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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-22-2004

Reported in : (2004)(96)ECC597

Judge : A T V.K., P Chacko

Appellant : Albert David Ltd., Ahlcon

Respondent : Cce

Judgement :

1. The appellants are manufacturers of pharmaceutical products including various types of Intravenous Fluids [hereinafter referred to as "IV Fluids"] falling under Chapter 30 of the Schedule to the Central Excise Tariff Act, IV Fluids were exempt from Central Excise duty under Sr. No. 47A of Notification No. 6/2000-CE dated 1.3.2000 as amended by Notification No. 36/2000-CE dated 4.5.2000. The appellants claimed this exemption in respect of some of their products and accordingly cleared the goods without payment of duty during the period from or after 4.5.2000 upto 28.2.2001. From 1.3.2001, they have cleared such goods on payment of duty in view of Notification No. 3/2001-CE dated 1.3.2001, whereunder "Intravenous fluids, which are used for sugar, electrolyte or fluid replenishment" were exempted from duty vide Sr. No. 56 to the Table to the Notification. The products which were cleared without payment of duty during 4.5.2000 - 28.2.2001 by M/s Albert David Ltd. (hereinafter referred to as "Albert David") were the following: M/s Ahlcon Parenterals (1) Ltd, hereinafter referred to as "Ahlcon") had similarly cleared the following product of theirs during the said period: In the case

of M/s Wockhardt Life Sciences Ltd. (hereinafter referred to as "Wockhardt") the following products were cleared without payment of duty during the period July 2000 to February 2001.

In all the cases, the department issued show-cause notices to the parties denying the benefit of exemption to the goods and demanding duty on the clearances made during the respective periods. The show-cause notices also proposed to impose penalties on the noticees on the ground of suppression of facts etc. The allegations 'raised in the show-cause notices were denied and the demands of duty and other proposals were contested. Against 'Albert David', the jurisdictional Commissioner of Central Excise confirmed the demand of Central Excise duty of Rs. 50,70,074 on IV Fluids cleared during the relevant period and also confirmed another demand of duty amounting to Rs. 22,58,916 equivalent to the Cenvat credit availed by the party in respect of the Inputs contained in the duty-paid plastic waste & scrap cleared by them. The Commissioner also imposed on the company a penalty of Rs. 73,28,990 under Rule 173Q read with Section 11AC and a personal penalty of Rs. 10 lakhs on Shri D.P. Ghosh, Sr. Vice President of the company under Rule 209A. Appeal No. 2497 of the company and Appeal No. 2498 of Shri D.P. Ghosh arc against the order of the Commissioner. In the case of 'Ahlcon', a few show-cause notices raising similar demands of duty on clearances effected by them during successive spells between 4.5.2000 and 28.2.2001 were adjudicated upon by the jurisdictional Assistant Commissioner of Central Excise. The adjudicating authority confirmed the demands of duty totalling to Rs. 2,89,62,908 against the company and also imposed on them a penalty of Rs. 25 lakhs under Rule 173Q. In the appeals preferred by the company against the orders of the original authority, the Commissioner (Appeals) reduced the quantum of penalty to Rs. 5 lakhs but upheld the demand of duty in its entirety.

Appeal No. 656/2003 filed by 'Ahlcon' is against the decision of the lower appellate authority. In the case of 'Wockhardt', adjudication of the dispute was made by the jurisdictional Commissioner, who confirmed demand of duty to the extent of Rs. 84,51,259 against the company in respect of three out of the six products in question and imposed on them a penalty of Rs. 55 lakhs under Rule 173Q. Appeal No. 956/03 challenges this decision of the Commissioner.

