Johnson and Johnson Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-13-1995

Reported in : (1995)(78)ELT193TriDel

Appellant : Johnson and Johnson Ltd.

Respondent : Collector of Central Excise

Judgement :

1. Johnson & Johnson Ltd. have filed this appeal feeling aggrieved by the order of Collector of Central Excise. The Collector had held :- "In the light of the aforesaid exposition, I hold that the assessee has failed to comply with the procedure laid down under the Law and have contravened the provisions under Rules 173B and 173F of Central Excise Rules, 1944, and are, therefore, liable to penal action as contemplated under Rule 173Q. The amount of duty totalling to Rs. 32,45,820/- (Rupees Thirty Two Lakhs Forty Five Thousand Eight Hundred Twenty only) leviable on the goods captively consumed by M/s. Johnson & Johnson Ltd. Andheri-Kurla Road, Bombay-400072, during the period from 1-4-1981 to 30-9-1985 and 1-10-1985 to 31-12-1985 is confirmed under Section 11A(2) of the Central Excises and Salt Act, 1944 and it shall be paid by the assessee immediately.

I impose a penalty of Rs. 5.00 lakhs (Rupee Five Lakhs only) on M/s.

Johnson & Johnson Ltd., Bombay 400072, under Rule 173Q(1) of the Central Excise Rules, 1944." 2. Briefly stated the facts of the case are that appellants are

engaged in the manufacture of Coated, Printed and Paper Backed Aluminium Foils.

It was alleged by the Deptt. that such Coated, Printed and Paper Backed Aluminium Foils, before they are cut to label size are excisable goods and classifiable under Tariff Item 27(c) of the Central Excise Tariff upto 31-7-1984, and under the Tariff Item 27(7) of the then Central Excise Tariff from 1-8-1984. It was alleged that the appellants have neither filed classification list nor paid duty under the aforesaid tariff item on such coated, printed and paper backed Aluminium Foils manufactured and captively consumed by the appellants in the manufacture of labels. The appellants were, therefore asked to show cause to the Asst. Collector as to why : (1) Central Excise duty from 1-4-1981 to 30-9-1985 amounting to Rs. 30,36,5707- and from 1-10-1985 to 31-12-1985 amounting to Rs. 2,09,250/- as worked out in the Annexures on clearances for captive consumption should not be demanded and recovered under Section HA of CESA, 1944 including the extended period of six months.

(2) Classification list of the Aluminium Foils manufactured and cleared by them was not filed for approval of the proper officer as required under Rule 173B of Central Excise Rules, 1944.

(3) They failed to determine the correct duty on Aluminium Foils as required under Rule 173F of the Central Excise Rules, 1944 and on quantity of Aluminium Foils manufactured and captively consumed by them.

(4) Penalty should not be imposed on them under Rule 173Q of the Central Excise Rules, 1944 for the irregularity committed by them as mentioned above.

3. Shri Atul Setalvad, Sr. Advocate with Sh. D.B. Shroff and Shri Nitin Khatkar, Advocates appeared for the Appellants. The ld. Sr. Advocate submitted that the appellants manufactured printed labels including Coated, Printed and Paper Backed Aluminium Foil labels, that such Printed labels at the relevant time were classified under Tariff Item 68; that exemption of duty was claimed on such printed labels under Notification No. 155/75; that this classification was not disputed.

4. The ld. Sr. Counsel for the appellants submitted that the relevant Tariff Entry under Tariff Item 27(c) upto 1-7-1984 reads :- (c) Foils (whether or not embossed, cut to shape, perforated, coated, printed, or backed with paper or other reinforcing material) of a thickness (excluding any backing) not exceeding 0.15 mm.

5. That this Tariff Item underwent change from 1-8-1984 and reads as under :- (viii) Foil means a flat product of rectangular section of thickness (excluding any backing) not exceeding 0.15 mm., whether or not embossed, cut to shape, perforated, coated, printed or backed with paper or reinforcing material.

The ld. Sr. Counsel submitted that under Notification No. 155/72 of 15-5-1972 and Notification No. 183/84, dated 1-8-1984 printed aluminium foils were fully exempt if: (2) The total quantity of bare aluminium foils used did not exceed 5 MT during the preceding financial year.

