IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. E/1497/2010

(Arising out of Order-in-Appeal No. PKS/23/BEL/2010 dated 26.5.2010 passed by Commissioner of Central Excise (Appeals), Mumbai-III)

S. Narendrakumar & Co. **Appellant**

Vs.

Commissioner of Central Excise, Mumbai-III **Respondent**

Appearance:

Shri S.R. Nair, Advocate, for appellant
Shri S. Hasija, Superintendent (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 13.11.2018
Date of Decision: 13.11.2018

ORDER No. **A/88305/2018**

Per: Sanjiv Srivastava

Appeal is directed against the Order in Appeal No PKS/23/BEL/2010 dated 26.05.2010 of the Commissioner Central Excise (Appeals) Mumbai III dismissing the appeal filed by the Appellants against order in original No KDN/288/SSB 2008-09 dated 25.02.2009 of the Assistant Commissioner, Kunjur

Division Mumbai III Commissionerate. By the sai order Assistant Commissioner held as follows:

"1. I classify the assessee's product "Henna Powder" under chapter heading 330491 Powders, whether or not compressed & under chapter sub-heading 33049190 as "other" and direct the assessee to pay the Central Excise Duty (Cenvat Duty) as per the rate mentioned at Sr No 66 in General Exemption No 52B issued vide Notification No 4/2006-CE dated 01.03.2006 as amended.

2. I confirm the total demand of as per the show cause notices dated 03.04.2008 & 23.09.2008 of Rs 4,33,528/- (Rupees Four Lakhs Thirty Three Thousand Five Hundred and Twenty Eight only) comprises of Basic Excise Duty Rs 4,20,900/- + Education Cess Rs 8419/- + Secondary Higher Education Cess Rs 4209/- for the clearance of the said product from the period from April 2007 to August 2008 under Section 11A of Central Excise Act, 1944 & order the recovery of the same.

3. I direct the assessee to pay the above amount with the interest as per the provisions of Section 11AB of the Central Excise Act, 1944.

4. I impose Penalty equivalent to duty amount confirmed i.e. Rs 4,33,528/- (Rupees Four Lakhs Thirty Three Thousand Five Hundred and Twenty Eight only)as per the provisions of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944."

2.1 Appellants are engaged in repacking of Henna Powder purchased in bulk in unit packages of 25 gms, 50 gms and 100 gms, and clearing the same. They were not discharging the duty payable on the clearance of Henna Powder cleared by them in unit pack.

2.2 Two Show Cause Notices dated 3rd April, 2008 & 23rd September 2008 respectively were issued to them proposing to classify the goods cleared by them under Heading 33049190 and demanding the duty at applicable rate as per Sr No 66 Notification No 4/2006-CE dated 01.03.2006 as amended. First Show Cause Notice demanded Central Excise Duty of Rs 156846 + Education Cess of Rs 3138 + secondary and Higher Education Cess of Rs 1569 = Rs 161583/- for the period from April 2007 to September 2007. Second Show Cause Notice demanded Central Excise Duty of Rs 264024.28 + Education Cess of Rs 5280.49 + secondary and Higher Education Cess of Rs 2640.24 = Rs 271945/- for the period from April 2007 to September 2007. Both the show cause notices demanded interest under Section 11AB and also proposed imposition of penalty under Rule 25 read with section 11AC of the Central Excise Act, 1944.

2.3 After considering the submissions made by the appellants, adjudicating authority decided both the show cause notices as per the order referred in para 1, supra.

2.4 Aggrieved appellants filed appeal before Commissioner (Appeal).

2.5 Aggrieved by the Commissioner (Appeal) order dismissing the appeal, appellants have filed this appeal before tribunal.

3.1 We have heard Shri S R Nair, Advocate for the appellants and Shri Sanjay Hasija, Superintendent (Authorized Representative) for the revenue.