2. We have heard both the sides and considered their submissions. The common issue arising from all these appeals is whether the products cleared as TV Fluids' by the appellants during the period 4.5.2000 to 28.2.2001 were eligible for the exemption under Notification No.6/2000-CE dated 1.3.2000 as amended by Notification No. 36/2000-CE dated 4.5.2000. The amending notification introduced Entry No. 47A in the Table annexed to Notification No. 6/2000-CE. The description of goods under this entry was "Intravenous Fluids" of Chapter 30 of the Schedule to, the Central Excise Tariff Act, 1985. Notification No.6/2000-CE, so amended, granted full exemption from duty to "Intravenous Fluids". On 1.3.2001, the Central Government issued Notification No.3/2001-CE. Entry No. 56 in the Table annexed to this Notification was also meant for specific goods falling under Chapter 30 and this entry reads as under: "Intravenous fluids, which are used for sugar, electrolyte or fluid replenishment" In the case of Albert David, the Commissioner of Central Excise held that the above Entry No. 56 was clarificatory in nature and hence retrospective in effect. The Commissioner, for this purpose, relied on case law as well as on a certain budgetary clarification of the year 2001-2002. Accordingly, it was held that the exemption from payment of Central Excise duty under Entry 47A of Notification No. 6/2000-CE (as amended) was available, for the period 4,5.2000 to 28.2.2001, only to those IV Fluids which were used for sugar, electrolyte or fluid replenishment. On this basis, the products cleared by Albert David during the said period, which were found to be drugs and not to be used for sugar, electrolyte or fluid replenishment were held to he dutiable. In the case of Ahlcon, the Commissioner (Appeals) also gave retrospective effect to Entry No. 56 of Notification No. 3/2001-CE and held that the goods cleared by the assessee during the above period were only intravenously administered medicines and not Intravenous Fluids. In the case of Wockhardt, however, the adjudicating authority recorded contradictory findings on the question whether Notification No. 3/2001-CE had retrospective effect. While, in one place, the Commissioner observed that the said Notification not being an amending notification but a separate notification could not have retrospective effect, he recorded a finding in another part of his order that Entry No. 56 of the Notification was just clarificatory in nature, Notwithstanding these contradictory findings, the Commissioner held that the products cleared by Wockhardt during the period of dispute were just injectable

medicines and not Intravenous Fluids. In all three cases, the authorities concerned relied on technical literature, pharmacopeia, encyclopedia, dictionaries etc.

In the case of Wockhardt, a test report of the Chemical Examiner was also relied on.

3. Ld. Advocate Shri V.L. Kumaran has submitted that Intravenous Fluids are large volume parenterals for intravenous administration, not only for fluid replacement, electrolyte-balance restoration and supplementary nutrition but also as a vehicle for administration of drugs. He has pointed out that Entry No. 56 ibid does not indicate that IV Fluids covered thereunder should exclusively be used for sugar, electrolyte or fluid replenishment. He has referred to Encyclopedia and Dictionary of Medicine and Allied Health (Fourth Edition), Remington's Pharmaceutical Sciences, British Pharmacopoeia 1988 (Volume-II) and Indian Pharmacopoeia (Volume-I/Third Edition) and has submitted that all the products cleared by his clients during the period of dispute were covered by the meaning of 'Intravenous Fluids' in terms of scientific literature. Ld. Advocate Shri C.S. Lodha, has contended that Entry No. 47A of Notification No. 6/2000-CE (as amended by Notification No. 36/2000-CE) was not affected by anything contained in Notification No. 3/2001-CE as the latter Notification was not an amending Notification but a fresh, independent Notification. He has also argued that the budgetary clarification of the term 'IV Fluids' was not a part of the Finance Bill 2001 and the same cannot be relied on to hold that Entry 56 of Notification No. 3/2001-CE was clarificatory and retrospective. It has been emphatically argued that, during the period of dispute, Intravenous Fluids used for whatever purpose were exempted from duty in terms of Entry No. 47A of Notification No. 6/2000-CE as amended. In this connection, reliance has been placed on the Supreme Court's decision in the cases of Union of India and Ors. v. Kanunga Industries,Indian Tod Manufacturers v. Assistant Collector of Central Excise, 1994 (74) ELT 12 (SC) and Milak Brothers v. Union of India, 1991 (31) ECC 198 (SC) : 1991 (51) ELT 204 (SC). Counsel has also relied on the Tribunal's Larger Bench decision in Collector of Central Excise, Ahmedabad v. Keti Chemicals, 1999 (113) ELT 689. It has been, further, submitted that the Central Government had no power under the Central Excise Act to make rules with retrospective effect. Exemption Notifications issued under

