

Dabur India Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-29-2000

Reported in : (2000)(72)ECC648

Judge : R T Lajja, P Bajaj

Appellant : Dabur India Ltd.

Respondent : Cce

Advocate for Pet/Ap. : Mr. Sorabji

Judgement :

1. This is an appeal filed by M/s Dabur India Ltd. (hereinafter referred to as 'M/s. Dabur'), being aggrieved with the Order-in-Original dated 26.11.1997 passed by the Commissioner of Central Excise, Meerut-I. The matter relates to the classification and the liability to pay central excise duty in respect of the vegetable extracts manufactured and consumed for manufacturing exempted Ayurvedic Medicaments. Vegetable extracts were obtained in three different forms (i) liquid, (ii) semi-solid--paste, and (iii) dry--powder. It was mentioned in the show cause notice dated 30.8.1995 that such vegetable extracts classifiable under sub-heading No. 1301.90 of the Central Excise Tariff were stored and could be stored for a time. They could also be marketed and were actually marketed by other manufacturer of similar vegetable extracts, in different forms--liquid, semi-solid and dry forms. The appellants were getting such vegetable extracts also from outside and some of the vegetable extracts manufactured by them were sent to outside

manufacturers for manufacturing Ayurvedic Medicaments on job work basis, where they were used after a time, without noticing any deterioration during storage and transit. It was alleged in that show cause notice dated 30.8.1995 that M/s. Dabur had suppressed the fact of manufacturing vegetable extracts falling under sub-heading No. 1301.90 of the Central Excise Tariff, in their factory, and did not knowingly and wilfully declare these excisable and dutiable products in any of the classification lists filed with the Central Excise Department during the period from 1.8.1990 to 28.2.1994. As a part of 1994 Budget, exemption from excise duty on all patent or propriety medicines of Homoeopathic, Unani, Siddha, Ayurvedic and Biochemic was withdrawn; however, unbranded products continued to be exempted vide Notification No. 8/94-CE dated 1.3.1994. Contraventions of the various provisions of Central Excise Rules, 1944 (hereinafter referred to as the 'Rules') were alleged with intent to evade payment of Central Excise duty of Rs. 3,85,96,927.42 for the period 1.8.1990 to 28.2.1994. For demanding the aforesaid duty, extended period of limitation was invoked. The penal provisions for imposition of penalty were also referred to.

The matter was adjudicated by the Commissioner of Central Excise, Meerut-I who under his Order-in-Original dated 26.11.1997 observed that M/s. Dabur had already admitted their duty liability in respect of some of the vegetable extracts, derived from a single plant referred to as 'Simple Extracts'. The adjudicating authority addressed himself to the various issues involved in the proceedings before him. He held the 34 vegetable extracts containing self-generating alcohol and not subjected to fermentation or other preservative processes, as not classifiable under the provisions of the Central Excise Act. The demand of Rs. 87,40,477.64 was dropped on this account. The mixed (compound) vegetable extracts were found to be in different forms, such as, liquid, paste and powder. It was also found that such extracts were incapable of being put to therapeutic or prophylactic use in the form in which they emerged after their extraction.

As regards the marketability, he noted that the assessee had sought classification of these mixed (compound) vegetable extracts under Chapter 30 of the Central Excise Tariff. Similar products were being marketed by other manufacturer; they were stored for considerable time without any deterioration; in some products

preservatives were added to increase their shelf-life. Similar goods in some cases were also procured from outside and were stored by the assessee. He came to a decision that the vegetable extracts were 'goods' for Central Excise duty purposes, were marketable and satisfied the test of marketability.

On limitation, he noted that the goods were not declared in any of the classification lists filed by M/s. Dabur. The appellants had not observed prescribed Central Excise formalities with regard to the items in question. They were also purchasing similar goods from outside on payment of duty. After analysing the facts and the relevant case law, he concluded that M/s Dabur had wilfully suppressed the facts and that the extended period of limitation was rightly invocable.

He upheld the classification of vegetable extracts under sub-heading No. 1301.90 of the Central Excise Tariff, and confirmed the demand of Rs. 2,98,56,449.73. A penalty of Rs. 2,98,56,450 was imposed under Rules 9(2), 52(A), 173(Q) and 210 of the Rules.