6. The ld. Sr. Counsel argued that Coating, Printing and Backing with paper of Aluminium Foils does not amount to manufacture; that pre-cut coated and printed labels do not come into existence as goods; that exemption under Notification No. 155/72 and Notification. No. 183/84 was applicable to Printed Aluminium Foils if the weight of bare Aluminium Foils used did not exceed 5 MT during the preceding financial year; that use of such foils admittedly did not exceed 5 MT in the appellant's case; that duty cannot be demanded twice under the same sub-heading.

7. On the findings rendered by the Collector in his Order-in-Original, the ld. Sr. Counsel submitted that bare assertion that printing etc., constituted manufacture and the conclusion that a new product came into existence cannot be accepted; that the Collector relied on the judgment of the Hon'ble Supreme Court in the case of Randal Mansukhrai, Rewari and Anr. reported in 1978 (2) E.L.T. (J 389) that the facts in the appellants' case are different and hence the ratio of the decision of the case cited and relied upon by the ld. Collector is not applicable to the appellants' case; that the Collector further held that the duty can be levied twice under the same sub-heading does not appeal to reason; that the Collector also held that arguments of the assessee are not compatible as they contended both that no classification list was required to be filed and that there was no suppression are

compatible reasoning. The Collector also rendered a finding that submission of classification list was the statutory duty of the assessee, and non-submission thereof definitely amounted to suppression is not based on the facts of their case.

8. The ld. Sr. Counsel submitted that no excise duty can be levied on uncut coated and printed labels unless they are goods. In support of this contention, the ld. Sr. Counsel relied on the decision of the Apex Court in the case of Ambalal Sarabhai Enterprises reported in 1989 (43) E.L.T. 214 wherein the Apex Court had held that "the duty of excise is on the manufacture of goods and for an article to be the goods, they must be known in the market as such and they must be capable of being sold in the market as goods. Actual sale is necessary. Use in the captive consumption is not determinative that the article is capable of being sold in the market or known in the market is goods"; that in the case of Bhor Industries Ltd. v. Collector reported in 1989 (40) E.L.T.280, the Apex Court held that, an article shall not be liable to excise duty merely because of its specification in the Tariff Schedule; it is 'goods' known to the market Marketability is an essential ingredient for dutiability"; that in the above decision, the Apex Court held that burden of establishing that particular product is liable to Central Excise duty squarely rests on the department; that the department has produced no material whatsoever, to support the conclusion that such uncut labels are goods; that the Collector in his order has not dealt with this issue at all; that even assuming that such uncut labels are goods they are admittedly made from duty paid Aluminium Foils which fall under the same sub-heading and that duty cannot be levied twice; that in the case of Rotopack reported in 1986 (24) E.L.T. 604, the Tribunal had held that, "the words embossed, cut to shapes, perforated, coated, printed do not sanction duty from one process to another such as can be performed when a plain foil is printed, and then subjected to another visitation if it is cut to shape, and so on and so forth. They only say that whatever may be done to the foil, duty must be paid.

Further, when the foil is printed, coated, a manufacture takes place and new product is born namely, printed/coated foil. But a manufacture to be relevant to Central Excise must be manufacture that brings out goods or a product that has not paid duty before. There must first of all be a duty, meaning thereby a head on description prescribing a duty of excise for such product." Contrary to popular

belief, the judgment of the Supreme Court in the DCM does not say, that "whenever a manufacture is perceived, a produced article must be subject to excise no matter whether it had paid very same duty or not. Therefore, the order of the Collector based on such mistaken belief is set aside and no duty is leviable under Item 27(c) on the Printed Aluminium Foil made from Aluminium Foil which has paid duty under the same Item." Referring to the judgment of the Tribunal, the ld. Sr. Counsel submitted that the Hon'ble Tribunal in the case of Entremonde Polycoates Pvt. Ltd. reported in 1984 (16) E.L.T. 389 had held that, "an article can be said to have been charged to duty twice only when it has paid that particular duty which is leviable on it or its group in the same tariff item or sub-item. There may be two or three articles or groups under one heading and one rate of duty is leviable for that group. But an article once assessed under one group cannot be placed again in that group and made to pay the same duty again the second time. But they can legitimately be recovered on an article when it moves to another group because of change in properties and qualities." Arguing the findings of the Collector holding that Rotopack decision cannot be followed as the appeal has been filed against that by the Department, the ld. Sr.

