

**(2003) 11 BOM CK 0042**

**In the Bombay High Court**

**Case No : Writ Petition No. 2268 of 1991**

Kalyani Packaging Industry

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

**Date of Decision : 11-11-2003**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 37B

**Citation :** (2004) 4 BomCR 210 : (2004) 113 ECR 25 : (2004) 164 ELT 12

**Hon'ble Judges :** R.M.S. Khandeparkar, J;J.P. Devadhar, J

**Bench :** Division Bench

**Advocate :** Manoj Sanklecha and H.N. Vakil, D.D. Mehta, instructed by, Mulla and Mulla and C.B. and Co, for the Appellant; D.S. Salvi, Sr. Panel and Suresh Kumar, for the Respondent

## Judgement

R.M.S. Khandeparkar, J.—The grievance of the Petitioners relates to refusal on the part of the Respondents to permit the Petitioners to avail exemption from payment of duty under Notification No. 193/86,, hereinafter called as "the said notification", in relation to the product manufactured by the Petitioners, even though the exemption under the said notification in similar circumstances was allowed to be availed by one of the competitors of the petitioners, besides there being a circular issued by the board on 15th May, 1995 clarifying availability of exemption from payment of duty under similar notification to the products manufactured by utilising the raw materials which had availed the benefit of exemption, from payment of duty under an exemption notification like the one bearing No. 193/86.

2. Few facts relevant for the decision are that:

The Petitioners are engaged in the business of packing Tea on job work basis for M/s. Sapat Packaging Industry (P) Ltd. M/s. Sapat Agro Pack Industry (P) Limited purchases tea classified under sub-heading 0902.19 of Central Excise Tariff Act, 1985 from the garden on payment of duty. Thereafter, Sapat Agro Pack Industry (P) Limited blends the tea and sell the same to M/s. Sapat Packaging Industry

(P) Limited without any payment of duty claiming benefit of Notification No. 425/86. M/s. Sapat Packaging Industry (P) Limited sends the tea so purchased to the Petitioner along with packing material. The Petitioners pack the tea in packets of different sizes and in terms of the Central Excise Tariff Act, a packet of less than 25 gms is classifiable under sub-heading 0902.11 whereas the packet of more than 25 gms but less than 20 Kgs is classifiable under sub-heading 0902.12. The duty payable on these two different classes of product also differs. Under Exemption Notification No. 193/86 dated 11th March, 1986 duty payable on goods falling under sub-heading 0902.11 is exempted in excess of 44 paise per Kg. if the duty payable on tea, falling under sub-heading 0902.19 and used in the manufacture of the said goods, has already been paid and no credit of such duty paid is availed of under Rule 57A of the Central Excise Rules, 1944. The said notification further provides for exemption in respect of tea falling under sub-heading 0902.12 in excess of Rs. 1.10 per Kg., if the duty paid on tea, falling under sub-heading No. 0902.19 and used in the manufacture of the said goods has already been paid and no credit of such duty is availed of under Rule 57A of the Central Excise Rules, 1944. The said Notification further provides that the exemption contained under the said notification shall not apply if in respect of such tea, falling under sub-heading No. 0902.19 of the said schedule., the exemption contained in the Notification No. 217/86-C.E., dated 2nd April, 1986 has been availed of. The Petitioners had cleared their products claiming exemption under the said notification. On or about 28th February, 1991 a show cause notice came to be issued to the Petitioners as to why the benefit under the said notification should not be withdrawn as the Petitioners product is not entitled to claim exemption under the said notification. Consequently, excise duty to the extent of Rs. 10,24,099/- was sought to be demanded for the period from August, 1990 to January, 1991 in exercise of powers u/s 11A of the Central Excise Act, 1944, as also the penalty for non payment of the said excise duty.