2. The matter was heard on 5.9.2000, when Shri V. Lakshmikumaran, Advocate, appeared for M/s. Dabur, and submitted that prior to 1.3.1994 no duty was leviable on Ayurvedic Medicaments including patent or proprietary Ayurvedic Medicaments. The appellants were engaged in the manufacture of patent or proprietary Ayurvedic Medicaments, and at intermediate stage vegetable extracts were manufactured by them. He explained that there were two types of vegetable extracts (i) Simple Vegetable Extracts obtained from single ingredients; and (ii) Compound Vegetable Extracts obtained from two or more ingredients. The duty liability with regard to simple vegetable extracts was submitted. With regard to compound vegetable extracts, however, it was argued that they were not marketable. According to the learned Advocate, they had limited shelf-life and were not stable. He submitted that as there was no process of manufacture, no excise duty could be levied. He referred to the Supreme Court decision in the case of Hyderabad Indus. Ltd. v. UOI . It was also his submission that the goods were not marketable and were not capable of being marketed and relied upon the Supreme Court decision in the case of Moti Laminates Ltd. v. CCE, Ahmedabad . It was his submission that no duty was leviable on compound vegetable extracts.

Reference was also made to the Supreme Court decision in the case of UOI v. Delhi Cloth and General Mills Co. Ltd. , wherein the Apex Court had laid down that the marketability was a must for levy of excise duty. He also referred to the Board's Circular No. 334/50/97-CX dated 16.9.1997 wherein it has been clarified that the mixed or compound vegetable extracts which have therapeutic or prophylactic value were appropriately classifiable under Heading No. 30.03 of the Central Excise Tariff. He referred to the Supreme Court decision in the case of Ranadey Micro Nutrients v. CCE , wherein it has been held that the circulars issued by the Central Board of Excise & Customs were binding on the officers of the Revenue Department. He also referred to the Tribunal's decision in the case of CCE, Chandigarh v. Oswal Woollen Mills Ltd. 2000 (39) RLT 283 (Tribunal), wherein the Tribunal had taken a view that the Department was bound by its Trade Notices.

In reply, Dr. Ravinder Babu, JDR, submitted that the vegetable extracts were not medicaments; the facts have been suppressed by the appellants and the vegetable extracts were 'goods' for excise purposes, were marketable and were actually marketed as per the facts on record. He submitted that a correct view has been taken by the adjudicating authority. The adjudicating authority had already extended the benefit in respect of vegetable extracts with self-generating alcohol. The appellants have already admitted their duty liability in respect of 'Simple Extracts' and the same criteria was to be adopted for the compound extracts. He reiterated the findings recorded in the impugned Order-in-Original by the adjudicating authority.

M/s. Dabur were, inter alia, engaged in the manufacture of medicaments including those used in Ayurvedic, Unani, Siddha, Homoeopathic or Biochemic systems classifiable under sub-heading No. 3003.30 of the Central Excise Tariff. For manufacturing medicaments used in Ayurvedic systems, they were procuring different herbs from outside. The herbs were in dry or semi-dried form. These herbs in dried or semi-dried form were further dried, grounded and crushed. Different herbs, so dried, grounded and crushed were mixed depending upon the medicaments to be prepared, in different proportions, and such herbs mixed in given proportions were subjected to the further process of grinding in the

grinding mill. This grinded mixed material was then processed to obtain vegetable extracts. Depending upon the requirement, the vegetable extracts obtained after processing of herbs, either taken as a single herb or after mixing different herbs, were also dried. The vegetable extracts whether liquid, semi-solid or dried were used for preparing different medicaments after adding certain other necessary ingredients to the vegetable extracts, as per manufacturing formula for the medicaments to be prepared. The vegetable extracts were not usable as medicaments as such.

Shri Bhuvanesh Kumar Dwivedi, Senior Production Officer, Ayurvedic Medicine Department, in the appellants' factory, in his statement dated 26.7.1995 recorded under Section 14 of the Central Excise Act, 1944 (hereinafter referred to as the 'Act') before the Superintendent of Central Excise, Ghaziabad, had stated that the herbs were mixed in dried condition as per formula and then they were grinded. The coarse powder was taken for decoction by adding ester in required quantity and then were boiled to get the required concentration. He clarified that the vegetable extracts manufactured by M/s. Dabur at intermediate stage by decoction method were not usable as medicaments. He explained that the vegetable extracts had no therapeutic or prophylatic uses of its own unless other ingredients were added and processed as per the formula given in the authoritative text books or patent formula as approved by the Drug Control Authorities.

For manufacturing vegetable extracts, drug licence from the prescribed authorities was required. M/s Lucky Laboratories Ltd. were engaged in the production of vegetable extracts. In his statement dated 21.7.1995 recorded under Section 14 of the Act before the Superintendent of Central Excise, Ghaziabad, Shri R.K. Agarwal, Asstt. Manager of M/s.