3.2 Arguing for the Appellants learned Advocate submitted that-

i. In the appellants own case the classification of the same product in same packing has been done by the revenue under CETH 3305 for the period June 2006 to March 2007. In the present which are for the subsequent period the classification has been done by the lower authorities under heading 3304.

ii. The processes undertaken by them do not amount to manufacture, as there is no Section/ Chapter note to chapter 14 of the tariff which specifies that process of packing, repacking from bulk pack to retail pack of Henna Powder amounts to manufacture.

iii. Circular No 256/90/96 dated 30.10.1996 accepted the decision of tribunal in case of Henna Export Corporation and also clarified that Henna

Powder Cleared in unit containers shall be classified under Chapter Heading No 33.05 provided the said unit containers specifically indicate that the powder is to be issued as hair dye.

iv. Though Henna Powder is cleared by them in unit pack, the pack nowhere indicates that the powder has to be used as hair dye.

v. The pack shows that it is to be applied on hands.

vi. Thus the Henna Powder cleared by them merits classification under Chapter 14 and not 33 as held by the authorities below.

vii. Chapter Heading 1404 nowhere restricts its scope to bulk packs only.

viii. They rely on the decision in case of Shubham Goldiee Masala Pvt Ltd [2017 (5) TMI 1286 CESTAT Allahabad in their support.

ix. It is well settled law that the goods should be classified under that heading which is more specific, [LML Limited [1997 (94) ELT 699 (T)]

x. Thus the classification as made by them under heading 1404 is correct and demand cannot be sustained under heading 33049190.

xi. Since the issue involved is in relation to classification penalty should not have been imposed as has been held in Surelia Engg Works

[2007 (209) ELT 49 (T-Ahd)], Bharat Bijlee Ltd [2009 (234) ELT 652 (T-Mum)]

xii. Since no duty has been short paid demand of interest cannot be sustained.

3.3 Arguing for the revenue learned Authorized Representative while reiterating the order of adjudicating authority and Commissioner (Appeal) submitted that-

i. Goods in the present case are cleared in unit packs and are used as beauty product for application on the hands. This is quite evident from the packing itself. Hence they merit classification under heading No 33049190 as has been held by the lower authorities.

ii. Since the manner in which the Henna Powder is cleared, it is evident that the same is not meant for dyeing or tanning. Since the single dash entry preceding the three dash entry Henna and four dash entry Henna Powder is *"raw vegetable materials of a kind used primarily in dyeing or tanning",* the same could not have been classified under chapter 14.

iii. As the product in form manner in which it is cleared, is classifiable under Chapter 33 of Central Excise Tariff, the process of packing/ repacking from bulk to retail packs shall amount to manufacture as per chapter Note 5 to Chapter 33.

iv. There is no res-judicata applicable in the matters relating to classification. The classification is to be done as per the terms of heading and relevant chapter and section Notes. The claim of the appellants that for the past period the goods have been classified by the revenue under heading 3305, cannot be determining factor for the classification of the same goods for all the subsequent periods.

v. In view of the above he requested that the appeal be dismissed.

4.1 We have considered the submissions made in appeal and during the course of argument.

4.2 The issue for consideration is primarily in respect of the classification of Henna Powder cleared in unit packs of sizes 25/50/100 gms.

4.3 For ease of reference the concerned tariff headings with relevant Chapter Notes are reproduced below:

SECTION II

VEGETABLE PRODUCTS

NOTES

1. .....
2. In this Section the expression, "unit container" means a container, whether large or small (for

example, tin, can, box, jar, bottle, bag or carton, drum, barrel or canister) designed to hold a predetermined quantity or number.

CHAPTER 14

Vegetable plaiting materials; vegetable products not elsewhere specified or included

NOTES

1404	-	VEGETABLE PRODUCTS NOT ELSEWHERE SPECIFIED OR INCLUDED
140410	-	Raw vegetables of a kind used primarily in dyeing or tanning
	---	Henna
14041011	----	Henna Leaves
14041019	----	Henna Powder
14041020	---	Red sandalwood powder

SECTION VI

PRODUCTS OF THE CHEMICAL OR ALLIED INDUSTRIES

NOTES

3. …….