3. The ground for taking action u/s 11A of the said Act as disclosed from the show cause notice was that the product manufactured by the Petitioner's did not constitute the goods which had manufactured by utilising the raw materials which had already paid the excise duty thereon. Consequent to the filing of the reply and hearing of the Petitioners, the concerned authority by its order dated 26th April, 1991 while rejecting all the contention of the Petitioners, held that the Petitioners were not entitled for exemption under the said notification and they were liable to pay the duty in entirety and therefore, confirmed the demand for the payment of duty to the extent of Rs. 10,24,009/- as was demanded under the show cause notice dated 4th March, 1991. Hence, this petition.

4. The impugned order is sought to be challenged on four grounds. Firstly, that the circular dated 15th May, 1995 clearly explains that in cases where the inputs are exempted from the excise duty, the exemption under the said notification to the finished products cannot be denied, even though the notification granting exemption for such product provides that exemption would be available in case the duty is paid on the inputs. The contention is that the expression "duty paid

on inputs" would also include goods subjected to NIL duty. Secondly, in the said notification, Clause (1) clearly provides that if the duty payable product is used in the manufacture of the goods, then such final product would be entitled to avail exemption under the said notification. Applying the law laid down by the Apex Court in Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, and bearing in mind the said circular dated 15th May, 1995, the department could not deny the Petitioners the benefit of exemption from the payment of duty under the said notification in relation to the product manufactured by the Petitioners. The contention is that such product would also include the product manufactured by utilising the raw material subjected to nil duty. Thirdly, it is the contention of the Petitioners that similar benefit has been allowed to one of the competitors of the Petitioners and in that connection attention is drawn to the decision of the Assistant Collector of Central Excise and Customs, Nasik II Division dated 20th June, 1994 in the matter of M/s. Ideal Agro Pack Industries, Panchavati, Nasik 3. Fourthly, it is sought to be contended that since the said notification debars the manufacturer from claiming exemption under the said notification only in a case where the exemption is availed under Notification No. 217/86, Clause (1) cannot be restricted to products manufactured with the help of raw materials subjected to the actual payment of duty, besides the incidence of payment of duty should relate to all the stages through which raw material has gone through, in the case in hand being from the stage of the leaves in the garden.

5. Undoubtedly circular dated 15th May, 1995 states that the exemption from payment of duty available to finished products should not be denied on the ground that the inputs utilized in such final products were exempted from payment of excise duty and that such inputs are to be classified as the goods which were subjected to payment of duty even though actually no duty was paid on such goods, while clarifying that exemption of such inputs from payment of duty, would amount to payment of nil duty, and therefore, they are to be considered on par with the goods which were subjected to payment of duty while considering the claim of the manufacturer for exemption from payment of duty in relation to the final product. Considering the same, the Petitioners would be justified in contending that merely because the raw materials which were received by the Petitioners were subjected to payment of nil duty, that by itself would not be justification for refusal of benefit under the said notification to the Petitioners. However, the Apex Court in Dhiren Chemical Industries case (supra) had an occasion to deal with the matter on the subject of interpretation of the phrase "on which appropriate amount of duty of excise have already been paid" and further to lay down the law in that regard, which is quite relevant and material for the decision in the matter in hand.

6. After referring to its earlier decision in Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., and M/s. Motiram Tolaram and Another Vs. The Union of India and Another, , it was held by the Apex Court that the view taken in Usha Martin Industries case was not a correct view and it was ruled that :

"an exemption notification that uses the said phrase applies to goods which have been made from duty paid material - In the said phrase, due emphasis must be given to the words "has already been paid". For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid and has been paid at the "appropriate" or correct rate. Unless the manufacturer has paid, the correct amount of excise duty, he is not entitled to the benefit of the exemption notification."

"where the raw material is not liable to excise duty or such duty is nil, no excise duty is, as a matter of fact, paid upon it. To goods made out of such material the notification will not apply."

"The notification is intended to give relief against the cascading effect of excise duty - on the raw material and again on the goods made therefrom. There is no cascading effect when no excise duty is payable upon the raw material and the hardship that the notification seeks to alleviate does not arise."