Counsel submitted that it was the duty of the Collector to follow the said judgment it was reversed. In support of this contention, the ld.Sr. Counsel cited and relied on the judgment of the Bombay High Court in the case of Pieco Electronics reported in 1980 (6) E.L.T. 689 in which the Hon'ble Court had held, "An appeal pending before the Supreme Court against the High Court's order will not make any difference in following the law as it stands on the passing of High Court judgment, because the decision of the Supreme Court will be binding on the parties, if it reverses the High Court's decision;" Further that in the case of Caprihans India Ltd. reported in 1991 (51) E.L.T. 249, the Hon'ble Bombay High Court had held that, "the decision recorded by CEGAT which is final authority under the Act is binding on each and every officer exercising powers under the Excise Act and the Asstt.

Collector in the present case could not ignore the judgment and refuse to grant refund." that the above referred views were followed by the Tribunal in the case of CCE, Bombay v. Pharmaceutical Capsules Laboratory reported in 1986 (25)

E.L.T. 211 wherein the Tribunal had held that, "merely filing appeals against the CEGAT decisions, based on an earlier decision of the Government of India does not affect the binding character of the CEGAT decisions until reversed", that similar views expressed in the decisions reported in 1990 (49) E.L.T. 352 (Cal.) E.L.T. 308 (Tribunal) and 1992 (60) E.L.T. 195 (Mad.).

9. The ld. Counsel submitted that even assuming that the Coated, Printed and Paper Backed Aluminium Foils were goods, the fact remains that they were fully exempt from duty under Notification. No. 155/72 and 183/84; that this contention was raised before the ld. Collector; that the ld. Collector has not dealt with this contention at all.

10. On limitation, the ld. Sr. Counsel submitted that proviso to Section 11A(1) cannot be invoked as no allegation of suppression has been brought out in the show cause notice. Referring to the various decisions of the Tribunal namely, the case of Patna Graphics reported in 1989 (40) E.L.T. 62, Lucas TVS reported in 1989 (41) E.L.T. 267 (T), and Universal Autocrafts reported in 1987 (31) E.L.T. 912, the ld. Sr.

Counsel submitted that the Tribunal had held that, "it is now well settled that in the absence of allegations of suppression, wilful mis-statement and violation of the Act or Rules with an intention to evade payment of Central Excise Duty, the longer period under proviso of Section 11A cannot be invoked" Arguing further, the ld. Sr. Counsel submitted that reliance on the case of Vishwkarma Steel Industries reported in 1986 (26) E.L.T. 169 and Kiran Spinning Mills reported in 1987 (30) E.L.T. 550 by the Collector is mis-conceived because in those cases no classification list had been filed and there was no material to show that the Department was aware of what was being manufactured; that in the present case the Department was fully aware of all necessary facts as is proved by the maintenance of relevant records.

11. The ld. Counsel also submitted that the penalty cannot be imposed on the appellants as the appellants had acted bonafide that there was bonafide belief that ,the Printed, Coated and Paper Backed Aluminium Foils were not goods; that for the subsequent period the Collector of Central Excise (Appeals) has held that

these are not goods and no appeal has been filed by the Department against these findings of the Collector of Central Excise (Appeals). The very fact that his contentions are supported by the judgment of this Tribunal in the case of Rotopack and Entremonde Polycoates Pvt. Ltd. established the bonafide of the appellants. The Sr. Counsel supported his contention by the decision of the Supreme Court in the case of Hindustan Steel and Cement Marketing Co. wherein the Apex Court had held that "no penalty should be imposed for technical or venial breach of the provisions of the Act or where the breach flows from bona fide belief that the offender is not liable to act in the manner prescribed by the statute", that similar view was expressed by the Hon'ble Supreme Court in the case of Cement Marketing Co. of India reported in 1980 (6) E.L.T. 295 wherein the Apex Court had held that, "It is elementary that Section 43 of the Central Sales Tax Act, 1958 providing for imposition of penalty is penal in character and unless the filing of inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. Otherwise the result would be that even if the assessee raises a bonafide contention that a particular item is not includible in the taxable turnover, he will have to pay tax upon it under the apprehension of being held liable for penalty in case his contention was ultimately found by the Court to be not acceptable which could hardly have been the intention of the Legislature." Concluding his submissions, the ld. Sr. Advocate submitted that both on merits and the limitation aspects, there is no case made out by the Department and therefore, prayed that the appeal may be accepted and consequential relief may be granted to the appellants.

