Transmissions Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-10-1997

Reported in : (1999)(114)ELT286Tri(Mum.)bai

Appellant : Transmissions Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. This is an appeal filed by the appellants against the decision of the Commissioner of Central Excise II, Mumbai made in the captioned Order-in-Original dated 13-10-1995, holding that the appellants were not entitled to the benefit of Notification 178/88, as the appellants have used materials which is other than the materials specified in the notification. The ld. Commissioner levied a duty of Rs. 1,27,97,636.91.

She also imposed a personal penalty of Rs. 10,00,000/- on the assessee.

2. In order to appreciate the entire matter it is better to look into the facts as indicated in the impugned order. The assessee had manufactured copper zinc base alloys and copper tin base alloys falling under Chapter 74 of Central Excise Tariff and availed of the exemption provided under Notification 178/88, dated 13-5-1988. In terms of the said notification exemption from the levy of duty to copper products indicated in the said notification is available only when inputs under chapter 74 were used for manufacture of such products. Classification lists were filed by the assessee regularly indicating the description of the goods produced. In

the list at column 10 regarding remarks it is mentioned as 'manufactured out of copper scrap on which duty leviable thereon is paid'. The department issued a show cause notice dated 31-8-1994, in consequence of which the impugned order has been made, indicated proposals among other things - (a) to levy duty on goods indicated in various classification lists; and (b) exemption claimed by the assessee under Notification No. 178/88 dated 13-5-1988 should not be disallowed.

3. At the outset it is relevant to mention here that the adjudicating authority previously issued a show cause notice dated 23-12-1991 charging the appellants that they had alleged to have contravened provisions of Rules 173B/173F/173G(1) read with Rule 9(1) of Central Excise Rules, 1944 in-as-much they had inter alia wilfully misdeclared and suppressed the fact that the copper scrap used as inputs for the manufacture of copper base alloys was clearly recognisable as non duty paid and fraudulently availed the exemption under Notification No.178/88 dated, 13-5-1988. After perusing the reply and after verification by the officers of the department, the then Collector dropped the proceedings initiated under the said show cause notice dated 23-12-1991 by his order V-Adj (ch. 74-15-196/91/706), dated 10-4-1992.

4. In the instant matter, the appellants gave elaborate reply dated 23-9-1994 and also gave written submissions. The ld. Adjudicating authority in the impugned order formulated the following two questions for consideration : Whether the products of copper alloy cleared vide the said classification lists are entitled to the benefit of exemption under Notification 178/88? Whether the assessee has correctly declared the goods while clearing the said products in the classification lists covered by the show cause notice? 5. The learned adjudicating authority had held that it was possible to manufacture the copper alloy by products of the kind cleared by the appellants i.e. ingots/rods by using the copper scrap and scrap of alloys of copper itself without the addition of fresh zinc or tin or any other metal. It was further held that if the conditions of Notification 178/88 was not observed strictly the said notification itself would be rendered redundant. Hence, it was held that the benefit of exemption would be available to all the products of Chapter 74 whether or not they are manufactured from inputs of Chapter 74.

(Emphasis supplied). This certainly makes the Notification No. 178/88 inoperative. As far as copper zinc base alloys and copper tin base alloys declared in the classification lists are concerned, it was held that 'copper zinc base alloys', copper tin base alloys etc. by itself did not declare that zinc and tin were added afresh to the nature of copper.

6. As far as the suppression of facts is concerned, it was held that at no stage the assessee had declared the fact of use of tin and zinc. The department was led to believe that the copper zinc base alloy products and copper tin base alloy products which were being cleared were entitled to the benefit of Notification 178/88.

7. Shri Rohan Shah, the ld. advocate, appearing for the appellants assailed the finding of the adjudicating authority. He argued that the appellants were filing classification list regularly claiming exemption right from 1989. Since they had been accepted how can there be any suppression of facts. He also argued that the appellants factory was subject to visit not only by the Range staff for routine check but also by Preventive and Audit staff.

8. As far as the Notification No. 178/88 is concerned, he aruged that it was not disputed that the inputs were made from copper and articles falling within chapter 74 in terms of the proviso to the notification supra. He invited our attention to the classification lists which read as copper zinc base alloy copper tin base alloy in column 2 thereof which described goods produced by the assessee appellants. He also placed reliance on chapter notes of chapter 74. He also relied on the decisions of the Tribunal in the following cases :Siotia Metal Industries v. CCE, Shillong -1996 (84) E.L.T. 442 (Tri).

Shri Shah further added that the department had sent the goods for tests to ascertain whether the product was copper alloys classified under sub-heading 7403.29. He also cited the case of Muzzaffarnagar Steels -1989 (44) E.L.T. 552 for the proposition that once the classification list with full particulars had been given it was for the department to show and prove contrary to nullify the case of the appellants. He also invited our attention to the decision of the Tribunal in the case of Winter Misra Diamond v. Collector of Central Excise, Jaipur -1996 (83) E.L.T.670 (Tribunal) for the proposition that if the wordings used in the exemption notification are the same as in the notes or headings, the help of Interpretative Rules can be taken to ascertain the meaning and scope of those wordings.

