i.E.L. Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-25-1988

Reported in : (1988)(15)ECC299

Appellant : i.E.L. Ltd.

Respondent : Collector of Central Excise

Judgement :

1. This is an appeal against the order of the Collector of Central Excise (Appeals), Bombay.

2. Brief facts of the case are that the appellants manufactured .

products falling under Tariff Item 15AA and availed of benefit of exemption Notification No. 101/66-C.E., dated 17-6-1966 under Serial No. 4 of the said notification. These products were manufactured out of the ingredients some of which were exempted under the said notification while in respect of, they had paid duty under T.I. No. 1.5 A A. The products manufactured by the appellants hereinafter described as said goods are the following : The various ingredients used as raw material and the duty paid/discharge status of the raw material as set out by the appellants are :-

Product	OSAAs used as raw materials	Remarks

(1)

(2)

(3)_____1.Cirra
i) Cationic softener i) Cationic softener C.S. Cone ii) Dispersol VLX and Dis- persol VLX (softener)iii) Dispersol 'A' are manufac- tured by the appellants at2.Perminal i) TRO 'B' i) TRO 'B' is manufactured KBI ii) Calsolene Oil 'GS' by the Appellant at its (wetting factory but no duty is paid out agent) thereon as the appellant claims exemption thereon3.Lissapol PS i) Gilapol'P' i) Gilapol 'P' is manufactured Cone (wett- ii) TRO'B' by the appellant at its ing out iii) Lissapol'CW factory. The appellant pays agent) duty thereon.4.Lubrol i) Lissapol 'NW i) Lissapol 'NX' is manufac- 'VA' ii) Dispersol 'A' tured by the appellant at(Emulsifier) its factory. The appellant pays duty thereon.5. Dispersol i) Dispersol 'VLX' i) Dispersol 'VLX' is manu- 'K' ii) Icipol Brillian factured by the appellant Oil at its factory. The appellant Paste (wetting pays duty thereon. out agent) For proper appreciation of the issues, the said notification is reproduced below : "Exemption to sulphonated caster oil, fish oil, sperm oil and Turkey red oil. In exercise of the powers conferred by Sub-rule

(1) of Rule 8 of the Central Excise, Rules, 1944, the Central Government hereby exempts the excisable goods specified in column

(2) of the Table hereto annexed and falling under Item No. 15AA of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) from the whole of the duty of excise leviable thereon subject to the conditions laid down in the corresponding entries in column

(3) of the said Table._____
Description
ConditionsNo._____

(2) (3)2. Organic surface-active agents If in or in relation to (other than soap; surface-active the manu- facture and packing preparations, and washing pre- of such surface/active agents, parations, whether or not con- surface- active

preparations taining soal.

and washing preparations no process is ordinarily carried3. Surface-active preparations and If in respect of surface-active washing preparations containing agents or surface-active prepa- less than five per cent by weight rations used in the manufacture of the principal active ingre- of such surface-active prepara-dients.

tions and washing preparations the appropriate amount of excise4. Emulsifiers, wetting out agents, If in respect of surface active softeners and other like prepa-agents used in the manufacture rations intended for use in any of such emulsifiers, wetting out industrial process.

agents, softeners and other like preparations the appropriate 2. This notification shall, in relation to sulphonated caster oil, commonly known as Turkey red oil (specified as serial No.1 in the Table above) be deemed to have taken effect from the 1st day of March, 1966.

3. Para 2 added Notification No.l72/66-CE shall be deemed always to have been added.

(Notification No. 101/66-CE dated 17-6-1966 as amended by Notifications No. 137/66-CE dated 10-9-66; No. 172/66-CE dated 5-11-1966 No. 4/68-CE dated 20-1-1968 and No. 182/75-CE dated 30-8-1975).

The appellants had been manufacturing these goods in their factory for a number of years and the manufacture of these different products for the first time took place at different points of time and they had been filing their classification lists from time to time furnishing the date regarding the raw materials used in the manufacture of products and were clearing the same without payment of duty availing of the exemption under Notification 101/66, till 5th October,1982 when the show cause notice was issued to them demanding the duty in respect of past clearances of the said goods. The reasons given in the show cause notice for demand are that the appellants had been using exempted inputs falling under T.I.I5AA for the manufacture of the said goods and therefore the said goods in

terms of the conditions set out at serial No.4 of the notification were not eligible for the benefit of duty free clearances. The Department's case in the proceedings is that the exemption to the said goods is available only if these are manufactured out of the surface-active agents on which appropriate excise duty has been paid. In as much as some of the ingredients used as inputs were found to have been cleared on nil duty being exempted in terms of the notification No.101/66, these apparently have been held to have not discharged the appropriate duty liability.