12. Sh. Somesh Arora, the ld. JDR appeared for the Respondent and submitted that the appellants have stated that Printed, Coated, and Paper Backed Aluminium Foils were goods and that the process of printing, coating and packing is undoubtedly the process of manufacture. In support of his contention, the ld. DR relied on the ratio of the judgment of the Hon'ble Supreme Court in the case of Laminated Packing (P) Ltd. reported in 1990 (49) E.LT. 326 wherein the Apex Court had held that, "Lamination of duty paid kraft paper with polyethylene resulting in polyethylene laminated kraft paper amounts to manufacture for the purpose of Section 2(f) of the CESA, 1944" and that for arriving on this ruling the Hon'ble Apex Court followed their own decision in the cases reported in 1985 (20)

E.L.T. 179 and 1988 (37) E.L.T. 490 [sic].

13. On double taxation, the ld. DR submitted that in the case of British India Corporation Ltd. v. CCE reported in 1986 (25) E.LT. 727 (T), the Hon'ble Tribunal had held that, "Tariff Item 43 makes it abundantly clear that blended tops containing more than 50% wool are to be taxed under it. In any case there is absolutely no basis for the scare of double taxation in as much as only single stage duty on blended wool tops is being demanded and nothing more. The appellants have also tried to confuse the issue by citing the earlier heavy duty payment on raw materials i.e. synthetic/cellulosic fibre constituents of the blended tops under separate Tariff Items (18 etc.) relating to man-made fibres. Such multi-point taxation of various raw materials, components is a deliberate policy decision which may be open to attack on policy grounds but its legality is not open to question." In this decision, the Hon'ble Tribunal had distinguished the Hon'ble Supreme Court's decision reported in 1985 (20) E.L.T. 202. In the case of Kiran Spinning Mills reported in 1987 (30) E.L.T. 550, the Hon'ble Tribunal held that, "It is only in the event of the products not conforming to the tests laid down in the specific entries for different types of yarn that resort could be had to Item No. 68. This exercise will have to be done after due investigation by the lower authorities to whom the matter is remitted for classification of each of the subject products.

If in respect of any products in question re-classification results in the levy of duty under the same tariff item on which duty has already been paid on any of the constituent yarn, set off of such duty should be allowed in order to avoid double taxation under the same tariff entry." For arriving at this decision, the Hon'ble Tribunal had relied on the ratio of the judgment reported in 1983 (14) E.L.T. 2497.

14. Arguing further, the ld. DR submitted that extended period under proviso 1 to Section 11A of the CESA, 1944 shall be applicable to the present case as was held by the Hon'ble Allahabad High Court in the case of S.P. Gupta and Sons v. UOI reported in 1993 (68) E.L.T. 530 wherein the Hon'ble Allahabad High Court had held that, "The order of the Collector the Respondent No. 3, dated 20-8-1991 is before us and upon a bare perusal thereof, we find that after due consideration of the entire relevant material on record a finding of fact has been recorded by her

to the effect that the petitioner manufactured and cleared the goods without obtaining Central Excise Licence and without complying with the provisions of law with an intent to evade the payment of Central Excise duty. Further, finding is that the party did not disclose the manufacture of excisable goods falling under sub-heading 2107.91 and suppressed the material evidence in respect thereof. On these findings the proviso to Section 11A of the Act envisaging the period of limitation to be five years from the relevant date is surely attracted." The ld. DR argued that the suppression is further established as the appellants did not give any classification list nor did they disclose the detailed process of manufacture of printed labels indicating therein that printed, coated & paper backed foils came into existence. The ld. DR submitted that in view of the fact that certain points were not properly dealt with in the order in original it was a fit case for remand.