4. Subject to Note 1 above, goods classifiable in heading 3004, 3005, 3006, 3212, 3303, 3304, 3305, 3306, 3307, 3506, 3707 or 3808 by reason of being put up in measured doses or for retail sale are to be classified in those headings and in no other heading of this Schedule.

CHAPTER 33

Essential oils and resinoids, perfumery, cosmetic or toilet preparations

NOTES

1. …..

2.

3. Headings 3303 to 3307 apply, inter alia, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use.

4. .....

5. In relation to products of headings 3303, 3304 and 3305, conversion of powder into tablets, labelling or relabelling of containers intended for consumers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the products marketable to the consumer, shall be construed as 'manufacture'.

3304		BE A UT Y O R M A KE - UP P R E PAR AT I O N S AN D PREPARATIONS FOR THE CARE OF THE SKIN (OTHER THAN MEDICAMENTS), INCLUDING SUNSCREEN OR SUNTAN PREPARATIONS; MANICURE OR PEDICURE PREPARATIONS
3304 10 00	-	
3304 20 00	-	
3304 30 00	-	
	-	Other:
3304 91	--	Powders, whether or not compressed:
3304 91 10	---	Face powders
3304 91 20	---	Talcum powders
3304 91 90	---	Other
3304 99	--	Other:

4.4 HSN General Explanatory Notes to Chapter 3304 reads as under-

"Preparations (e.g. varnish) and unmixed products (i.e. unperformed powdered talc, fuller earth, acetone, alum) which are suitable for other uses in addition to those

described above are classified in these headings only when they are:

(a) In packings of a kind sold to the consumer and put up with labels, literature or other indications that they are for use as perfumery, cosmetics or toilet preparations, or as room deodorizers; or

(b) Put up in a form clearly specialized to such use (e.g. nail varnish put up in small bottles furnished with the brush required for applying the varnish)."

4.5 In case of Henna Export Corporation 1993 (67) ELT 907 (T) it was held as follows:

"7. *In respect of Henna powder the Department seeks to classify it under Heading 33.05 CETA, 1985 on the same basis of the above two Chapter Notes, whereas the appellants herein claim classification of the product under Heading 14.01 which covers vegetable plaiting materials; vegetable products not elsewhere specified or included. The appellants have also relied upon Chapter Note 6 to Chapter 33 to say that Henna powder falls outside the purview of Heading 33.05 by applying the principle of Nosciture a Nociis to the interpretation of the Chapter Note 6 of Chapter 33 which reads as follows :-*

Chapter Note 6 - *Heading No. 33.05 applies, inter alia, to the following products; brilliantines, perfumed hair oils, hair lotions. Pomades and creams, hair dyes (in whatever form), shampoos, whether or not containing soap or organic surface active agents.*

Examining this contention, it is seen that Chapter Note 6 clearly indicates the group of products which is covered thereunder and whether Henna powder has any of the aspect or features common to the items in the group will have to be found out by applying the principles of