Lucky Laboratories Ltd., Sikandrabad, had referred to the drug licence for vegetable extracts issued to their unit by licensing authority and the Director, Ayurvedic/Unani Services, Uttar Pradesh, Lucknow, as per letter No. 3993/ D-2318/86 dated 8.6.1995 for 86 additional products as per authoritative books on Ayurveda.

Shri R.K. Agarwal was earlier working with M/s. Dabur in their packing section. He explained that the vegetable extracts as per the approved list were manufactured in dried powder form, semi-solid (paste) form and liquid form as per the requirements of their buyers. He confirmed that these vegetable extracts were not usable for therapeutic or prophylactic use as medicines as these were mere ingredients which could be used for manufacture of medicaments. He also clarified that even without use of preservatives, these vegetable extracts could be stored. In their case, liquid extracts without preservatives were supplied to their customers within a week's time. In some cases, preservatives were used while some extracts had self-preservative properties. In their case the whole of the production of the vegetable extracts was for outside sale. They were supplying mixed/compounded vegetable extracts to M/s. Dabur also.

Shri R.K. Agarwal was cross-examined by the counsel for M/s. Dabur on 4.6.1996 when he confirmed that the extracts were not taken as medicaments as such. He also clarified that the extracts arising at the final stage having gone through the multi stage evaporation stage when the concentration had been increased to about 70% could be stored without deterioration even upto six months.

4. From the facts on record, it is seen that the vegetable extracts in question have definite name, character and use. They were prepared as per manufacturing formula described in authoritative Ayurvedic Publications. Depending upon the requirement, they were obtained in different forms--liquid, semi-solid or dry. Even when in liquid form, they were stored for subsequent use. In certain extracts preservatives were also used.

In the show cause notice, there is reference to a manufacturer who was manufacturing such and like vegetable extracts for out right sale (refer para 7.1 of the show cause notice). The extracts in question were stored for a time before sale and despatch by such manufacturer.

M/s. Dabur, were also getting the vegetable extracts manufactured from other manufacturers on job work basis. They were procuring them from outside manufacturers too. The extracts were also being sent to outside manufacturers for preparing medicaments on their behalf.

These vegetable extracts were marketable and were actually marketed.

They were 'Goods' for the purpose of central excise levy.

5. In fact, the appellants had voluntarily paid central excise duty on certain vegetable extracts. In their reply to the show cause notice in para A.4, the appellants had submitted as under: A4. In respect of the following, Dabur does not dispute its classification under sub-heading 1301.90 and accordingly has already discharged its liability/is discharging the liability.(a) HEIC extract Rs. 63005.00 paid on 25.8.95(b) Neem leaves extract The consideration that weigh with regard to 'simple extracts' will equally apply to compound extracts.

6. The vegetable extracts were not medicaments at the stage of extracts themselves in the hands of M/s Dabur. While for their manufacture, drug licence was required, they were not usable as medicaments in that form.

The medicaments have to be the products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses [refer para 18 of East India Pharmaceutical Works Ltd. v. Asstt. Collector of Central Excise . In Note 2(i) under Chapter 30 of the Central Excise Tariff, 'Medicaments' have been defined as to mean goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages) not falling within Heading No. 30.02 or 30.04 which are either: (a) products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; or (b) unmixed products suitable for such uses put up in measured doses or in packing for retail sale or for use in hospitals.

As vegetable extracts, the goods in question were not used for therapeutic or prophylactic purposes. 'Therapeutic' refers to curative medicine or a curative use of medicine and 'Prophylactic' medicines or prophylactic uses refer to disease preventing ones (refer para 19 of East India Pharmaceutical Works Ltd. v. Asst. Collector of Central Excise Only when particular medicaments were made with the use of such vegetable extracts, such finished medicaments were usable for therapeutic or prophylactic purposes.

In para 4.3 of the show cause notice what was stated was that the vegetable extract as such was not usable as medicament. This fact has not been challenged. The issue has been countered with the argument that each of the plant from which the extract was taken has therapeutic or prophylactic value (refer para B.10 of the reply at page 59 of the paper book).

Shri Bhuvanesh Kumar Dwivedi, Senior Officer Production, Ayurvedic Medicine Department, in M/s. Dabur, in his statement dated 26.7.1995 recorded under Section 14 of the Act had stated before the Superintendent of Central Excise, Ghaziabad, as under: Q.1 Please clarify whether the vegetable extract manufactured by you in M/s. Dabur at intermediate stage by decoction method is usable as medicine as such or not? Q. 3 Please explain whether the vegetable extract has therapeutic or prophylactic use as such or the vegetable extract is used for manufacturing the ayurvedic medicine as per formula given in authoritative text books patent/approved by Drug Authorities? A. 3 The vegetable extract has no therapeutic or prophylactic use of its own unless other ingredients are added and processed as per the formula given in authoritative text books or patent formula as approved by drug authorities.