15. In the rejoinder, the ld. Sr. Advocate submitted that there was no case for remand in as much as all the points were agitated before the Adjudication Authority. It was further argued by the ld. Sr. Counsel that manufacture is not only requirement for levy of Central Excise duty, what is required is the coming into existence of excisable goods which are capable of being bought and sold. The ld. Counsel argued that to be goods they should be marketable; that the admitted position in the instant case is that uncut printed labels were not marketable; that assuming that two views were possible; that in case two views are possible in any matter, the belief is bonafide and, therefore there was no suppression whatsoever warranting to the extending the period beyond five years.

16. Heard the submissions of both sides and considered them. The first issue agitated before us by the ld. Sr. Counsel was that Printed, Coated and Paper Backed Aluminium Foils manufactured by them were not goods as they were never sold by them as such and that these foils were captively consumed by them in the manufacture of printed labels. We observe that for levy of Central Excise duty, the product must be goods and to be goods, they must be capable of being brought to the market for the purpose of buying and selling and the product so known to the market. A lot of case law was cited on what is manufactured goods and on dutiability, marketability and the Trade and common parlance test.

17. The first issue is whether printing, coating and backing with paper can be called a process of manufacture and printed, coated and paper backed Aluminium Foils can be called as manufactured goods. From the order of the Collector, we find that the process of Coating, Printing and Paper Backing the Bare Aluminium Foils, the process has been considered as a process of manufacture on the ground that Coated, Printed and Paper Backed Aluminium Foils are definitely different from the Bare Aluminium Foils.

18. In the case of U.O.I. v. Delhi Cloth and General Mills Co. Ltd. reported in 1977 (1) E.L.T. (J 199), Hon'ble Supreme Court had held : "14. The other branch of Mr. Pathak's argument is that even if it be held that the respondents do not manufacture 'refined oil' as is known to the market, they must be held to manufacture some kind of 'non-essential vegetable oil' by applying to the raw material purchased by them, the processes of neutralisation by alkali and bleaching by activated earth and/or carbon. According to the ld. Counsel 'manufacture' is complete as soon as by the application of one or more processes, the raw material undergoes some change. To say this is to equate 'processing to manufacture' and for this we can find no warrant in law. The word 'manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance, however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases Vol. 26, from an American Judgment. The passage runs thus :- 'Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use.' 19. We also observe that to become goods, an article must be something which can ordinarily come to the market to be bought and sold. This ruling was given by the Apex Court in the case of Union Carbide India Ltd. v. U.O.I. & Ors reported in 1986 (24) E.L.T. 169 (SC). Examining the facts of the case before us in the light of the above rulings, we find that Printing and Coating and Backing with Paper of Bare Aluminium Foils brings into existence a new product namely, Printed, Coated and Paper Backed Aluminium Foils. We also observe that these Printed, Coated and Paper Backed Aluminium Foils are

distinct from the bare Aluminium Poils in character and use.

20. It is well settled position in law that every process does not bring into existence a new product with distinct name, character and use, but some processes are such as definitely bring into existence a new product with distinct name, character and use.

21. We observe that similar issues were agitated before the Tribunal in the case of Sivastik Packaging, v. CCE, Bombay reported in 1986 (23) E.L.T. 217, wherein this Tribunal had examined various issues and rendered their findings as under :- "(a) Manufacture under Central Excise means manufacture of an excisable goods and manufacture not always endowed with power to charge duty under following terms (Paras 17 to 21) :- * * * * * * * (b) Duty leviable only once either at plain or printed stage. Duty paid on aluminium foils under Item 27(c) - When printed not again liable to duty under same sub-item in the following terms (Paras 4 to 7): (c) Change in item or sub-item necessary for attracting fresh duty levy in the following terms (para 23): 22. As against the above, specific decision of the Tribunal on Aluminium Foils, the Hon'ble Supreme Court examined identical issue in the case of Laminated Packings (P) Ltd. reported in 1990 (49) E.L.T.326. The issue examined and the rulings of the Apex Court are as under : (a) Whether Lamination of duty paid kraft paper with polyethylene resulting in polyethylene laminated kraft paper amounts to manufacture holding that :- "Lamination, indisputably by the well settled principles of excise law, amounts to 'manufacture'. This question in our opinion, is settled by the decisions of this Court. Reference may be made to the decision of this Court in Empire Industries Ltd. & Ors v. U.O.I. 1985 (20) E.L.T. 179 (SC). Reference may also be made to the decision of this Court in Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co. 1988 (37) E.L.T. 480. We are, therefore, of the opinion that by process of lamination of kraft paper with polyethylene different goods come into being. Laminated kraft paper is distinct, separate and different goods known in the market as such from the kraft paper." (b) Whether Polyethylene laminated kraft paper produced out of lamination of duty paid kraft paper with polyethylene, liable to excise duty in the following terms :- "5. Counsel for the appellant sought to contend that the kraft paper was duty paid goods and there was no change in the essential characteristic or the user of the