3. The learned advocate for the appellants, Shri R.K. Habbu, pleaded that the appellants had been filing classification lists in respect of the said goods from time to time and they furnished all the information about the ingredients utilised for the manufacture of the goods. He pleaded that alongwith some items falling under 15AA exempted under notification 101/66 they had utilised duty paid surface active agents also for the manufacture of the goods in question. His plea is that since some of the inputs falling under T.I.15AA had suffered duty, the goods manufactured by them should be taken to have manufactured out of duty paid inputs. He pleaded in view of the information furnished by the appellants in the classification lists, the original adjudicating authority has clearly held in his order that there had been no suppression of any facts on their part and in his order made the demand of duty on the ground that approval accorded to the classification lists filed was provisional in nature. He ointed out that in the show cause notice the duty had been demanded in terms of Section 11A and there was no mention in the show cause notice that the duty had been demanded for the reason of provisional approval of classification lists. He pleaded that the findings of the lower authority holding that the assessments were provisional is contrary to the facts in as much as the provisional duty procedure set out in Rule 9(2) had not been followed and unless this was done, the assessment could not considered provisional. He stated that the Assistant Collector's findings holding the assessment as provisional were also in violation of the principle of natural justice as the appellants had not been asked to explain their position in regard to the provisional nature of the assessments as held by the lower authority. He pleaded that the classification lists were approved by the Assistant Collector subject to the outcome of the test. He pleaded that if, at all, the approval of the classification lists could be considered as provisional it is only for the purpose of the test for

classification of goods under T.I. 15AA and it could not the considered as provisional for all purposes. He stated as early as on [17.6.71, final approval had been granted to three out of the five products now under issue and drew our attention to the classification lists filed by him in the paper book at page 23. He stated that when one of the items before us 'Lubrol 'VA' for the first time manufactured by them, they had submitted the classification list alongwith the covering letter dated 4.8.77. He pleaded that provisional nature of the assessment could be considered only with reference to the outcome of the test results and to which they had acquiesced. He cited in this regard the case of 1985 (20) ELT 102(Tribunal). However, on further scrutiny of the documents filed it was seen that in respect of the classification list filed on 5.3.8J,, the appellants gave the following undertaking in their covering letter: "Should, however, it is decided at a later date that the products attract Central Excise duty we shall pay the same with retrospective effect. Please therefore let us have your approval of the classification list" It is further seen that in respect of classification list filed effective from 16.3.82, provisional approval has been granted under Rule 9B as under: Subject to Dy. CC's chemical report. Approved provisionally under Rule 9B subject to execution of Bond and therefore of satisfaction of all the conditions laid down under Notification No.101/66 by the R/s." The learned advocate, however, pointed out that in respect of clearances made in pursuance of this classification list, they have not made any plea regarding the limitation. He further pointed out that RT-12 had been finalised except in the case of a few Gate Passes. His plea, in short, is two-fold : Firstly, that the demand is time-barred except in the case where he has given up the plea regarding the limitation as above; and secondly since the ground regarding the assessment being provisional was not set out in the show cause notice issued, the demand could not be raised on this ground without giving them an opportunity to put forth their defence. He cited in this regard the judgment of the Hon'ble Gujarat High Court : AIR 1972 (Guj.) 115.

He further pleaded that in as much as there was no charge regarding the suppression of any facts also that the lower authority had accepted that all the facts were on record, demand for extended period beyond six months could not be raised. He pleaded that all the ingredients manufactured by them and which were either exempted in terms of notification No.101/66 or on which duty had been paid

were declared in the classification list. On merits, he pleaded, even the exempted organic surface agents utilised in the manufacture of the goods in question should be deemed to have discharged the appropriate duty for the purpose of the notification.

4. The learned JDR for the Department, Smt. Chander, drew our attention to some of the classification lists where she pointed out that these lists had been approved provisionally except one which had been approved finally. She pointed out that the endorsement on the price list dated 1.12.79 was subject to the eligibility of the notification.

