." 7. The appellants stated that whenever they manufacture formulation products, they clear the same on payment of appropriate duty and submit that the demand in this case is only on their trading activity.

Therefore, we have to determine whether the process of dilution with water/addition of soda ash as inert filler amounts to manufacture. This issue has been considered by the Tribunal in several orders.Commissioner of Central Excise

v. Mallya Fine Chemicals Pvt. Ltd. (Order No. 1245/90-C, dated 13-11-1990) the assessees procured duty paid food colours in dilute form, added either common salt or glauber's salt or potable water depending upon the mode of shipment i.e. powder form or liquid form, and repacked the same as food colour preparation in the retail packs for sale under a brand name. The Assistant Collector held that the above process amounts to manufacture and hence confirmed the demand, which was set aside by the Collector (Appeals) against whose order, the Revenue filed an appeal before the Tribunal which upheld the impugned order and rejected the appeal of the Department.

In the case of Bush Boake Allen India Ltd. v. C.C.E. (Order No.1246/90-C, dated 13-11-1990) the assessees procured food colours in concentrate form diluted them by either mixing with common salt or potable water and sold them to consumers. The lower authorities held that the process carried out amounted to manufacture and confirmed the demand which was set aside by the Tribunal following the ratio of the Mallaya Fine Chemical decision. The appeals of the Revenue in both the cases were dismissed by the Hon'ble Supreme Court [vide order dated 7-5-1991 in Civil Appeal No. 1847/91 [1991 (54) E.L.T. A25] and C.A No.2610/91, dated 15-7-1991 respectively].C.C.E. v. Markfed Agro Chemicals reported in [1993 (68) E.L.T. 848], the Tribunal held that preparation of malathion 50%, DDT 25%, Aldrin 30% and Sohnagar 30% B.C. mainly dilution of basic pesticide chemicals in highly concentrated form by addition of inert carriers/solvents and dispensing and stability agents to make them suitable for either direct use or use after addition of water, does not amount to manufacture within the meaning of Section 2(f) of the Central Excise Act, 1944 since no new product having distinct name, character and use appeared as a result of such processing.Laboratories v. C.C.E. -1994 (72) E.L.T. 669 (T) it was held that mixing and dissolving in hot water of acid dye Ranipal and Ultra Marine Blue being a physical change is not manufacture under Section 2(f) of the Central Excise Act, 1944.Commissioner of Central Excise v. Densons Engineers [1991 (52) E.L.T. 296], the Tribunal held that mixing of fillers with epoxy resin has not been found by the Revenue to bring out a chemical change resulting in a new product with a different name, character or use other than that of the original product and since no new chemical product has emerged, duty for the second time cannot be levied

on the mixed product.

12. In the case of N.S. Corp. v. C.C.E., Bombay [1998 (29) RLT 43], the Tribunal has held that the process of dilution of duty paid ultra white RNI by addition of water and cleared under different names such as Polywhite NSR and Ultra white CD etc., does not amount to manufacture so as to give rise to duty liability. The Tribunal relied upon its earlier orders in the case of Mallya Fine Chemical, Bush Boake Allen and Jyoti Laboratory (cited supra) while arriving at its conclusion.

13. In the present case, there is no evidence led in by the Revenue to show that any chemical change occurred as a result of dilution/addition of filler and that a new product having different name, character and use emerged as a result of the processes carried out by the appellants.

14. The learned DR contended that the products based on sulphonated castor oil have anti-corrosive properties for use as scale softeners for boilers which property must have been acquired only after dilution and that, therefore, a new product for altogether different use and application has emerged so as to amount to manufacture of a new excisable commodity. However, there is no material on record to support the contention that sulphonated castor oil did not contain anti-corrosive properties in its concentrated form and thus the Department has not discharged the burden of proving that a new product has resulted in the hands of the appellants.

15. The ratio of the above decisions is squarely applicable on all fours to the present case and following the ratio thereof, we hold that the process of dilution/addition of filler to herbicides/fungicides, sulphonated castor oil and inorganic and organic chemicals, carried out by the appellants, does not amount to manufacture in terms of Section 2(f) of the Central Excise Act, 1944.

16. We note that Chapter Note 2 to Chapter 38 was added on 23-7-1996 by which dilutions etc. were deemed to amount to manufacture in respect of goods falling under Heading 38.08. However, the appellants have submitted that no clearance of diluted herbicides/fungicides took place subsequent to this date. This is a factual matter which will be required to be verified by the jurisdictional authorities

to whom this aspect is remanded. If investigation reveals that the appellants cleared diluted fungicides/herbicides after 23-7-1996, duty will be payable on such clearances. We also observe that Chapter notes have been added on 1-3-1997 to Chapters 28, 29, 34 and 38 by which the process of packing have been deemed to amount to manufacture; however, the period in these cases is upto 31-1-1997 and therefore, the Chapter notes are not applicable herein.