7. Apparently, the law on the point as to whether the goods which were not liable to the excise duty or when duty payable was nil duty could be considered to be the goods on which duty was paid, has been clearly settled by the said decision of the Apex Court and it has been held that, the goods which have not been subjected to payment of excise duty and even those subjected to nil duty cannot be held to be the goods which have already paid the duty, in order to allow manufacturer to claim benefit of exemption notification like the one under consideration.

8. Undoubtedly the Apex Court, as rightly pointed by the learned Advocate for the Petitioners, has observed in the said judgment that regardless of the interpretation that the Apex Court has given to the relevant phrase, i.e. "on which the appropriate amount of duty has already been paid" it was observed that, "if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase given by the board would be binding upon the Revenue". Referring to the said observation it was sought to be contended that since there was a circular issued by the board on 15th May, 1995 clarifying that even the goods which were subjected to nil duty could be considered as the goods on which duty has been paid, for the purpose of allowing the benefit of the exemption notification to the manufacturer regarding its final product, it is to be seen that the law on the point of interpretation of the relevant phrase has been clearly settled by the Apex Court in the said decision. Being so the observations made by the Apex Court while laying down the said law cannot be construed to defeat the very law laid down by the Apex Court. It is apparent that the Apex Court, while laying down the said law had taken note of the fact that in some cases the Board has clarified the said expression in different context and had given different interpretation and in those cases, it would not be fair and just to allow the revenue to take a contrary view consequent to the law laid down by the Apex Court, and in that

view of the matter the said observation was made. In any case, the said observation cannot come to the help of the Petitioners in the case in hand, as the circular to which the attention has been drawn is dated 15th May, 1995 which was issued about four years after passing the impugned order. The impugned order was passed on 26th April, 1991.

9. The learned Advocate for the Petitioners thereupon sought to draw attention to Para 4 of the circular dated 15th May, 1995 which relate to the instructions issued by the Board on 6th December, 1980. The said instructions dated 6th December, 1980 read thus :

"I am directed that a doubt has been raised whether the benefit of concession of duty in respect of the four specified dyes in Notification No. 180/61, dated 23-11-1961 would be available when they are made from primary dyes which have availed full exemption of duty under the Notification 71/78, dated 1-3-1978 since superseded by Notification No. 80/80, dated 19-6-1980. The doubt has arisen in this case on account of the fact that while the primary dyes have availed full exemption of duty. Notification 180/61 allows the exemption to the specified secondary dyes only when the primary dyes are such "on which excise duty or countervailing customs duty has already been paid". The matter was referred to the Ministry of Law who have opined that the specified secondary dyes manufactured from primary dyes in this case are entitled to exemption under Notification No. 180/61 even though the primary dyes had availed full exemption of duty under Notification No. 71/78 or 80/80. An extract of the opinion of the Ministry of Law is enclosed. The Board has accepted the opinion of the Ministry of Law."

10. Bare reading of the said instructions dated 6th December, 1980 would disclose that they refer to a specific case in relation to specified dyes and Notification No. 180/61, dated 23rd November, 1961. The instructions do not relate to the interpretation of the phrase which was subject matter of the decision of the Apex Court nor the instructions are general in nature. The instructions only clarify the doubt which had arisen in the case arising under a particular notification in relation to the specified dyes and the clarification also relates specifically to the said doubt in relation to the specified dyes. In other words, there were no general instructions or circular pertaining to interpretation of the phrase which was subject matter of the decision of the Apex Court in Dhiren Chemical Industries case. Being so under no stretch of imagination the circular dated 15th May, 1995 read with the instructions dated 6th December, 1980 can be said to be binding upon the Respondents to grant benefit to the Petitioners under exemption Notification No. 193/86.