Similarly, Shri Rama Kant Dixit, Production Officer, M/s. Dabur, in his statement recorded under Section 14 of the Act on 21.7.1995 before the Superintendent of Central Excise, Ghaziabad, had stated as under: Q. 4 Please state whether vegetable extract (Herbal) manufactured in M/s. Dabur either from single ingredient herbs or mixture/compound of herbs and are directly used as medicine or these are further processed in admixture of other ingredients to obtain Ayurvedic medicine in your factory? A. 4 The vegetable extract is not usable as medicine as such. We use the vegetable extract for further manufacture of medicine.

According to the Drugs and Cosmetics Act, 1940, Ayurvedic (including Siddha) or Unani drug had been defined as under: [(a) "Ayurvedic (including Siddha) or Unani drug" includes all medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease in human beings, mentioned in, and processed and manufactured exclusively in accordance with the

formulae described in, the authoritative books of Ayurvedic (including Siddha) and Unani (Tibb) systems of medicine, specified in the First Schedule;] For any formulation to be considered as Ayurvedic medicaments it should be recognized so in the standard Ayurvedic Books and should be so indicated by way of description on the label, dosage, prescription etc.

In the Vadodara Collectorate Trade Notice No, 140/91 dated 23.10.1991 appearing at page T-9 in 1991 (56) ELT it has been clarified as under: It is reported that the manufacturers of Ayurvedic preparations face problems in the matter of identification/classification of such products. The doubts relate to the question as to whether the products claimed to be Ayurvedic medicine are in fact so, and whether those would merit classification under sub-heading 3003.30 of the Schedule to the Central Excise Tariff Act, 1985.

2. According to the existing practice, each medicament used in the various systems of treatments e.g., Ayurvedic, Unani and Siddha has to be examined on merits.

3. Broadly, a preparation would merit classification as an Ayurvedic medicine, if in the common parlance, it is known as an Ayurvedic medicine and all its ingredients are mentioned in the authoritative book(s) on Ayurvedic medicines. Thus, the aforesaid two tests for determining the classification of the products claimed to be an Ayurvedic medicine (excluding herbal or ayurvedic cosmetic) would be kept in view while dealing with such cases.

In this connection, para 29 of the judgment of the Madhya Pradesh High Court, Indore Bench, in the case of Panama Chemical Works v. UOI , is extracted below: 29. Now, in the light of the aforesaid authorities it has to be seen as to how the medicine in question i.e. SWAD is known in the common parlance or in commercial use. There is not an iota of evidence to show that this product is sold as a confectionary and is commonly used as a confectionery by the consumers. In Tariff Entry 3003.30 the medicaments including those in Ayurvedic, Unani, Sidh and Homoeopathy system have been mentioned as the goods falling within that entry. Therefore, for ascertaining whether a product is an Ayurvedic product or not the facts on the record have to be perused and in the light of the decisions of the

Supreme Court in Akbar Badruddin Jiwani's case (supra), the Leukoplast (India) Ltd.'s case (supra) and the case of Ramesh Chemical Industries (supra), this Court has to look to the scientific and technical aspect of the product with the aid of the Cosmetics Act, 1940.

Similarly, Para 15 of the Bombay High Court decision, Panaji Bench (Goa), in Leukoplast (India) Ltd. v. State of Goa is also given below: 15. The Drugs and Cosmetics Act is a comprehensive piece of legislation which deals with drugs and provides not only for the standards of quality, misbranded and adulterated drugs but also for the safeguards for the manufacture, sale and distribution of such drugs, as well as of cosmetics. Chapter IV deals with the manufacture, sale and distribution of drugs and Section 18(c), inter alia, provides that no person shall himself or by any other person on his behalf manufacture for sale, or sell, or stock, or exhibit for sale or distribute any drug or cosmetic except under a licence issued for such purpose under the said Chapter. Clauses (a) and (b) prohibit the manufacture for sale, the sale, the stocking, the exhibition for sale and distribution of any drug or cosmetic which is not of standard quality, which is misbranded or adulterated or which has been imported or manufactured in contravention of any of the provisions of the Act or the rules made there under. Section 27 provides for penalties to the contraventions of the provisions of the Act and specifically lays down that whomsoever, himself or by any other person on his behalf, manufactures for sale, sells, stocks or exhibits for sale or distributes, inter alia, without a valid licence as required under Clause (c) of Section 18 shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to 10 years and shall also be liable to fine. In other words the Drugs and Cosmetics Act makes it abundantly clear that only those drugs which are manufactured under a valid licence issued under the said Act and in compliance with its provisions can be lawfully sold, exhibited for sale or distributed.