paper after lamination. The fact that the duty has been paid on the kraft paper is irrelevant for consideration of the same before us. If duty has been paid, then benefit or credit for the duty paid would be available to the appellant under Rule 56A of the Central Excise Rules, 1944." (c) Whether goods could be charged twice to duty if they are classified under the same entry as under :- "6. The further contention urged on behalf of the appellant that the goods belong to the same entry, the goods are different identifiable goods, known as such in the market. If that is so, the manufacture occurs and if manufacture takes place, it is dutiable. 'Manufacture' is bringing into being goods as known in the excise laws, that is to say, known in the market having distinct, separate and identifiable function. On this score, in our opinion, there is sufficient evidence. If that is the position, then the appellant was liable to pay duty. We are, therefore clearly of the opinion that the order of the CEGAT impugned in this appeal does not contain any error. The appeal therefore fails and is accordingly dismissed." 23. It was also agitated before us that the goods were captively consumed and were not sold as such. We observe that in para 18 of the report of the case of Union Carbide reported in 1978 (2) E.L.T. (J 1), the Apex Court had held :- "18. Section 3 of the Central Excises and Salt Act, 1944 levies excise duty on manufacture or production of goods, not on their sale." Similar view was taken by the Hon'ble Supreme Court in the case of Delhi Cloth and General Mills reported in AIR 1963 SC 791. In that case it was held that, "a substance produced at an intermediate stage is not put in the market for sale would not make any difference and would be immaterial for its liability to duty." We further observe that this Tribunal had more or less expressed similar views as is apparent from the judgment in the case of Indian Oil Corporation (Assam Oil Division) v. Collector of Central Excise, Calcutta reported in 1984 (15) E.L.T.456 (T). The relevant para is reproduced below :- "10. We have given sufficient attention to all the authorities quoted by the Assam Oil Co. to argue that the condensate was not goods or that since it was not removed it would not be excisable or that it was not marketable or was not understood to be marketable goods and all other rulings. But the quotations are largely irrelevant. For one thing it must be remembered that rules 9 and 49 were amended in 1982 so as to make goods liable to duty even if they are not removed. These amendments took retrospective effect from 1944 and are deemed to have been coeval with the

Central Excise Rules. The Assam Oil Co. claimed that the goods are not marketable and they are not known as motor spirit. They overlook the fact that the goods were not marketable simply because they did not market them but used it themselves. This is not the same thing as not being marketable. The fact that it was marketable is proved by its utility for the purpose to which it was put. The fact that condensate did not have specifications of motor spirit under Indian Standards specifications will not make it less a motor spirit assessable under Item 6; we cannot go by Indian Standards for determining assessability of the Central Excise except for very limited purposes as where there is doubt whether a product or an article is what it is claimed to be or whether it is of the quality that Indian standards has laid down standards for. It is for this reason that this Institution has a scheme for stamping goods placed on the market as a guarantee that the product stamped conforms to specifications laid down by it, for the safety or satisfaction of customers. It does not mean that the goods not so stamped are not goods of the same generic description. Indeed, there are goods that bear no Indian Standards marks. But whether stamped or not, all the goods are equally liable to Central Excise levy." 24. We also get support of the above even from the Hon'ble Kerala High Court judgment in the case of The Western India Plywood Ltd. v. U.O.I reported in 1982 (10) E.L.T. 447 (Ker.) in which the Hon'ble Kerala High Court had held :- "9. The question next arises whether for goods to be excisable as falling in a particular item in Schedule I of the Act, it is necessary that the goods must be actually put in the market. This question is of importance in deciding whether an intermediate manufacture of another product is also excisable. As already pointed out the taxable event is the manufacture of goods and not the sale, despatch or disposal of goods. Therefore, whenever goods which satisfy the description in any one of the items in Schedule I of the Act, come into existence in the course of manufacture, such goods would become excisable. However, care must be taken to verify whether the intermediate product so coming into existence is known to the market, the consumers or the commercial community. If the intermediate product is not known to the market or the commercial community, it cannot be regarded as goods. The various items in Schedule one cannot go by the scientific or technical meaning of the expressions involved; one must necessarily go by the popular meaning or the meaning in common parlance; i.e. the meaning attached to those