Section 5A of the Act formed a part of the statute itself and, therefore, it was beyond the Government's power to give retrospective effect to Entry No. 56 of Notification No. 3/2001-CE. In this context, reliance was placed on the Supreme Court's judgment in the Cannanore Spinning and Weaving Mills Ltd. v. Collector 1978 ELT (} 375). Counsel has also claimed support from the Tribunal's decision in CCE v. Magnum Solution P. Ltd. 2002 (51) RLT 785. Shri V.L. Kumaran has relied on the Tribunal's decision in Usha Martin Telecom Ltd. v. CC, Calcutta 2001 (45) RLT 1054 in support of his submission that as the budgetary clarification was not present during the period of dispute, retrospective effect cannot be given to Entry No. 56 of Notification No. 3/2001-CE by invoking the said clarification. It has also been pointed out that the Tribunal's decision in Usha Martin Telecom Ltd. was upheld by the Supreme Court vide 2002 (49) RLT 1049.

4. Ld. SDR has heavily relied on the budgetary clarification and has, in this connection, relied on the Tribunal's decision in the following cases :R. Rajagopal Reddy and Ors. v. Padmini Chandrasekharan, (1995) 2 SCC 630 He has also relied on a write-up (captioned "IV Fluids and Plasma Expanders") published in the journal, "Indian Drug Review" and has also quoted from some unauthenticated literature on Intravenous Fluids, Intravenous Therapy etc., which are apparently computer prints. Ld. SDR has argued that TV infusion' and TV Fluid' are not one and the same.

Mannitol was used as an osmotic diuretic while the other products viz.

Ciprofloxacin inj., Metronidazole inj. etc. were 'Schedule-H' drugs.

Addition of Sodium Chloride in these items was only to make them isotonic with blood and did not make the items IV Fluids. Ld. SDR further argued that an exemption notification had to be strictly construed and the term TV Fluids' has to be understood strictly in terms of the technical literature. In this context, the DR relied on the following decisions: (i) Hemraj Gordhandas v. ACCE Surat and Ors., 1978 (2) ELT (J 350) (SC)Rajasthan Spg. and Wvg. Mills Ltd. v. CCE, Jaipur, 1995 (50) ECC 167 (SC) : 1995 (77) ELT 474 (SC) In their rejoinder, the Counsel have submitted that 'large-volume parenterals' is synonymous with 'Intravenous Fluids' and that the data shown by the DR cannot be made universally applicable

to all IV Fluids as they relate to few Intravenous Fluids only.

5. Another issue which arises in the case of Robert David is whether they were eligible to avail Cenvat credit of the duty paid on plastic granules for the purpose of payment of duty on equivalent quantity of plastic scrap generated during the process of manufacture of IV Fluids.

6. Shri V.L. Kumaran has submitted that Albert David were also availing the benefit of Notification No. 89/95-CE dated 18.5.95 in respect of waste and scrap of plastic but they subsequently paid the duty on the goods at the instance of the department. When duty was so paid on the plastic scrap, the appellants were entitled to the benefit of Cenvat credit of the duty paid on the inputs (plastic granules) contained in such scrap. In this connection, counsel has relied on the Tribunal's decision in Rolls Tubes Ltd. v. CCE, Allahabad, 2002 (149) ELT 747 (Tri.-Del.) On the Cenvat credit issue, the SDR has reiterated the findings of the Commissioner.

7. In the case of Albert David, a valuation issue is also involved.

Without prejudice to his arguments on duty liability in respect of IV Fluids, Shri V.L. Kumaran has submitted that the value of IV Fluids adopted by the adjudicating authority should be treated as a cum-duty value and accordingly deduction should be allowed in terms of Section 4(4)(d)(ii) of the Central Excise Act as held by the Tribunal's Larger Bench in Sri Chakra Tyres v. CCE, 2002 (80) ECC 588 (LB) : 1999 (108) ELT 361 (LB).