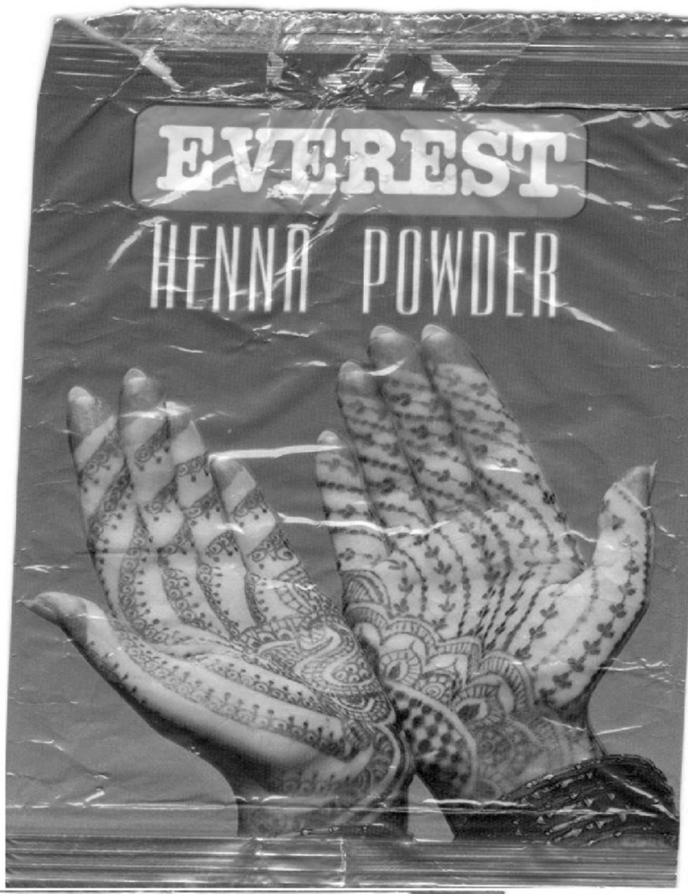
Nosciture a Sociis. A similar exercise, we note, was done by the Tribunal while interpretating Chapter Note 4 of Chapter 4 of the CETA mats decision in the case of Collector of Central Excise v. Frozen Foods Pvt. Ltd., reported in 1992 (59) E.L.T. 279 (Tribunal) where also the heading was similarly worded using the term inter alia. The Tribunal found that in interpreting the Chapter Note, the principles of Nosciture a Sociis as laid down by the Supreme Court in the case of Rohit Pulp and Paper Mills Ltd. v. Collector of Central Excise, reported in 1990 (47) E.L.T. 491 (S.C.) can be applied. The products mentioned in Chapter Note 6 are all preparation of a kind used exclusively on the hair. Brilliantine is a cosmetic hair dressing, so also Pomade is a scented ointment for the hair, and the shampoo is usually a liquid or powder preparation for washing the hair. HSN Explanatory Notes under Heading 33.05 also say that preparations applied to hair on parts of the human body other than scalp are excluded, whereas under the HSN Explanatory Note under Heading 14.04 covering vegetable products not elsewhere specified or included, it is stated under a raw vegetable materials of a kind used primarily in dyeing or tanning that such materials may be untreated, dried, ground or powdered and the more important are inter alia given at Serial No. (6) as Stems, Stalks, leaves and flowers: steins, stalks and leaves of woad, sumach, "young fustic", holly, myrtle, sunflower, henna, reseda, indigo plant: leaves of lentiscus (mastic); flowers of safflower (bastard saffron) and dyer's greenwood (Genistra tinctoria; woadwaxen). In the Book titled "Textiles Fiber to Fabric - Sixth Edition to Bernard P. Corbman at Page 202 under heading Natural Dyes, Henna is mentioned as one of the principal vegetable dyes. In these circumstances, there is sufficient material *to hold that Henna powder in bulk as produced by the appellants herein will be more appropriately classifiable under 14.01 CETA, 1985. However, in respect of Henna powder in unit packings, a perusal of the literature relating to Instructions for use of Red Rose Henna there is a clear indication for its use as a hair dye as follows :-*