17. The next issue to be considered is regarding the includibility of insurance charges, forwarding charges and consultancy charges in the assessable value of the goods cleared by the appellants. The Adjudicating authority has held that these charges are liable to be included in the assessable value. The appellants submit that in addition to sales at the factory gate where insurance charges are not collected, there are instances where delivery is given at the customers premises for which insurance charges are, collected and that since-sale price at the factory without insurance charges is available, such charges cannot form part of the assessable value. Similar are the submissions, in respect of insurance charges. Regarding consultancy charges, the appellants claim that these charges can be bifurcated into two parts, sale of technology (no goods are supplied) and (2) providing inplant technical services. They contend that consultancy charges in respect of the first category where no goods are supplied do not relate to value of clearances and therefore, cannot be included in the assessable value of final products. The above contentions require to be verified and for this purpose, we remand this issue to the jurisdictional Commissioner. If as a result of verification, it is found that factory gate price is available without insurance and forwarding charges, then we hold that such charges cannot be included in the assessable value of the final products of the appellants.

Similarly, if the claim of the appellants that in certain cases, there was only sale of technology without supply of goods, then such consultancy charges cannot be included in the assessable value of the final products.

18. Regarding the applicability of the extended period of limitation, we find that detailed statements were recorded on 25-10-1993 and 26-10-1993 on the basis of which, the Department gathered material to allege that the separateness of the

five units was only a facade and therefore, exemptions individually sought under SSI notification were not admissible and that the clearance of all five units was required to be clubbed together, as seen from the detailed recital in show cause notice regarding facts disclosed on 25-10-1993 and 26-10-1993. The factory premises were searched again on 16-7-1996 and documents were seized and statement of Dr. Chadha was recorded once again. The allegation that KWI, KWC, KWJ and KWU have sold all the goods manufactured by them w.e.f. 8th June, 1996 to M/s. KWHCL created in 1995 at very low prices when compared to the prices at which four units sold the goods directly to their customers is not based on earlier investigation but upon continued investigation and therefore, it is not correct on the part of the appellants to contend that all the material necessary for the Department to issue the present show cause notice was already available in October, 1993 itself so as to claim that the demand for the period subsequent to 27-10-1993 is barred by limitation, particularly when the charge of suppression prices is not contested by the appellants. We therefore, hold that no part of the demand is barred by limitation.

19. The contention of the appellants is that, if the argument that dilution with water /soda ash and packing and selling is not manufacture and consultancy charges for sale of formula alone cannot be included in the assessable value of their product is accepted, then the value of clearances by the assessees will remain within the exemption limit prescribed for each of the units in each of the financial years in question, even if the clearances of all the units are clubbed. They submit that this will be brought out from the charts produced by the Adjudicating authority for each of the unit for each financial year. In view of our finding in the previous paragraph of this order that dilution with water/soda ash does not amount to manufacture and that insurance and forwarding charges cannot be included in the assessable value of the final products if it is found on verification that factory gate price is available without such charges, and our finding that consultancy charges cannot be included in the assessable value of final products if on verification it is found that there is some sale of technology without supply of goods, the claim that the clearances of the unit will be within the ceiling limit, will have to be verified and for this purpose, we remand the matter to the jurisdictional Commissioner. If on the other hand, it is found that the clearance value of products manufactured by the appellants

exceeds the ceiling limit prescribed in the SSI notifications, then the finding of the Commissioner that clearances of all the units are to be clubbed for the period in dispute, requires to be upheld as the appellants did not assail this finding in this case.

20. Similarly the finding on valuation namely that the price at which KWHCL has sold the goods to customers is the normal price for determining the assessable value of goods sold by KWU, KWC, KWI and KWJ to KWHCL requires to be sustained, since this finding has not been challenged by the appellants in these appeals.

21. Coming to interest penalty, we agree with the submission of the appellants that interest under Section 11AB cannot be levied and penal action under Section 11 AC of the Central Excise Act cannot be taken against them for the period upto 28-9-1996 which is the date on which the above mentioned sections were introduced in the Act. However, if it is found that duty is payable on goods manufactured by the appellants during the period from 28-9-1996 and 31-1-1997, then interest and penalty are warranted. Similarly, penalty is warranted under Rule 173Q for contravention of the relevant Central Excise Rules in the event of it being found that some duty liability still remains, in the light of the guidelines set out above. Penalty on Dr. S.N. Chadha is also justified if duty is found to be payable by the appellants 1 to 5. The quantum of penalty on all the appellants is to be re-determined by the Adjudicating authority to whom we remand the matters if any duty demand still survives.

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