expressions by those who deal with them in the commercial sense. (See Ramavtar v. Asstt. Sales Tax Officer -AIR 1961 SC 1325) and Union of India v. G.W.F Mills (AIR 1977 SC 1548). Therefore an intermediate product in order to be excisable as a product mentioned in any item in Schedule I of the Act must be product known to the market or commercial community; of course, the manufacturing process of that product must be complete. In other words, if the intermediate product which comes into existence is as such a complete product known to the market it is excisable. But if something more is to be done on the product or with reference to the product to bring it into a form known to the commercial community, it cannot be treated as excisable. These principles have been well established by the Supreme Court in a number of decided cases." 25. Moreover, the table annexed to Notification No. 155/72, dated 15-6-1972 under which the appellants have claimed exemption from duty on Coated, Printed and Backed with Paper or other re-inforcing material reads :----------Sl.

Descriptions ConditionsNo.1.

2.

3.----------1.

Aluminium Foils:- If manufactured by a manufacturer (i) Coated printed and out of the aluminium foils, on backed with paper or which the appropriate duty of ex- other reinforcing cise or the additional duty under material; or Section 2A of the Indian Tariff Act (ii) Coated or printed 1934 (32 of 1934) has already been or backed with paper Paid and the total quantity of such or other reinforcing foils taken for the Process of material.

manufacture in one or more of his factories, in any financial year does The above goes out to show that Coating, Printing and Backing with paper has been accepted as a process of manufacture for the purpose of this exemption Notification. Needless to say that manufacture has a definite connotation for the purpose of duty, once the goods are considered to be manufactured they become liable to duty.

26 From the above citations and case laws and other material we observe that the Tribunal had dealt with Aluminium Foils which is a specific issue also before us and the Apex Court had dealt with identical issues in respect of lamination of kraft paper, we find that the conclusion of the Tribunal was altogether different from the one delivered by the Hon'ble Supreme Court. It may be mentioned on the issue of manufacture, the Tribunal had held that, Coating, Printing and Paper Backing amounted to manufacture. Having regard to the rulings of the Hon'ble Supreme Court and other materials as discussed above, we hold as under :- (a) Printing, Coating and Paper Backing of Aluminium Foils amount to manufacture for the purpose of levy of Central Excise Duty.

(b) Printed, Coated and Paper Backed aluminium Foils produced out of duty paid Bare Aluminium Foils shall be liable to excise duty.

(c) Though Aluminium Foils and Printed, Coated and Paper Backed Aluminium Foils find mention against the same tariff sub-item, the goods being different identifiable known as such in the market. The fact that duty has been paid on Aluminium Foils under the same Tariff Entry is irrelevant for consideration of the issues before us. If duty has been paid on Bare Aluminium Foils then Modvat credit or benefit of set off of duty under Rule 56A of the Central Excise Rules, 1944 would be available.

27. Another issue that was agitated before us was that even if Coated, Printed and Paper Backed Aluminium Foils were taken to be goods leviable to duty under Central Excises and Salt Act, 1944, under Tariff Item 27(c)/27 (7) of the then Central Excise Tariff, this product was exempt under Entry No. 1 of Notification No. 155/72, dated 15-6-1972 and Entry No. 15 of Notification No. 183/84-C.E., dated 1-8-1984 which clearly specifies that "if duty leviable under the Central Excises and Salt Act, 1944 or the additional duty leviable under the Customs Tariff Act, 1975 on Aluminium Foils had already been paid and if the total quantity of such Aluminium Foils does not exceed 5 MT during the preceding financial year. It was therefore argued that since Aluminium Foils had borne payment of excise duty under Tariff Item 27(c)/27(7), no further duty could be charged on Coated, Printed and Paper Backed Aluminium Foils. It was also, argued that the appellants