8. Regarding penalty on the appellant-companies, counsel have submitted that, the non-payment of duty on IV Fluids during the period of dispute having been based on their interpretation of the relevant Notification, they had no malafides in the matter as alleged in the show-cause notices. The appellants had no intent to evade payment of duty on the goods. In the circumstances, the penalties imposed on the appellant-companies cannot be sustained. It has also been argued that the penalty imposed on Shri D.P. Ghosh (Sr. Vice President of M/s Albert David Ltd.) under Rule 209A of the Central Excise Rules, 1944 is also not sustainable on the ground of "active involvement in evasion of duty by the company" recorded by the

Commissioner because there was no evasion of duty at all by the company and the necessary ingredients for a penalty under the said rule were not found to exist in the case.

9. We note that Notification No. 3/2001-CE dated 1.3.2001 was not issued to amend Notification No. 6/2000-CE, unlike Notification No.36/2000-CE dated 4.5.2000 which was issued to amend Notification No.6/2000-CE. Notification No. 6/2000-CE was rescinded on 1.3.2001 itself vide Notn. No. 10/2001-CE. In terms of Entry No. 47A of the Table annexed to Notification No. 6/2000-CE as amended by Notification No.36/2000-CE dated 4.5.2000, "Intravenous Fluids" were wholly exempt from Central Excise duty. It is further noted that no specific condition was attached to availment of the exemption on "Intravenous Fluids". The description "Intravenous Fluids which are used for sugar, electrolyte or fluid replenishment" under Entry No. 56 of Notification No.3/2001-CE dated 1.3.2001 -- an independent notification -- cannot be given retrospective effect so as to restrict the meaning of "Intravenous Fluids" under Entry No. 47A of Notification No. 6/2000-CE as amended by Notification No. 36/2000-CE dated 4.5.2000. The description of Intravenous Fluids under Notification No. 3/2001--CE cannot be held to be clarificatory, particularly, of an entry contained in a Notification rescinded on 1.3.2001. We have examined the 2001-02 Budget Circular which 'clarified' thus: "Medicaments (Chapter-30) -- The description of Intravenous Fluids (IV Fluids) has been changed to IV Fluids for sugar, electrolyte or Fluid replenishment. This change is clarificatory in nature".

To our minds, the above statement cannot be held to be clarificatory inasmuch as it ex facie indicates that the description of "Intravenous Fluids" has been changed to Intravenous Fluids for sugar, electrolyte or fluid replenishment. It is beyond our senses to accept a change as clarificatory. A change of description of goods as above is a change only, which could take effect only from the date thereof. The Apex Court's decisions in the cases of Mithilesh Kumari (supra) and Rajagopal Reddy (supra) are of no aid to the Revenue's case in the above situation. We, therefore, hold that the meaning of "Intravenous Fluids" described under Entry No. 47A of Notification No. 6/2000-CE as amended by Notification No. 36/2000-CE dated 4.5.2000 was not affected by the description given under Entry No. 56 of

Notification No.3/2001-CE dated 1.3.2001 which was not an amending Notification at all but a new Notification. In this context, we think, it is useful to refer to the Tribunal's decision in Usha Martin Telecom case (supra).

Computer software imported by the party in that case was unconditionally exempt from customs duty at the time of clearance in terms of Entry 173 of the Table annexed to Notification No. 11/97-Cus.