She pleaded that the appellants themselves in their letter dated 5.3.1981 stated that "should however it is decided at a later date that the products attract Central Excise duty we shall pay the same with retrospective effect". She pleaded that this undertaking by the appellants was a blanket undertaking not with reference to the approval granted subject to the testing of the goods alone. She pleaded, no doubt, the lower authority in the show cause notice issued, has invoked Rule 11A but the invoking of a wrong rule by itself does not vitiate the demand as the said demand was due in view of the fact that the classification lists had been approved provisionally and the appellants themselves had acceded to pay the duty in case the benefit of the notification was not available to them. Referring to the plea of the appellants that there was some overlapping in the demand raised in the two show cause notices issued to the appellants, she pleaded that the demand had been raised for two different periods in the two show cause notices and there was no overlapping of the demand raised in this regard. She further pleaded that in terms of notification No.101/66 the benefit under Serial No.4 of of the same was available only if duty paid inputs were used. She stated these conditions in the notification had been inserted with a view to ensure that once the inputs had got benefit of exemption notification No.101/66, the products made out of thej same should not get the benefit for the second time. She pleaded that the notification should be strictly interpreted inasmuch as some of the inputs falling under 15AA had not suffered any duty, the appellants goods were not entitled to the benefit of the notification as claimed- 5. Shri Habbu in reply stated that there was duplication of demand to the extent of Rs.... and he draw our attention to worksheet given by

him in the paper book. He however did not elucidate how the duplication was there.

(i) whether there has been any denial of principals of natural justice in hodling the assessment as provisional without stating so in the show cause notice; (ii) whether the assessment could be considered at all as provisional; (iii) whether the inputs exempted under notification No. 101/66 and used in the manufacture of the said goods can be taken to have been cleared on payment of appropriate duty? 7. We observe from the documents filed before us that the appellants have been furnishing all the relevant information in their classification lists for the purpose of the approval of the same. These classification lists, we find, have been approved at different points of time with different endorsements. The approval of the classification list is a quasi-judicial function and is an essential step towards the assessment of the goods for the purpose of levy of duty. The approval accorded has to be in terms of the provisions of the law and the finality to the approval is required to be given at the shortest possible time both in the interest of Revenue and in fairness to the assessee unless there are some very compelling reasons for keeping the assessment open. Here, we find, that the approval of the classification lists by the authorities were indicated as provisional for one reason or the other but no sense or urgency has been shown by the concerned officer to give a finality to the assessment by proving the classification lists finally lifting the burden of the endorsements made on the classification lists. If some test was required to be done it should have been carried out expeditiously or if the eligibility to the notification was under consideration the necessary orders should have been issued after giving the appellants opportunity in the matter.

What, in fact, happened was that the appellants were allowed to make clearances year after year and the RT 12 returns were also accepted from month to month without taking the desired action. Suddenly the authorities woke up and issued show cause notices on the ground that benefit of notification was not available. In fact it was only a few classification lists where the provisional approval was for consideration of the benefit of the notification. We find there is a lot of force in the appellants plea that at least where the assessments had been approved subject to the test, these cannot be taken to be provisional assessment for the purpose of

raising demand for reason of ineligibility of the appellants goods to the benefit under Notification No. 101/66. There is a specific legal provision under Rule 9(2) of the Central Excises Rules for provisional assessment and modalities provided for assessments in terms of these rules do not appear to have been followed Nothing has been shown to us by the respondents that the Department had followed this Procedure. There can be some exceptional situations where the assessments can be considered to be provisional as was the case in the case of Premier Automobiles Ltd., Bombay v. Union of India and Ors. : 1987 (30) ELT 71 (Born.) where the Hon'ble Bombay High Court has held that even though procedure under Rule 9B has not been followed, the assessment could be considered provisional as in that case the question of fixation of value had been agitated before the Court as some statutory bar had been imposed against the appellants in the matter of price fixation. The case before us is not one of that type nor it has been shown by the Revenue that this is so. However, we are also constrained to observe in this context that the assessees themselves have contributed to the confusion in the present case by giving an undertaking to the authorities when they filed their classification lists in 1981 as mentioned earlier to pay the duty in case that were not found eligible for the benefit of the exemption. We observe that the appellants were probably aware as to the nature of the list in the matter and why the assessments in RT 12 returns in their case had not been finalised. This is not to say that the action of the authorities by endorsing on the classification lists that approval was provisional gave them the right to raise demands whenever they wanted to and for whatever reason. We are in fact not proposing to give any findings on this point in view of what we are going to say in the following paragraphs. We are not giving our findings in respect of (i) and (ii) above. We propose to first deal with the point formulated us in (iii) above. It is not disputed that the appellants had utilised surface active agents manufactured by them as ingredients for the manufacture of the said goods and it is not the appellants case that they had utilised the ingredients bought out from the market. In respect of some of the ingredients as mentioned by the appellants they had paid duty under 15AA while in respect of the no duty has been paid as these had been cleared by them at nil duty in terms of Notification No. 101/66. So far as the ingredients on which the duty was paid by the appellants are concerned there is no point of