This also indicates that trade in respect of drugs is lawfully possible only when there is a compliance with the provisions of the said Act, both by the manufacturers and dealers. In Ashok Leyland's case (above) the Division Bench of this Court held that the relationship between the manufacturer and the dealer is not that of a principal and agent but that of a seller and a buyer. Applying the ratio

of this decision to the case at hand, it seems to us obvious that the relationship that is established between the manufacturer and the dealer as regards the sale of the products manufactured by the petitioners is of a seller and a buyer and thus, the observation of the Supreme Court in Hindustan Sugar Mills' case (above) became most relevant. Their Lordships of the Supreme Court, dealing with the provisions of the Central Act regulating the sale and the price of cement vis-a-vis the clauses of the agreement entered into by the parties, indeed observed that the provisions of the Central Act regulating the sale and the price of cement had an overriding effect and thus, if the said Control Order was stipulating that the freight was to be paid by the purchaser, such stipulation had to prevail notwithstanding clauses to the contrary in the agreement. In the case at hand, considering the provisions of the Drugs and Cosmetics Act which minutely regulate the manufacture, sale and distribution of drugs and cosmetics, it appears to us that such provisions necessarily have an overriding effect and therefore, prevail and thus, the definition of 'drug' given in the said Act is most relevant for determining its meaning in the trade. We are thus of the view that Mr. Hidayatullah is entirely right when he contends that the true and real meaning which a drug has in the trade or in commerce is the meaning given to it in the Drugs and Cosmetics Act.

The provisions of Section 18 are unquestionably motivated by public interest to protect and defend the health and lives of people. We are, therefore, of the view that the popular or the commercial meaning of a drug is synonymous to the one given in the Drugs and Cosmetics Act.

The ingredients--vegetable extracts could not be confused with the final medicaments prepared from such extracts along with other ingredients. Merely because the herbs had medicinal properties, it could not be said that the extracts were medicaments as per the definition in the tariff and as commonly understood.

7. According to the Harmonized Commodity Description and Coding System (HSN) Explanatory Notes, both simple vegetable extracts and compound vegetable extracts were classifiable under Heading No. 13.02 of the HSN. Simple vegetable extracts were those that were obtained by the treatment of only one variety of plant. Compound vegetable extracts were those that were obtained

either by mixing simple, extracts or by treating mixtures of different varieties of plants. Vegetable extracts whether simple or compound could be in liquid form, paste form or solid form. For classification, no distinction was made on the basis of the form or the fact that the extracts were simple or compound.

The extracts are generally raw materials for various manufactured products. They did not have the character of medicaments. When because of the addition of other substances/products, the extracts assumed the character of medicaments then such products could not be treated as either simple or compound vegetable extracts. With addition of such other substances/products, the extracts became medicinal preparations.

The vegetable extracts which have been mixed or compounded with the addition of other substances/products for therapeutic or prophylactic purposes also travel beyond the scope of vegetable extracts. Such mixtures and similar medicinal compound extracts made by treating mixture of plants become medicaments. Simple vegetable extracts when put up in measured doses for therapeutic or prophylactic purposes or in forms or packings for retail sale for such therapeutic or prophylactic purposes were also to be treated as medicaments.

As is seen from the product description, the vegetable extracts in question did not have due character of medicaments. They were the raw materials for the production of medicaments, but in themselves they were not usable for therapeutic or prophylactic purposes. The appellants have also not treated them as medicaments. Admittedly, the vegetable extracts were obtained for specific medicines. They were not medicines in such. In Para B.1 of their reply dated 4.3.1996 to the show cause notice at page 56 of the paper book, the appellants had stated as under: B.1. In the case of the extracts, which are compound extracts, i.e.

the extraction is done by treating mixtures of different varieties of plants. These are extracted for a specific end-use. For ensuring that the necessary properties are obtained, these are extracted together. During the course of investigation, it has been categorically explained that the decoction prepared has different percentages of Total Soluble Solids (TSS). Thus, the compound extract is

obtained from different plants for a specific medicine.

The appellants had confused the herbs having therapeutic or prophylactic values with the description in the HSN Explanatory Notes of the finished products for therapeutic/prophylactic purposes. Para B.8(a) and B.10 from the reply to the show cause notice, as aforesaid, are extracted below: B.8(a). The ingredients from which the extracts are taken are listed in the authoritative text books on Ayurveda, which are in turn listed in Schedule-I to the Drugs and Cosmetics Act. These ingredients themselves have therapeutic/prophylactic values.

