SUPREME COURT OF INDIA

Nestle India Ltd.

Vs.

Commnr. of Central Excise, Chandigarh

C.A.No. 5064 of 2004

(S.H. Kapadia and H.L. Dattu JJ.)

25.02.2009

ORDER

1. Leave granted in S.L.P.(C) No.20726/2004. A short question which arises in this batch of Civil Appeals is: whether the process undertaken by the appellant (Assessee) resulting in emergence of "intermixture of vitamins" comes under the definition of the word "manufacture" in Section 2(f) of the *Central Excise Act, 1944* read with Note 11 to Chapter 29 of the *Central Excise Tariff 1997-98* dealing with Organic Chemicals? To answer the above question, we quote herein-below Section 2(f) of the said 1944 Act, which reads as follows: "(f) "manufacture" includes any process - (i) incidental or ancillary to the completion of a manufactured product; (ii) which is specified in relation to any goods in the section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or (iii) which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer; And the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;" We also quote herein-below Note 11 to Chapter 29, which deals with Organic Chemicals: "In relation to products of this Chapter, labelling or relabelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture." Assessee is engaged in the manufacture of various food products in their factory at Moga. One of the food products manufactured in their factory is infant foods which are sold under brand names such as Lactogen and Cerelac. The infant foods are chargeable to nil rate of duty. For the purpose of manufacture of infant products, assessee buys various vitamins like Vitamin A, Vitamin D and Vitamin E etc. on payment of excise duty from the manufacturers of the vitamins. Thereafter, depending upon the requirement of the particular vitamin content to be present in the finished product, various vitamins are mixed in a pre-determined ratio with the help of electro mechanical devices by effecting a uniform dispersion of liquid, semi solid or solid ingredients of a mixture by means of mechanical agitation. After the bought out vitamins are

mixed in the above mentioned manner, the item so obtained is called "intermixture of vitamins". According to the assessee, the item so obtained is stored by them in plastic drums/aluminium bottles in their factory. In order to identify the particular intermixture of vitamins, which are used in particular grade of the finished product, a sticker is also affixed on the drum/aluminium bottle containing the "intermixture of vitamins" giving details regarding the content of the drum/aluminium bottle. These intermixtures of vitamins are used in the manufacture of infant foods. According to the assessee, the said intermixtures of vitamins are not saleable in the market as such and it is of no use to any other infant food manufacturer whosoever. After investigations, a show cause notice was issued by the Department on 7th August, 2001 making demand for duty for the period July, 1996 to December, 2000. It was alleged that the activity of mixing the various bought out vitamins and making the intermixure of vitamins constituted 'manufacture' and, therefore, excise duty was required to be paid on the said intermixture of vitamins manufactured and captively consumed by the assessee. In the show cause notice, it was, inter lia, alleged that when different vitamins are mixed in certain proportion, then, the original property of particular ingredient is lost and the same gets mixed with the properties of other ingredients with the result that a new and different product having a distinct name, character and use emerges which is known as 'intermixture of vitamins'. In the show cause notice, it was further alleged that the assessee had affixed labels on containers/drums with the help of tags which fact also established that the process of manufacture is involved while preparing the 'intermixture of vitamins' for the infant foods. In this connection, the Department places reliance on the aforesaid Note 11 to Chapter 29. In reply to the show cause notice, assessee contended that Vitamin A, Vitamin D and Vitamin E etc. are purchased by them; they are mixed in a pre-determined ratio with the help of electro mechanical device but both prior to the activity of mixing and even thereafter the bought out vitamins remain the vitamins. Assessee contended that individual Vitamin A, Vitamin D and Vitamin E etc. do not undergo any change whatsoever in their chemical or physical properties after mixing and that they retain their individual chemical and physical properties after being mixed with other vitamins and, consequently, it did not constitute 'manufacture', both conceptually as well as in terms of Section 2(f) of the said 1944 Act. As regards the applicability of Note 11 to Chapter 29, assessee contended that the activity of labelling of containers or adoption of any other treatment to render the product marketable referred to in Note 11 has no application to the facts of the present case. According to the assessee, the vitamins bought by them fell under Heading 29. 36. According to the assessee, the test of manufacture, as laid down in Section 2(f), is not satisfied in the present case. According to the assessee, the intermixture of vitamins is not capable of being bought and sold in the market as such. According to the assessee, tying of a sticker on the containers containing intermixture of vitamins did not amount to labelling within the meaning of Note 11 to Chapter 29. According to the assessee, they have not undertaken any activity of repacking from bulk packs to retail packs. According to the assessee, in order to attract Note 11, mere labelling was not sufficient unless the same was either preceded or succeeded by the activity of repacking from bulk packs to retail packs. According to the assessee, therefore, Note 11 is not applicable to the facts of the present case. The assessee further submitted that Section 2(f) of the 1944 Act gives an extended meaning to the word 'manufacture' and, therefore, the said section needs to be read strictly. The submissions made by the assessee were rejected by the adjudicating