dispute. However, point made by Revenue is that inasmuch as some of the inputs falling under 15AA had been cleared at nil rate of duty it could not be said that appropriate duty had been paid in respect of these and since payment of appropriate rate of duty on the inputs falling under 15 A A is a condition precedent for availing the benefit of Notification 101/66, this benefit in respect of the said goods covered by Serial No. 4 of the notification is not available. The appellants, however, have pleaded that even though the goods had been cleared at nil rate of duty, these should be considered as goods on which appropriate duty had been paid. In short, what Revenue is pleading is that there should be some payment towards duty in respect of the inputs utilised in terms of Notification 101/66 for the manufacture of the said goods.

8. We observe that a similar question came up for consideration before the Hon'ble High Court of Patna in the case of Tata Yodogawa Limited and Anr. v. Union of India and Ors. : 1987 (32) ELT 521,in the context of Notification No. 66/73 and 150/77. Under Notification No. 66/73 steel ingots falling under 26 of the First Schedule to the Central Excises & Salt .Act were exempted from the whole excise duty levy provided that :- (a) all such ingots are manufactured exclusively from fresh unused steel melting scrap on which the appropriate duty of excise leviable under the aforesaid item No. 26 of the said First Schedule has already been paid; and (b) no set off or proforma credit has been availed of in respect of the duty paid on such steel melting scrap used in the manufacture of steel ingots.

Under Notification No. 150/77, fresh unused melting scrap of various description falling under 26 of the First Schedule to the Central Excise Act, were exempted from excise provided that : (a) "such fresh unused steel melting scrap is cleared direct from an integrated steel plant and it is proved to the satisfaction of an Officer not below the rank of an Assistant Collector of Central Excises that such scrap is intended to be used as melting scrap in the manufacture of steel ingots or semi-finished steel, as the case may be, by a manufacturer manufacturing such ingots or semi-finished steel with the aid of electric furnaces; and (b) the procedure set out in Chapter X of the Central Excise Rules is followed." In that case the Court also considered the question of availability of benefit of Notification No. 152/77 which is reproduced as under : "The Central Government has exempted iron and

steel products falling under item No. 26-AA of the First Schedule of the ,Act, and specified in column

(2) of the table thereto annexed, from so much of the duty of excise leviable thereon as in in excess of the duty specified in the corresponding entries in column

(3) of the said table, subject to the conditions laid down in the corresponding entries in column

(4) thereof. Column

(2) in serial No. 2 of the Table mentions "all products falling under sub-item (ia) of item 26-AA other than rails and sleeper bars specified in serial No. 3." "Provided that where the products mentioned in the Table are made from steel ingots, falling under item No. 26 of the aforesaid Schedule, Which have been cleared from the factory, prior to the 18th day of June, 1977, on payment of duty at the appropriate rate, the duty specified in the corresponding entries in column

(3) of the Table shall be reduced by two hundred rupees per metric tonne : Provided further that where the products mentioned in the Table, other than bars and rods, falling under sub-item (ia) of item No. 26-AA referred to in serial No. 3 of the Table, are made from semi- finished steel on which duty at the appropriate rate has already been paid, or from steel ingots falling under item No. 26 of the aforesaid Schedule which are cleared from the factory on or after the 18th day of June, 1977 on payment of duty, the duty specified in the corresponding entries in column

(3) of the Table shall be reduced by three hundred and thirty rupees per metric tonne : Provided also that where the duty paid on steel ingots or semi-finished steel, as the case may be, used in the manufacture of any quantity of the products mentioned in the Table is in excess of duty leviable on such products, the amount eligible for adjustment towards the exemption shall be restricted to the amount of duty leviable on the quantity of the products : Provided also that in the case of products mentioned in the Table and manufactured with the aid of electric furnace from and of the following material, namely :- (ii) a combination of the material

referred at (i) with fresh unused steel melting scrap on which the appropriate duty of excise has been paid; and (iii) iron in any crude form falling under item No. 25 of the said First Schedule on which the appropriate duty of excise has been paid, in combination with the materials referred to at (i) and (ii) : the duty specified against the corresponding entries in column