dated 1.3.97. After the duty-free clearance of the goods, an Explanation was added to the above entry by the amending Notification No. 3/98-Cus. dated 11.2.98 and the department took the stand that the Explanation had retrospective effect and that the imported goods did not come within the definition of "Computer Software" in terms of the Explanation. The department therefore sought to deny the benefit of exemption to the goods and accordingly demanded duty. The Tribunal disapproved the department's stand and held that the above amendment to Notification No. 11/97 had no retrospective effect. The Tribunal's view was upheld by the Supreme Court vide 2002 (49) RLT 1049. The decision in Usha Martin Telecom was followed by the Tribunal in the case of Magnum Solution (supra). We note that the instant case, wherein the Notification which changed the description of 'IV Fluids' on 1.3.2001 was not even an amending Notification but a fresh Notification, stands on a stronger footing and we must hold that the benefit of exemption in terms of Entry No. 47A ibid was applicable to "Intravenous Fluids" for the period 4.5.2000 to 28.2.2001. It was only from 1.3.2001 that the description of IV Fluids changed and accordingly the appellants have paid duty on the goods from that date. The doctrine of strict construction has been invoked by Ld. SDR to say that an Exemption Notification should be strictly construed. This doctrine, however, operates only to the extent of bringing any goods within the purview of the notification. Once the goods are within the purview of the notification, a liberal interpretation beneficial to the assessee would follow. This is trite law. In the instant case, there is no two opinion regarding the fact that the good's in question were "IV Fluids" falling under Chapter 30 as described under Entry 47A ibid. Applicability of Notification No. 6/2000-CE (as amended on 4.5.2000) having thus been found, "IV Fluids" would be understood and interpreted in the widest amplitude of the term as understood in medical parlance.

10. A view has been taken in the cases of Albert David and Ahlcon by the lower authorities to the effect that the goods which were cleared as IV Fluids by the said companies during the period of dispute did not conform to the specifications of "IV Fluids" in terms of technical literature. The view taken by the authorities is that the product in question were meant for intravenous infusion for medicinal purposes and were not merely intended to be used as fluid replenishment in human body. It has also been held that the products were IV Fluids containing added substances. On this basis, the authorities have held that the subject goods were not "Intravenous Fluids" within the meaning of this term under Entry No. 47A of Notification No. 6/2000-CE as amended by Notification No. 36/2000-CE. This view has been contested by Ld.

Counsel on the strength of technical literature such as pharmacopoeia, encyclopedia and dictionaries. After a careful perusal of the literature cited before us, we are of the view that the stand taken by the lower authorities is not justifiable. Intravenous infusion means administration of fluids through a vein vide Encyclopedia and Dictionary of Medicine, Nursing and Allied Health (supra). The encyclopedia further says that intravenous therapy is not limited to replacement of body fluids and electrolyte supplements, and many medications are administered by intravenous infusion. Ail the literature shown to us invariably say that intravenous fluids arc large-volume sterile solutions packed in containers holding 100 ml or more. In Chapter 8 of Sterile Dosage Forms (3rd Edition) by Salvatore Turco & Robert E. King, we read thus: "The most common uses of intravenous fluids include the correction of serious disturbances in electrolyte and fluid balances in the body and a means of providing basic nutrition, In recent years, they have been used as vehicles for other drugs and as a method of providing parenteral hyperalimentation." Remington's Pharmaceutical Sciences has listed the common uses of intravenous fluids as under : "Intravenous fluids commonly arc used for a number of clinical conditions. These include The basic for the practice of providing TPN [Total Parenteral Nutrition].

The British and Indian Pharmacopoeia also recognize the above position, Therefore, the subject goods which were undisputedly cleared in unit volumes of 100 ml or more would not be anything other than intravenous fluids by the mere

reason of the fact that they contained any drug whether Schedule 'H' drug (under the Drugs and Cosmetics Act) or not.

They might contain ingredients serving the aforementioned purposes of IV fluids and also contain substances like sodium chloride which make the fluid isotonic with (i.e. having the same osmotic pressure as that of) blood. Such ingredients/substances arc an essential part of IV fluid and not "added substances" in the sense understood by the adjudicating authority. There is no evidence, in these cases, to show that any of the subject goods contained "added substances" (in the sense understood by the Commissioner) which could ipso facto render the goods other than IV fluids. In most of the cases, the Commissioner has not even disclosed the identity of the so-called "added substances". We have also seen the literature produced by the DR. We have not found anything in Indian Drug Review, that is contrary to the essential scientific facts disclosed by the literature cited by counsel. The computer prints produced by the DR cannot be relied on for want of authenticity, either.