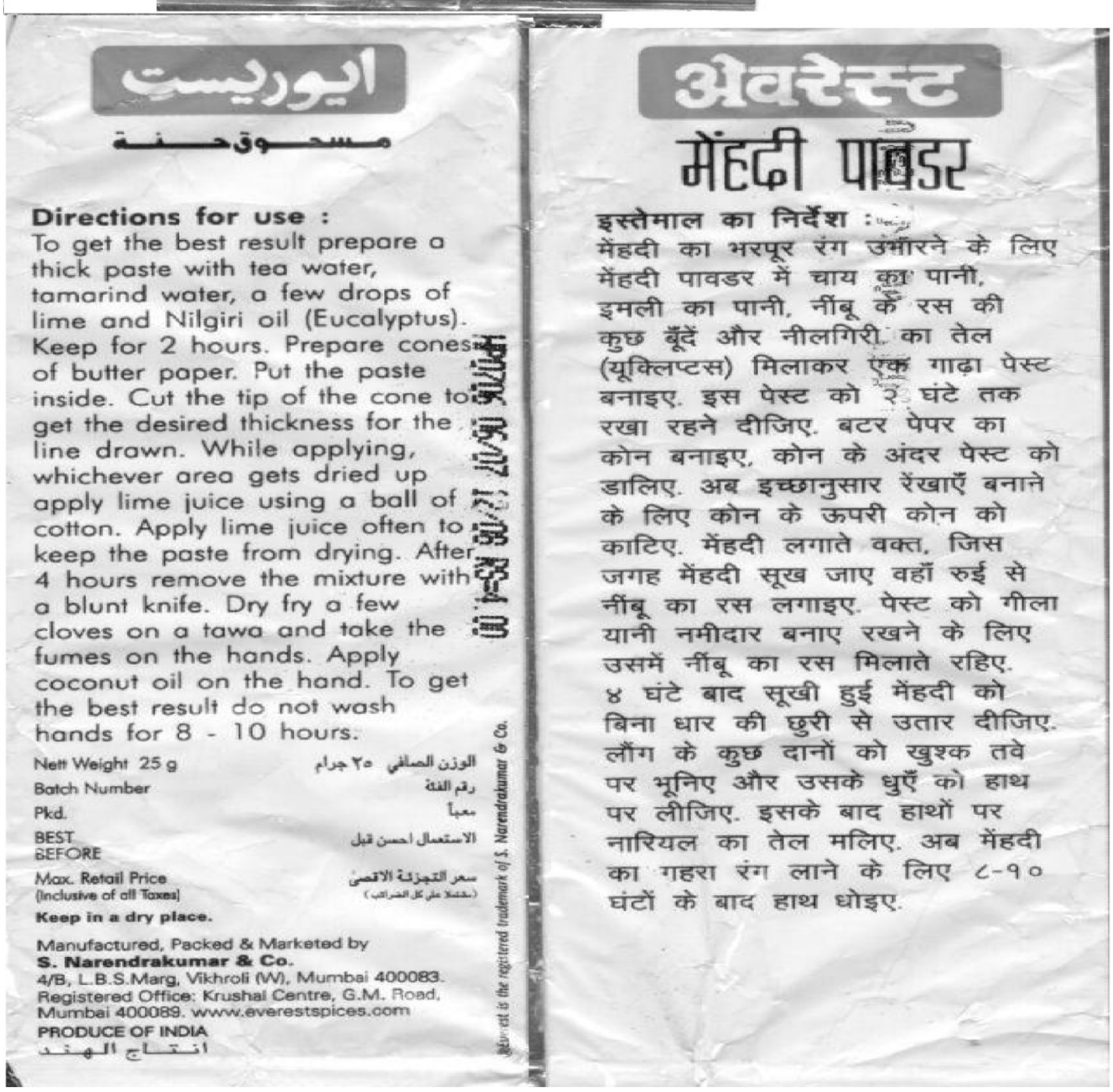
RED ROSE HENNA FOR HAIR DYE

Open the packet and take powder according to your requirement. Make paste by mixing water, curd, tea or coffee or egg in a bowl. Make paste one hour before its application. It should be applied gently up to the roots of hair. Wash the hair when Henna is fully dried. It is a good hair conditioner. It gives body and texture to hair and dispel heat and have soothing effect.

From the above, it will be evident that Henna powder in such unit packings will be covered by Chapter Notes 2 and 4 of Chapter 33 and hence such Henna powder will fall for classification under Heading 33.05 Central Excise Tariff Act, 1985. In respect of Rose herbal Shikakai Powder, the goods are classifiable under Heading 33.05 Central Excise Tariff Act, 1985. The appeal is disposed of in the above terms."