Consequently the extracts therefrom either simple or compound also have the required therapeutic/prophylactic values.

B.10. The show cause notice seems to proceed on a misconception. The assumption that the vegetable extracts (simple or compound) do not have therapeutic or prophylactic value is not correct. Each of the plant from which the extract is taken has therapeutic or prophylactic value. Similarly in the case of compound extracts also each of the plants do have therapeutic or prophylactic values.

The definition of medicaments as appearing in Chapter Note 2(i) of Chapter 30 of the Tariff and the understanding of the therapeutic/prophylactic purposes had already been given above.

It is clear from the facts on record that the vegetable extracts in question were not medicaments and were not classifiable as pharmaceutical products in Chapter 30 of the Central Excise Tariff.

8. Much emphasis has been laid by the appellants on the Board's Circular dated 16.9.1997 which according to them was on the very same issue which is for consideration before us and which in their view covered the matter in their favour.

The show cause notice in the present proceedings was issued on 30.8.1995 and the appellants replied to the show cause notice under communication dated 4.3.1996. Shri Bhuvanesh Kumar Dwivedi, Senior Production Officer of M/s. Dabur was cross-examined on 4.6.1996.

Shri R.K. Agarwal, Asst. Production Manager of M/s. Lucky Laboratories (Shri Agarwal had earlier worked with M/s. Dabur in their packing section) was also cross-examined on 4.6.1996. Further, written submissions were made on 14.6.1996. It was during the course of such proceedings against them, when the matter was under adjudication by the Commissioner of Central Excise, Meerut, that M/s Dabur under their communication dated 15.9.1996 addressed the Central Board of Excise and Customs for suitable clarifications and directions with regard to the classification of the liquid vegetable extracts obtained in the manufacture of Ayurvedic medicines. On 16.9.1997, the Central Board of Excise & Customs issued the following circular: Liquid vegetable extracts obtained in the manufacture of Ayurvedic Medicines--Clarification [Chapter 30] I am directed to say that a doubt has been raised as to whether liquid vegetable extract obtained in the course of manufacture of Ayurvedic medicines are excisable under the Central Excise Tariff Act, 1985 and if so whether they merit classification under Chapter 13 or under Chapter 30 of the Central Excise Tariff Act, 1985.

2. A general study of the process for obtaining these extracts reveals that in the first stage medicinal herbs/shrubs are ground/crushed to obtain coarse powder and thereafter it is boiled in water to get the extract. In the second stage the said extract is subjected to preservative processes whether fermentation or otherwise.

3. The matter has been examined. In this context it mentioned that liquid vegetable extracts which emerge at an intermediate stage in the manufacture of Ayurvedic, Unani or Siddha medicines are not marketable unless subjected to preservative processes whether fermentation or otherwise. Therefore, such liquid vegetable extracts unless subjected to fermentation or other preservative processes are not liable to be considered as "goods" attracting the scope of excise levy. If these are subjected to fermentation which gives rise to self-generated alcohol, they go out of the purview of CETA, 1985 in view of Chapter Note 4 to Chapter 30 and attract duty under the Medicinal & Toilet Preparations (ED) Act, 1955. Rule 66 of the M & TP Rules, 1956 also makes it clear that medicinal preparations containing self-generated alcohol are chargeable to duty under the M & TP Act. In this connection attention is drawn to the judgment of Supreme Court in the case of M/s. Baidyanath Ayurved Bhavan (P) Ltd. 1971 (1) SCR 590, wherein it has been held

that in order to attract duty under the M& TP Act, all that is required is that a medicinal preparation should contain alcohol. Alcohol may be part of the preparation either because it is directly added to the solution or it came to be included in it because one of the components of that preparation contained alcohol.

4. If such extracts are subjected to other preservative processes which do not give rise to self-generated alcohol or addition of alcohol in the extracts, they would attract duty under the CETA, 1985. Such extracts can be classified as under: Simple Extract - Extraction from single herb/plant. Compound Extract - Extraction from different herbs/plants together.

HSN explanatory notes at page 93 excludes vegetable extracts from Chapter 13 which have been mixed or compounded for therapeutic or prophylactic purposes. HSN explanatory notes at page 436 further state that Heading 30.03 includes medicinal compound vegetable extracts including those obtained by treating a mixture of plants.

