

Collector of Central Excise Vs. Colour Chem. Limited

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-12-1996

Reported in : (1997)(90)ELT514TriDel

Appellant : Collector of Central Excise

Respondent : Colour Chem. Limited

Judgement :

1. These are two appeals filed by the Collector of Central Excise, Bombay against two orders-in-appeal passed by the Collector of Central Excise (Appeals), Bombay whereby he had allowed two appeals filed before him by the present respondents holding that the products in question were classifiable under TI-68 of the erstwhile tariff and not 15A ibid. The respondents had paid Central Excise duty under Item 15A and recovered the same from their customers. Subsequently, as a result of the reclassification of the product under Tariff Item 68, they had claimed refund of Central Excise duty amount to Rs. 6,39,495.10 and Rs. 10,44,777.33. The Assistant Collector while sanctioning the refund took note of the fact that the refund that was becoming payable to the claimants as a result of the reclassification was of duty paid by them but recovered from their clients and consequently the amount of refund would add to the assessable value of the goods. In addition, in the former case where the refund claim claimed was Rs. 6,39,495.10, the Assistant Collector held that part of the refund claim was barred by limitation as it had been filed beyond a period of six months from the date of payment of duty. Accordingly, refund amount of Rs. 3,35,199.17 and Rs.

9,67,386.42 were sanctioned by him in the two cases. In the second case the amount of refund which was withheld was Rs. 77,390.91 which was entirely on account of the inclusion of the amount of refund held to have been admissible being added to the assessable value of the goods.

2. Aggrieved with these orders, the respondents filed two appeals before the Collector of Central Excise, Bombay who held that as far as the first appeal is concerned the finding of the Assistant Collector that the claim was partly time barred was not correct as the appellant had paid duty for the said period also under protest and hence time bar was not applicable. On merits, he held that there was no power to refuse the refund on the ground that duty has been or may have been recovered by the manufacturer from the customers. The present appeals have challenged the correctness of the decision taken by the Collector (Appeals) in both the appeals filed before him.

3. When the appeals came up for hearing, Shri Gopal Singh, the respondent Company's Representative submitted a letter from them wherein they had stated that they understand the Constitution Bench consisting of nine Honourable Judges of the Supreme Court had concluded final hearing in various matters regarding refunds and unjust enrichment and the final judgment is expected shortly. They have, therefore, requested that pending the availability of the judgment in the said case, the present appeals may be adjourned. They had also made a request for transfer of the appeal to the Bombay Bench of the Tribunal.

4. Shri T.R. Malik, learned Senior Departmental Representative submitted by way of reply to the plea made by the respondents for adjournment of the case that the issue involved in the appeals is not unjust enrichment and hence the Supreme Court decision in the refund cases need not be awaited. The effect of refund on the assessable value of goods has been considered in a number of decisions by the Courts and the Tribunal. He referred to a recent decision of the Tribunal, Final Order Nos. 3513-15 dated 30-10-1996 in Appeal Nos. E/340/87-A and E/1404-1405/96-A in Digvijay Cement Co. Limited v. C.C.E., Bombay, reported in 1997 (18) RLT 99 (Tribunal) wherein the issue has been exhaustively dealt with taking note of several various decisions.

5. We have considered the submissions. We turn down the request for transfer of the appeals to the Bombay Bench as well as for adjournment of the case to a later date to await the Supreme Court judgment in the unjust enrichment matter. We agree with Shri Malik that the present issue is different and relates to the includibility of the amount of refund in the assessable value of goods in terms of the provisions of Section 4(4)(d)(ii) of Central Excises Act, 1944. When duty originally assessed and paid is recovered by the manufacturer from his customers and later on refund is allowed on account of reassessment, such amount of refund will depress the amount of duty that is excludible from the cum-duty value or price of the goods already recovered from the customers. The effect of refund on the assessable value of excisable goods has been considered by the Karnataka High Court in *Union of India v. Alembic Glass Industries Limited* - 1992

(61) E.L.T.

193. The full Bench of that Court was answering the following questions of law referred to them in the writ appeal :-

1. Whether it is correct to hold that as per the 2nd part of the explanation to Section 4(4)(d)(ii) of the Act only the effective rate of duty can be deducted from the normal price and not that element of duty which is refunded by the Department, the benefit of which has not been passed on to the buyer?

2. Whether as per Clause (ii) of the 2nd part of the explanation to Section 4(4)(d)(ii) of the Act, the refunded amount can be included in the normal price, in cases where the higher rate of duty is initially assessed and collected from the customers and subsequently on a proper computation of value as per Section 4, the value of goods gets reduced resulting in refund of duty, the benefit of such refund is not passed on to buyer?

3. Where full duty is levied on exempted goods and subsequently as a result of applying the exemption notification, the excess duty is refunded, whether as per Clause (i) of the 2nd part of the explanation to Section 4(4)(d)(ii) of the Act, such excess amount (i.e., the difference between the full amount of duty and the duty payable at reduced rate) the benefit of which is not passed on to buyers becomes

part of the normal price?

1. As per the second part of the explanation to Section 4(4)(d)(ii) of the Act, the effective rate of duty has to be deducted not only from the normal price but also from any amount charged and collected as excise duty, but subsequently refunded, if the benefit of refund has not been passed on to the buyer.
2. As per Clause (ii) of the second part of the explanation to Section 4(4)(d)(ii) of the Act, in cases where the higher rate of duty is initially assessed and collected from the customers by a manufacturer and paid to the Government and subsequently on a proper computation the excise duty gets reduced and becomes refundable to the manufacturer, excise duty on the amount so becoming refundable is leviable, if the benefit of such refund is not passed on to the buyer.
3. Where full duty is levied on exempted goods, and subsequently as a result of applying the exemption notification, the excess duty is refundable, such excess amount the benefit of which is not passed on to the buyers becomes part of the normal price, in view of the explanation to Section 4(4)(d)(ii) of the Act.

The aforesaid position will not be confined to cases where reassessment is by giving effect to an exemption notification and is equally applicable to a case of the present type where the reassessment was as a result of reclassification of the goods attracting a lower rate of duty.

7. Respectfully following the said judgment we agree with the contention raised in the appeals that the amount of refund arising from the reassessment of duty on the reclassification of the goods in question would add to their price or cum-duty value and any refund actually payable to the respondents has to be in accordance with such reassessment with reference to the altered higher value. As regards the contention raised in the appeal about the time barred nature of the claim in the first appeal, we agree with the findings of the Collector (Appeals) that since duty had been paid under protest, the time bar factor will not be applicable. The plea raised in the appeal that the protest had become extinguished with the approval of the price list under TI-15A on 16-8-1977 and, therefore, the stamping of gate passes with the endorsement tender protest has no relevance, is not valid.

Nothing turns on the fact that the classification/price list was approved under Tariff Item 15A as such classification had been challenged by them and the alternative classification under Item 68 was ultimately accepted. The impugned order is upheld to this limited extent. However, the appeal is allowed on the main question of reworking the refund amount by taking into account the effect of refund on the assessable value by directing that the inclusion of the refund amount will have to be in the price of cum-duty value and not the assessable value itself.

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