(3) of Table shall be reduced by three hundred and thirty rupees per metric tonne." In this case the Hon'ble High Court took note of the clarification given by the Government of India in the context of Notification No.152/77 & 153/77 and observed as under : "Apparently to answer certain doubts which had been created on various terms used in the Tariff Item Nos. 26 and 26-AA of the First Schedule to the Act a clarification was made by the Central Government stating that where duty on melting scrap, is nil the manufacturers of ingots would be eligible for exemption under Notification No. 152 of 1977 and 153 of 1977. This notification has posed the question :- "whether the expression 'fresh unused steel melting scrap on which appropriate duty of excise has been paid' appearing in the last proviso of the Notification No. 152/77-C.E., dated 18-6-1977 also covers the specified types of fresh unused steel melting scrap which are conditionally exempted under Notification No. 150/77-C.E., dated 18-6-1977." "Assessment includes 'nil' duty and the expression 'paid' has to be construed to mean 'contracted to be paid' and it is not necessary that some amount of duty should have been assessed and actually paid for interpreting the said expression. Specified types of melting scrap which are exepmpted under Notification No. 150/77-C.E. are thus to be treated to have paid the appropriate duty of excise for eligibility to duty reduction in terms of the 4th proviso to each of the Notifications No. 152/77-C.E. and 153/77-C.E. as amended." "In view of the stand taken by the parties before us contentions are limited to the interpretation that they put to the words used in the notification dated 1-3-1973, namely, on which the appropriate duty of excise leviable ... has already been paid." The Hon'ble Court after examining various issues took note of judgment in the case of N.B. Sanjana v. The Elphinstone Spinning & Weaving Mills Company Ltd. "In yet another case the very words with which we are concerned fell for interpretation before Supreme Court in. the case of N.B. Sanjana. Recovery of duties or charges short-levied, or erroneously refunded When duties or charges have been short-levied, through

inadvertance, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description of value of such goods on the part of the owner, or when any such duty or charge, after having been levied has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be on written demand by the proper officer being made within three months from the date on which the duty or charge was paid or adjusted in the owner's account current, if any, or from the date of making the refund." The Supreme Court has by the said pronouncement, established two propositions :

(1) Expression "paid" in the context of a particular statute may mean "ought to have been paid" and

(2) Nil assessment may mean "assessed to duty". It has referred to a judgment in the Court of Appeal in the case of Allen v. Thorn Electrical Industries Ltd. (1968) IQ-B-487-7 and has said : "The liberal meaning of the expression 'paid' as actually paid in case has again not been adopted by the Court of Appeal in the case of Allen v. Thorn Electrical Industries Limited (1968) IQ-B 487.

Having regard to the context in which the said expression appeared in the particular provision which came up for interpretation, the Court of Appeal construed the said expression to mean 'contracted to be paid'." "The expression "paid" in the rule quoted above was given a meaning in the context of the law under consideration by the Supreme Court and it found no error in reading the expression "paid" as "ought to have been paid". The law stated by the Supreme Court without any ambiguity makes one aware that the literal meaning of the expression "paid" as actually paid in cash need not be accepted." The Hon'ble Court also took into consideration various aspects and pointed out that the Hon'ble Gujarat High Court in the case of Steel Authority of India Limited v. Collector of Central Excise, Calcutta : 1984 (18) ELT 555 in a similar matter holding as under : "Although interpreted in a different context and for the reasons stated in the judgment, Deshpande, J. (as he then was in the Delhi High Court) hasnoticed the relevance of interpreting the words "already paid" to mean "contracted to be paid"

or "ought to have been paid", there is no reason why the same meaning be not given to the words used in Notification No. 66/73 when in the hands of Tayo the scraps were in the capacity of a transferee for the purpose of manufacturing ingots and even in the hands of the Tisco who may have the liability to pay'duty on the scraps, since the scraps answered the requirement of the description in the said notification, no duty was payable by them on the ingots." In this background therefore we find that the wording used in the notification before us are similar to the wording of Notification No.66/73 in the case before the Hon'ble High Court. Ingots were exempt from the payment of duty if these were manufactured out of fresh unused steel melting scraps on which appropriate rate of duty of excise had been paid. In the case before them, the fresh unused melting scrap was also exempt from the duty. The Hon'ble Court has held that the use of scrap cleared at nil rate of duty did not disentitle the ingots to the benefit of Notification 66/73 and have held, as mentioned above, appropriate payment of duty should be taken to mean duty that ought to have been paid or contracted to have been paid. Since such duty in terms of exemption notification is nil these goods cleared without payment of any duty therefore can be taken to be duty paid goods. In that view of the matter, therefore the appellants are entitled to the benefit of notification under serial No. 4 of the Notification 101/66.

We, therefore, following the ratio of the judgment of Hon'ble High Court of Patna as above, allow the appeal and set aside the order of the lower authority. In view of what we have held above, we do not find it necessary to give our findings on the other points raised.