As per HSN explanatory notes single ingredient extracts are classifiable under Chapter 13 of the CET. However, single ingredient extracts when put up in measured doses for therapeutic or prophylactic purposes or in forms or packings for retail sale for such purposes are covered under Chapter Heading 30.04.

5. In view of the above it is clarified that liquid vegetable extracts unless subjected to fermentation or other preservative processes are not liable to be considered as "goods" attracting the scope of excise levy. Mixed or compounded vegetable extract which have therapeutic or prophylactic value are appropriately classifiable under Heading 30.03 of the Central Excise Tariff.

Single ingredient extracts are classifiable under Chapter 13 of the Central Excise Tariff. However, single ingredient extracts when put up in measured doses for therapeutic or prophylactic purposes or in forms of packing for retail sale for such purposes are appropriately classifiable under Heading 30.03 of the Central Excise Tariff.

6. All pending disputes/assessments on the issue may be settled in the light of these guidelines.

[C.B.E. & C. Circular No. 334/50/97-CX issued under F. No. 102/11/94-CX. 3, dated 16.9.1997] It was clarified therein that the liquid vegetable extracts unless subjected to fermentation or other preservative processes were not liable to be considered as "goods" attracting the scope of excise levy. At the same time, it was stated therein that the mixed or compounded vegetable extracts which have therapeutic or prophylactic value were appropriately classifiable under Heading No. 30.03 of the Central Excise Tariff. In other words, they were taken to be the 'goods' attracting the scope of excise levy. In effect, it means that according to the Board's Circular the mixed or compounded vegetable extracts which had no therapeutic or prophylactic value were not 'goods' but if they had therapeutic or prophylactic value, they were 'goods'.

From the facts on record, it is clear that the vegetable extracts with which we are concerned in these proceedings were identifiable, well defined products as per authoritative texts and were obtained for definite medicines. A drug licence was required for their production. A manufacturer was producing such extracts exclusively for sale. M/s. Dabur were purchasing some extracts from outside and some of the extracts were sent to outside manufacturers for manufacturing medicines. It has also come out clearly from the statements of the various witnesses who were concerned with the business of the appellants that the vegetable extracts in question had not been mixed or compounded for therapeutic or prophylactic purposes. They were not medicaments for classifying under Heading No. 3003.30 which covered medicaments including those used in Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic systems.

Thus, the Board's Circular does not advance the case of the appellants.

9. The appellants have contended that in respect of universal facts which are known to everyone, the question of alleging suppression could not arise.

M/s. Dabur are one of the prominent manufacturers of Ayurvedic Medicines in the country. They were not only manufacturing vegetable extracts themselves, but

were getting them manufactured also from outside manufacturers.

at page 14 of the adjudication order, the adjudicating authority, the Commissioner of Central Excise, Meerut-I, had recorded the fact that M/s. Dabur were purchasing extracts regularly from other manufacturers on payment of duty. It has been recorded as under: Even assuming for the sake of argument that intent to evade duty has necessarily to be established for sustaining the charge of suppression, my finding is that the theory that the assessee was operating under a bona fide belief regarding the non-dutiable nature of vegetable extracts is not credible particularly when he was himself purchasing extracts regularly from other manufacturers on payment of duty.

The vegetable extracts were also being sent to other manufacturers of Ayurvedic Medicines for formulation. In his statement dated 21.7.1995 recorded under Section 14 of the Act before the Superintendent of Central Excise, Shri R.K. Agarwal, Asst. Manager of M/s. Lucky Laboratories Ltd., Sikandrabad, had this to say-- As required, I am submitting the photocopies of Drug Licence of vegetable extracts issued to M/s. Lucky Laboratories Ltd. by licensing authority and Director, Ayurvedic/Unani Services UP. (Lucknow) as per letter No. 3993/D-2318/86 dated 8.6.1995 for 86 additional products as per authoritative books of Ayurveda. The list is duly signed by me. The application was made by us in 1994.

The vegetable extracts as per the approved list are manufactured by us in our factory in dry powder form, semi-solid (paste form) and liquid form as per the requirement of the buyers. These vegetable extracts are not usable for therapeutic/prophylactic use as medicine as these are mere ingredients which can be used for manufacture of medicines or cosmetics.

The appellants had not declared the production of vegetable extracts in any of their declarations. They had not given any notice of their production/removal etc.

Under Section 11A of the Act where any duty of excise has not been paid by reason of suppression of facts, a show cause notice could be served on the person concerned within five years from the date on which the monthly return in respect of the goods in question was required to be filed.

What is "suppression of facts" for the purposes of proviso to Section 11A of the Act will depend on the specific circumstances of each case.