11. The contention, that the restriction against availability of exemption under the said notification is only in cases where the manufacturer has availed exemption under Notification No. 217/86 and that the exemption would be available even though the supplier of raw material to the Petitioners had not paid duty by availing the exemption, considering the fact that the product was

subjected to payment of duty at the time the same was taken out from the garden and the Petitioners, therefore, would be entitled to claim exemption under the said notification, cannot be accepted. As regards the exemption Notification No. 217/86 is concerned, undoubtedly Clause (2) of Notification No. 193/86 provides that the exemption contained in the said notification would not be available in respect of the tea falling under sub-heading 0902.19 when the exemption under Notification No. 217/86 has been availed of. However, merely because Clause (2) of the said notification excludes the availability of benefit of the said notification to those who have taken benefit under Notification No. 217/86 that would not help the Petitioners to interpret Clause (1) and (2) of the said notification in a manner to mean that the payment of duty on the inputs could relate to any stage through which such inputs have passed through. If one reads Clause (1) and (2) of the said notification, the same clearly state that, "..... used in manufacture of the said goods, has already paid .....". In other words, the expression clearly refers to the goods which are supplied to the manufacturer by the immediate supplier. It does not relate to any other goods. Undoubtedly in case of the Petitioners, the goods supplied to them were not in the original form in which the supplier had obtained the same from the garden and they were supplied to the Petitioners after blending. The expression "has already paid" refers to the goods which formed the raw material for manufacture of the final product in respect of which the exemption is sought for under the said notification. The same does not relate to the goods in any form other than the one which has been supplied to the manufacturer as the raw material. There is no scope for interpretation of Clause (1) & (2) of the schedule of the said notification as is sought to be argued on behalf of the Petitioners and in case the same is accepted, it would virtually amount to reading down Clause (1) and (2) of the schedule of the said notification in a manner in which it has not been provided for in the schedule.

12. Undoubtedly, the department in one of the cases namely M/s. Ideal Agro pack Industries, had allowed the benefit under said notification on the ground that the original tea from which the blended tea had been manufactured had already paid duty under sub-heading 0902.19 and that, therefore, there was no loss of revenue on account of grant of exemption to the final product. Undoubtedly the said observation was based on interpretation of the Clause (1) and (2) of the schedule of the said notification in a manner as has been argued on behalf of the Petitioners. However, as noted above such a interpretation cannot be accepted. At the same time, merely because by way of wrong interpretation of the said clause benefit was allowed to a competitor of the Petitioners that would not entitle the Petitioners to claim benefit under the said notification as there is no question of acquiring any right in illegality or to claim equality in the illegality. Apparently, any such interpretation would virtually amount to legislating upon the said notification and, therefore, the contention in that regard on behalf of the Petitioners is to be rejected.

13. Our attention was also drawn by the learned Advocate for the Petitioners to

the decision of the Apex Court in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., , while contending that the proper interpretation to be placed on the expression "paid" is "ought to have been paid" and not that "actually paid". The said decision is of the bench of two judges whereas the decision in Dhiren Chemical Industries case is a decision of Constitutional Bench, besides being a decision delivered at later point of time and considering the same, the law laid down in Dhiren Chemical Industries case, is binding upon this Court.

14. For the reasons stated above the petition fails and is here by dismissed. Rule is discharged. The Petitioners shall be liable to pay the amount of duty of Rs. 10,24,009/- within the period of eight weeks from today. The Petitioners shall not be liable to pay interest on the said amount. Considering that law as was in force consequent to the decision of the Apex Court in Elphinstone Spinning & Weaving Mills Co. Ltd. as well as in Usha Martin Industries case was different than which has been settled by the Constitutional Bench of the Apex Court in Dhiren Chemical Industries case, and the same was delivered on 12th December, 2001, we are not inclined to grant any interest on the said amount. However, in case the Petitioners fail to pay the said amount within the period of eight weeks from today, the Petitioners shall be liable to pay interest on the said amount on expiry of the period of eight weeks at the rate of 10% per annum. The observations that the Respondents shall be liable to pay interest on expiry of period of eight weeks shall not be construed as restrain against the department from taking appropriate action for recovery of amount in case of failure on the part of the Petitioners to pay the same within the stipulated period.

15. The petition accordingly stands disposed of. There shall be no order as to costs.