4.6 In terms of the above Section/ Chapter Note, HSN Explanatory Notes and the terms of heading the product in dispute needs to be examined. The packing and details of the product are reproduced below:


EVEREST
HENNA POWDER


ايوريست
مسحوق حنة
Directions for use :
To get the best result prepare a thick paste with tea water, tamarind water, a few drops of lime and Nilgiri oil (Eucalyptus). Keep for 2 hours. Prepare cones of butter paper. Put the paste inside. Cut the tip of the cone to get the desired thickness for the line drawn. While applying, whichever area gets dried up apply lime juice using a ball of cotton. Apply lime juice often to keep the paste from drying. After 4 hours remove the mixture with a blunt knife. Dry fry a few cloves on a tawa and take the fumes on the hands. Apply coconut oil on the hand. To get the best result do not wash hands for 8 - 10 hours.
Nett Weight 25 g
الوزن الصافي ٢٥ جرام
Batch Number
رقم الفئة
Pkd.
معبأ
BEST BEFORE
الاستعمال احسن قبل
Max. Retail Price (Inclusive of all Taxes)
سعر التجزئة الاقصى
Keep in a dry place.
Manufactured, Packed & Marketed by
S. Narendrakumar & Co.
4/B, L.B.S.Marg, Vikhroli (W), Mumbai 400083.
Registered Office: Krushal Centre, G.M. Road, Mumbai 400089. www.everestspices.com
PRODUCE OF INDIA
انتاج الهند
Everest is the registered trademark of S. Narendrakumar & Co.
अेवरेस्ट
मेंहदी पावडर
इस्तेमाल का निर्देश :
मेंहदी का भरपूर रंग उभारने के लिए मेंहदी पावडर में चाय का पानी, इमली का पानी, नींबू के रस की कुछ बूँदें और नीलगिरी का तेल (यूक्लिप्टस) मिलाकर एक गाढ़ा पेस्ट बनाइए. इस पेस्ट को २ घंटे तक रखा रहने दीजिए. बटर पेपर का कोन बनाइए, कोन के अंदर पेस्ट को डालिए. अब इच्छानुसार रेंखाएँ बनाने के लिए कोन के ऊपरी कोन को काटिए. मेंहदी लगाते वक्त, जिस जगह मेंहदी सूख जाए वहाँ रुई से नींबू का रस लगाइए. पेस्ट को गीला यानी नमीदार बनाए रखने के लिए उसमें नींबू का रस मिलाते रहिए. ४ घंटे बाद सूखी हुई मेंहदी को बिना धार की छुरी से उतार दीजिए. लौंग के कुछ दानों को खुश्क तवे पर भूनिए और उसके धुएँ को हाथ पर लीजिए. इसके बाद हाथों पर नारियल का तेल मलिए. अब मेंहदी का गहरा रंग लाने के लिए ८-१० घंटों के बाद हाथ धोइए.

4.7 From the facts as indicated on the packing of the product it is quite evident that product is not used for the purpose of dyeing or tanning. Hence classification of the product under CETH 1404 is ruled out. Now coming to the Chapter 33 and examining the product with reference to terms of heading under the said Chapter. From the description of the product as it appears on the packing it is quite evident the product is a beauty or make up preparation for application on the hands. In terms of Section Note 4 to Section VI, such beauty or make up preparations are to be classified only under the heading 3304 of tariff and not anywhere else in the Schedule. In terms of chapter note 3 to Chapter 33, also these goods have to be classified as per the use as indicated on the packing material. It is fact that though the Henna Powder in unit container could be used for colouring the hairs also, but the packing describes the use of the product being cleared as beauty or makeup preparation for decoration of the hands. In view of the specific description and use as is mentioned on the packing the classification under heading 3305 cannot be accepted. In the case of Henna Export Corporation referred, supra, the Henna Powder was described to be used for the purpose of colouring hairs and hence classified under the said heading 3305. In the present case when the same is used as beauty or make up preparation the same gets classified under heading 3304. Even in terms of HSN Explanatory Notes for Chapter Heading 3304, the test for treating the products as preparation classifiable under heading 3304 are satisfied. CBEC Circular 256/90/96-CX dated 30.10.1996 also supports the classification of the said product under Chapter 33 only. The said circular reads as follows:

"The matter has since been examined in the Board. The Board has observed that the CEGAT Special Bench-C, New Delhi in its order No. 27/93-C, dated 11.2.93 in Appeal No. E/ 1666/92-C in case of Henna Export Corporation v. CCE "1993 (67) E.L.T. 907 (Tribunal)" has held that Henna powder in bulk is classifiable under Chapter Heading 14.01 of the Central Excise Tariff Act, 1985 and that in unit packings with indication to its use as a hair dye is classifiable under Heading 33.05 of the CET. The Appeal filed by the party before the Hon'ble Supreme Court against the said order of the CEGAT has been dismissed vide its order dated 1.5.95.

The Board has accepted the above said judgment of the CEGAT. Therefore, the classification of the said goods. i.e. Henna powder be decided in the light of the above said judgment of the CEGAT.".

4.8 Thus we are of the view that the goods in the forma and manner in which it is cleared is classifiable under Heading 33049190 as has been held by the revenue. Since the product gets classified under Chapter 33, in terms of Chapter Note 5, *"conversion of* *powder into tablets, labelling or relabelling of containers intended for consumers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the products marketable to the consumer, shall be construed as 'manufacture'."* Thus the processes undertaken by the appellant also amount to manufacture.

4.9 Since we uphold the classification as adjudged by the department the demand of duty under Section 11A is also upheld and so is interest under section 11AB.

5.1 Now coming to the penalty equivalent to duty imposed under Rule 25 of Central excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944, we find the demand in the present case is made within the normal period of limitation as provided by Section 11A (1).

5.2 Not even a whisper or iota of mention of ingredients mentioned for invoking extended period of limitation as per proviso to section 11A(1) is there in any of the two show cause notices, or adjudication order. Since the ingredients as prescribed for invoking extended period of limitation are identical to those for invoking Section 11AC for imposition of penalty, we do not find any justification to sustain the penalty imposed. Hon'ble Supreme Court has in case of

Rajasthan Spinning Mills [2009 (238) ELT 3 (SC)] held as follows:

*"**14.** Sub-section 1A of Section 11A provides that in case the person in default to whom the notice is given under the proviso to sub-section 1 makes payment of duty in full or in part as may be accepted by him, together with interest under Section 11AB and penalty equal to 25% of the accepted amount of duty within thirty days of the date of receipt of notice then the proceeding against him would be deemed to be conclusive (without prejudice to the provisions of Sections 9, 9A and 9AA) as provided in the proviso to sub-section 2 of Section 11A. Sub-section 1A and the proviso to sub-section 2 were inserted with effect from July 13, 2006 and, therefore, have no application to the periods relevant to the two appeals.*

***15.** Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of duty before the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub section 2B will have no application.*

***16.** The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :*

*[**11AC. Penalty for short-levy or non-levy of duty in certain cases**.- where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so *increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -*

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate* *wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.*

20. *At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :*

“2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the “Act’) inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act’) taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the “Rules’) and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI’s case (supra) and not in Dilip Shroff’s case (supra). Therefore, the matter was referred to a larger Bench.”

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.........".

21. *From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.*

22. *There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :*

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section

11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. *The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.*

24. *It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision."*

5.3 In view of the decision of the Hon'ble Apex Court we set aside the penalty equivalent to the duty demanded imposed on the appellants under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of The Central Excise Act, 1944.

6.1 In view of the discussions as above we allow the appeal of the appellant to the extent of setting aside the penalty imposed. The demand of duty under Section 11A along with interest under Section 11AB of Central excise Act, 1944 is upheld.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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