11. In any case, there is no dispute that the goods are "Intravenous Fluids". In our view, in order to attract Entry No. 47A ibid, it is enough for a product to be an "Intravenous Fluid" as understood in medical parlance as above. The expression has got to be given the widest amplitude as in the medical parlance. This view seems to get support from the case law cited by Ld. Counsel. The Apex Court's decisions in the cases of Indian Tool Manufacturers (supra), Kanunga Industries (supra) and Milak Brothers (supra) and the Tribunal's Large Bench decision in the case of Keti Chemicals (supra) are relevant to this context. We, therefore, hold that the benefit of exemption under Entry No. 47A of Notification No. 6/2000-CE as amended by Notification No. 36/2000-CE dated 4.5.2000 is not liable to be denied in respect of the subject goods. Accordingly, the demands of duty on the goods cleared during the period of dispute require to be set aside.

12. With regard to the Cenvat credit issue raised in the case of Albert David, we note that the appellants paid duty on the plastic scrap generated in the process of manufacture of IV Fluids when the department denied them the benefit of Notification No. 89 /95-CE. Their claim is that they are entitled to avail Cenvat

credit of the duty paid on that quantity of plastic granules which was contained in the scrap.

Case law has been cited in support of this claim. Admittedly, the IV Fluids were manufactured by using "form-fill and seal technology", which meant, every piece of the product manufactured was 'IV Fluid in sealed plastic bottle'. Therefore, the plastic granules consumed in the manufacture of the plastic bottle have been rightly held to have been consumed in the manufacture of IV Fluids under the above technology.

Every piece of the product so manufactured was exempt from Central Excise duty and, therefore, the appellants were not entitled to take Cenvat credit of the duty paid on the inputs which went into the manufacture of plastic bottled IV Fluids which were exempt from payment of duty. However, this cannot be the case of the input contained in the plastic scrap generated during the manufacture of the plastic bottled IV Fluids. On such scrap, admittedly duty was paid by the appellants.

The scrap which was cleared from the appellants' factory and which subsequently suffered duty at the instance of the department was a "final product" for all purposes including Cenvatcredit purpose, against which there can hardly be any worthy argument by the department who recovered duty on the scrap as final product only. Therefore, the duty paid on that quantity of the plastic granules which was contained the plastic scrap should be available as Cenvat credit to the appellants as consistently held by this Tribunal vide Surya Roshni (supra) and Rolles Tubes (supra). The demand of duty equivalent to the Cenvat credit taken on input which was contained in the duty-paid plastic scrap will be vacated.

13. In view of our finding on the main issue relating to duty liability of the appellants in respect of IV Fluids, the valuation issue does not survive. So is the position with regard to the question relating to penalty imposed on the appellant-companies and, therefore, those penalties will not be sustained. Consequently, the penalty imposed on Shri D.P. Ghosh under Rule 209A is also not sustainable.

14. In the result, the impugned orders are set aside and all these appeals are allowed.

15. I agree with the order as recorded by the learned Member (Judicial), except the finding recorded in paragraph 12 of the order, which relates to the availability of Cenvat Credit of the duty paid on the plastic granules contained in the scrap. The appellants are not eligible to avail the Cenvat Credit of the duty paid on plastic granules, which are contained in the scrap. The plastic granules, admittedly, had been brought into the factory for manufacture of IV Fluids, which have been held to exempted by us in the present order.

Once the inputs are used in or in relation to the manufacture of products, which are exempted from payment of duty, Cenvat Credit will not be available to the appellants. It is not the case of the appellants that they are bringing out inputs for the manufacture of scrap. The scrap arises as a result of process of manufacture undertaken by them on the inputs for getting the finished products.

Therefore, the demand of duty, equivalent to the Cenvat Credit taken on inputs contained in the scrap, is upheld.16. Whether Cenvat credit of the duty paid on input (plastic granules) contained in the plastic scrap which was generated in the process of manufacture of IV Fluids and cleared by M/s. Albert David Ltd. (appellant) without payment of duty and on which duty was subsequently paid as demanded by the Revenue, was admissible to the said appellant as held by Member (Judicial).

Whether such credit was not admissible to them as held by Member (Technical).

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