had maintained detailed records of the use of Bare Aluminium Foils and that a copy of the statement prepared on the basis of data on records prescribed under Trade Notice No. 135 (MP)/AL/ B(5)/1972, dated 4-7-1972 for consumption of Aluminium Foils was submitted to the authorities in the case; that the admitted position was that the weight of Bare Aluminium Foils used in the manufacture of Coated, Printed and Paper Backed Aluminium Foils never exceeded 5 MT during the preceding financial year and, therefore even if Coated, Printed and Paper Backed Aluminium Foils are treated to be goods chargeable to duty, the same were exempted in the Notification referred to above. The Sr. Counsel for the appellants submitted that, the ld. Collector nowhere discussed this aspect. On a perusal of records, we find that this issue was taken up before the ld. Collector.

On perusal of the impugned order we observe that this issue was not at all discussed by the Collector in his order. However, the issue being that of exemption under Notification even if not discussed by the Collector can be taken into consideration by the Tribunal. Having regard to the facts that the two notifications exempted Coated, Printed and Paper Backed Aluminium Foils if the total quantity of Bare Aluminium Foils used for manufacture of the above item did not exceed 5 MT during the preceding financial year. We also find that the condition of the notification was complied with by the appellant as the figures given in the statements submitted before the Adjudicating Authority have not been controverted. In view of these exemption Notifications, we hold that no duty was chargeable on the Printed, Coated and Paper Backed Aluminium Foils as the condition prescribed in the Notification was fully met by the manufacturers.

28. On the question of limitation, it was argued by the appellants, that there was no allegation of suppression of any information, wilful mis-statement, or contravention of any provisions with the intention to evade payment of duty; that there was no question of filing the classification lists in view of the fact that the said Coated, Printed and Paper Backed Aluminium Foils cannot be considered as a manufactured product under Tariff Item 27(c)/27(7); that the classification lists were not submitted because there was bonafide belief that no duty was chargeable on them; that Printed, Coated and Paper Backed Aluminium Foils were not goods and that further, it was argued that in their case as the weight of bare

Aluminium Foils did not exceed 5 MT during the preceding financial year, that assuming that even if Coated, Printed Paper Backed Aluminium Foils were goods chargeable to duty they were exempt and hence no classification list was filed; that no intention to evade payment of duty can be attributed to them. It was pleaded by the ld. Sr. Counsel that in this view of the matter, penalty could not be imposed on them. On the question of allegation about suppression or wilful mis-statement, a lot of case law was cited by both sides. From the facts as illustrated above, we find that there was no intention to evade payment of duty and as the Hon'ble Supreme Court in the case of Cosmic Dye Chemical reported in 1995 (75) E.L.T. 721 had held that for purpose of extension of the time beyond six months under the proviso of Section 11A, the intention to evade payment of duty should be proved, is not proved in the case before us. We, therefore hold that extended period under proviso to Section 11A, cannot be invoked in the present case.

29. On the question of imposition of penalty, the ld. Sr. Counsel for the appellant relied on the decision of the Hon'ble Supreme Court in the' case of Cement Marketing Co. of India v. Assistant Commissioner of Sales Tax reported in 1980 (6) E.L.T. 295 wherein the Hon'ble Supreme Court had held, "even if the minimum penalty is prescribed, the authority competent to impose a penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute." Reliance was also placed on the Hon'ble Supreme Court's judgment in the case of Hindustan Steel Limited reported in 1978 (2) E.L.T. Q159) wherein, the Apex Court had held, "An order imposing penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the

provisions of the Act or where the breach flows from a bonafide belief that the offender not liable to act in the manner prescribed by the statute." Having regard to all the facts of the case and the Rulings of the Apex Court we hold that in the circumstances no penalty could be imposed on the appellants in this case and we order accordingly.

30. In view of the above findings the appeal is allowed and the impugned order is set aside. Consequential relief, if any shall be admissible, in accordance with law.