In the case of Jaishri Engg. Co. (P) Ltd. CCE , the Hon'ble Supreme Court had observed that whether there was any fraud, collusion, wilful mis-statement or suppression of facts for the Department to justify to claim of duty beyond the period of six months, was a question of fact. The Hon'ble Supreme Court had further observed that the fact that the Department visited the factory of the appellants and they should have been aware of the production of the goods in question, were no reason for the appellants not to truly and properly to describe those goods. It was further added that having come to the conclusion that there was deliberate suppression or wrong statement, it follows automatically that the Tribunal was justified in upholding the imposition of penalty. The quantum of penalty, however, was a matter which the Tribunal was free to fix as they thought fit, as the justice of the case demanded.

The appellants had not declared the goods in question and had not disclosed the facts of the manufacture of vegetable extracts to the Department. The adjudicating authority after analysing the facts on record and after applying the ratio of various judicial pronouncements held that the appellants had failed to properly declare the products they have manufactured in their factory and that it amounted to suppression of facts.

When no classification list was filed in respect of goods, it was tantamount to suppression of facts (refer Kiran Spinning Mills v. CCE, Bombay-II From the facts and circumstances of the case, it is seen that the appellants had not disclosed the facts with regard to the vegetable extracts and the allegation of suppression of facts is well established against them.

In case of suppression of facts, extended period of limitation was applicable. Marco Textiles v. UOI 1997 (69) ECR 28 (SC), when there was no material on record to show that the assessee genuinely believed that the tufted fabric manufactured by it was embroidered fabric and was eligible to exemption, the Supreme Court held that the demand was not time-barred. Extended time limit was invocable when full facts were not disclosed to the Department (refer Mangala Textiles v. CCE, Pune

2000 (39) RLT 288 (CEGAT). Extended period of limitation was invocable when clearance of soft cotton used was not disclosed to the Department (refer C.T. Cotton Yarn Ltd. v. CCE, Indore 2000 (39) RLT 943 (CEGAT)).

Extended period of five years was applicable for failure to file classification lists. Mere vague and uncertain letter will not be able to disprove the suppression, of facts (refer V.S.T. Tillers Tractors Ltd., Bangalore v. CCE, Bangalore In the facts and circumstances of the case, following observations of the Hon'ble Supreme Court in para 14 of their judgment in the case of Madras Petro-Chem Ltd. v. CCE, Madras , are very 14. The proposition of law as laid down is not in dispute. We find in the present case as aforesaid, a clear finding was recorded that the petitioner was aware and was obliged to file RG 1 Register, gate passes and also of clearances in the RT 12 returns by disclosing the particulars which was not done in the present case. The finding recorded in this case, especially in the background that this was a case of self-removal procedure in which there is obligation cast on the assessee to make proper and correct declaration and entries in the production register RG. 1. Further finding was that it was not by inadvertence. There could be no other inference if it was not by inadvertence, then deliberate, then it is not in the realm of inaction of the assessee but with the objective of a gain, which in other words would be conscious withholding of the information. Thus unhesitatingly we conclude, on the facts of this case, proviso to Section 11 would be applicable, hence, show cause notice is held to be within time.

With regard to the penalty, para 11 from the judgment of the Apex Court in the case of Jaishri Engg. Co. (P) Ltd. v. CCE , is extracted below: 11. In the aforesaid view of the matter, we are of the opinion that the Tribunal was right in classifying the goods under Tariff Item 52 of the Central Excise Tariff and in upholding the demand of the duty for a period beyond six months as contemplated by Section 11A of the Act. The Tribunal duly gave benefit of the exemption notification in respect of the goods which had been exported. This part of the order is not challenged and cannot be challenged. The Tribunal, however, reduced the penalty from Rs. 1 lakh--to Rs, 50,000. Mr. Sorabji, learned Counsel for the appellant, contended that this was not right. There should not have been any penalty

imposed. We are, however, unable to accept that position. Having come to the conclusion that there was deliberate suppression (sic) wrong statement, it follows automatically that the Tribunal was justified in upholding the imposition of penalty. The quantum of penalty, however, was a matter which the Tribunal was free to fix as they thought fit, as the justice of the case demanded. Nothing has been shown to us that the conclusion of the Tribunal was bad.

10. The decisions referred to by the learned Counsel are not applicable to the goods in question and the facts of the case, as will be seen from the facts analysed and case law discussed above.

11. After taking into account all the relevant facts and considerations of the case, we do not find any merit in this appeal. In the facts and circumstances of the case, the amount of penalty is also appropriate.

Accordingly, the appeal is rejected. Ordered accordingly.

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