Authority who confirmed the demand. However, the adjudicating Authority granted the benefit of MODVAT credit. Aggrieved by the decision, the matter was carried in appeal to the Tribunal whose decision is the subject matter of Civil Appeals Nos.5064/2004, 323/2005, 1859/2005, 3632/2005, 7608-7611/2005 and 909/2006 filed by the assessee. Incidentally, it may be mentioned that Civil Appeal arising out of S.L.P.(C) No.20726/2004 is filed by the Department against the decision of the Tribunal which has held that there was no suppression of material facts and, therefore, the Department was not entitled to invoke the extended period of limitation. Having gone through the impugned judgment of the Tribunal, we find that the basic point which arises for determination in this batch of Civil Appeals filed by the assessee concerns "excisability". At the outset, it may be stated that the decision of the Tribunal impugned by the assessee is cryptic. It does not deal with the points which are specifically raised by the assessee in its appeals filed before the Tribunal. Therefore, we need to categorise each of these points: (a) Whether on the facts and circumstances of this case, the activity undertaken by the assessee constitutes 'manufacture' conceptually/on first principles? In this connection, we may clarify that the Tribunal was required to consider the twin tests of manufacture and marketability which it has failed to do. "(b) Whether the activity undertaken by the assessee stands covered by the provisions of Section 2(f) of 1944 Act read with Note 11 to Chapter 29?" In this connection, we may record the relevant portion of para 8 of the finding of the Tribunal, which reads as follows: "As per the last portion of this Note, any treatment which renders the product marketable to the consumer shall amount to manufacture. From the perusal of this Note, it does not flow that the last portion of the Note will be applicable only to a product which prior to the adoption of the treatment was in a non-marketable state. That may be one of the situation but not the only situation. Even if a product is by itself marketable and the assessee undertakes some treatment on the said product which renders it marketable in some other form, the treatment would be covered by the phrase "any other treatment to render the product marketable to the consumer". In the present case, as stated above, Vitamin A, Vitamin D and Vitamin E etc. were undoubtedly bought out items. They were undoubtedly marketable. These vitamins were converted into a recipe which according to the assessee was not marketable and, therefore, Note 11 is not applicable. According to the assessee, no evidence has been led by the Department to show that the said recipe is marketable. On this aspect also there is no finding of the Tribunal. One more aspect needs to be mentioned. In the context of above controversy, the Tribunal will also have to decide the meaning of the word "consumer" in Note 11. Since the above questions have not been decided by the Tribunal in proper perspective, we set aside the impugned judgment of the Tribunal and we remit the matter to the Tribunal for de novo disposal in accordance with law. Having said this, one aspect remains to be answered. The Tribunal has set aside the demand for the period prior to 1.3.1997. This finding has not been assailed by the Department in its Civil Appeal. Therefore, though we are remitting the matter to the Tribunal, this finding shall remain concluded. On the question as to whether the Department was entitled to invoke the extended period of limitation, we are in agreement with the view expressed by the Tribunal that the extended period of limitation was not invokable in this case for two reasons. Firstly, the assessee has been clearing the said intermixture of vitamins for last more than twenty years prior to the issuance of show cause notice. In fact, during adjudication, the assessee offered demonstration to the Department. The Department did not avail of that opportunity to find out whether there is manufacture in

the first instance, conceptually. Secondly, as held in the judgment of this Court in the case of *Padmini Products Vs. Collector of C.Ex.*[1], as well as in the case of *Collector of Central Excise Vs. Chemphar Drugs & Liniments*[2], extended period of limitation is applicable only when there is some positive act other than mere inaction or failure on the part of the manufacturer. There must be conscious or deliberate withholding of information by the manufacturer to invoke larger period of limitation. In view of the aforesaid two decisions, we see no infirmity in the decision rendered by the Tribunal on the question of extended period of limitation. Accordingly, Civil Appeal arising from S.L.P.(C) No.20726/2004 filed by the Department stands dismissed. Subject to what is stated, the assessee's Civil Appeals are allowed as directed herein-above. The matters are remitted to the Tribunal who will decide the matter in accordance with law and uninfluenced by its earlier impugned judgment. There shall be no order as to costs.

[1]*1989 (43) ELT 195*
[2]*1989 (40) ELT 276*