9. Shri S.V. Singh, the ld. JDR relies on the findings of the ld.adjudicating authority and also argued as follows : 10. The benefit of notification is admissible only to the cases where copper alloys are manufactured out of the copper & articles thereof falling under chapter 74. The contention of the party that it is impossible to manufacture copper alloys without addition of zinc, tin etc. from outside (falling under heading other than 74) being a technical/technological necessary does not hold water.

11. The goods in question that is copper alloys ingots can be manufactured by mere melting of various articles of chapter 74 like waste particles etc. Though in such cases the nature of the alloys may not compare with high quality alloys. Nevertheless the fact cannot be denied that steel without adding zinc/tin etc. from outside, the alloys could be made from out of goods of chapter 74. Moreover, the quality copper alloy ingots could be manufactured by adding suitable proporation of Master alloys falling under chapter heading 7405. The uses of master alloys is defined in the Tariff as well as HSN one of them being for mixing with other materials to manufacture alloys.

12. Thus the benefit of notification could go only to such of the goods which are exclusively manufactured from out of the goods falling under Chapter 74 alone and since all along in the body of the classification filed by the party they have declared that goods were being manufactured from waste/ scrap falling under chapter 74. There was no reason for the department not to accept the declaration.

13. The contention that the ingots manufactured were tested for metal contents and composition, does not in any manner absolve the party from the allegation of misdeclaration and suppression of facts. Because by mere testing of final product the department would not come to know that zinc etc. available in final product was added from outside. As the zinc content will invariably present in the waste and scrap and therefore the party has suppressed the fact of adding zinc etc. falling under heading other than Chapter 74 and therefore extended period is invokable and benefit not admissible.

14. We have considered the several contentions and the facts and circumstances of the case. It is undisputed that the appellants have manufactured alloys of copper zinc base and copper tin base. It is also undisputed fact that the nature of the inputs and products have been shown to the department. Let us see the contents of the chapter notes.

1. In this Chapter the following expressions have the meanings hereby assigned to them : Metal containing at least 97.95% by weight of copper, provided that the content by weight of any other element does not exceed that limit specified in the following table :

Element	Limiting content % by weight
Ag Silver	0.25
As Arsenic	0.5
Cd Cadmium	1.3
Cr Chromium	1.4
Mg Magnesium	0.8
Pb Lead	1.5
S Sulphur	0.7
Sn Tin	0.8
Te Tellurium	0.8
Zn Zinc	1
Zr Zirconium	0.3
Other elements, each	0.3

Other elements are, for example, Al, Be, Co, Fe, Mn, Ni, Si.

Metallic substances other than unrefined copper predominates by weight over each of the other elements, provided that: (i) the content by weight of at least one of the other elements shall be greater than the limit specified in the foregoing table; or (ii) the total content by weight of such other elements exceeds 2.5%.

Alloys containing with other elements more than 10% by weight of copper, not usefully malleable and commonly used as an additive in the manufacture of other alloys or as de-oxidants; de-sulphurising agents or for similar uses in the metallurgy of non-ferrous metals.

However, copper phosphide (phosphor copper) containing more than 15% by weight of phosphorus falls in heading No. 28.48.

(d) One-tenth of the width, of a shape other than rectangular or square, of any size, provided that they do not assume the character of articles or products of other headings.

Heading Nos. 74.09 and 74.10 apply, inter alia to plates, sheets, strips and foil with patterns (for example, grooves, ribs, chequers, tears, buttons, lozenges) and to such products which have been perforated, corrugated, polished or coated, provided that they do not thereby assume the character of articles or products of other headings.

(h) Hollow products, coiled or not, which have a uniform cross-section with only one enclosed void along their whole length in the shape of circles, ovals, rectangles (including spares), equilateral triangles or regular convex polygons, and which have a uniform wall thickness. Products with a rectangular (including square), equilateral triangular or regular convex polygonal cross-section, which may have corners rounded along their whole length, are also to be taken to be tubes and pipes provided the inner and outer cross-sections are concentric and have the same form and orientation. Tubes and pipes of the foregoing cross-sections may be polished, coated, bent, threaded, drilled, waisted, expanded, coneshaped or fitted with flanges, collars or rings.

2. In relation to products of Heading No. 74.11, the process of drawing or redrawing shall amount to manufacture.

In this Chapter the following expressions have the meanings hereby assigned to them : Alloys of copper and zinc, with or without other elements. When other elements are presents : Zinc predominates by weight over each of such other elements; any nickel content by weight is less than 5% (see copper-nickel-zinc alloys nickel silvers); and any tin content by weight is less than 3% (see copper-tin alloys (bronzes).

(b) Copper-tin base alloys (bronzes): Alloys of copper and tin, with or without other elements are present tin predominates by weight over each of such other elements; except that when the tin content is 3% or more the zinc content by weight may exceed that of tin but must be less than 10%.

Alloys of copper, nickel and zinc, with or without other elements.

The nickel content is 5% or more by weight (see copper-zinc alloys (brasses) Alloys of copper and nickel, with or without other elements but in any case containing by weight not more than 1% of zinc, when other elements are present, nickel predominates by weight over each of such other elements.

15. From the reading of 'alloys' and master alloys it will be clear that the finished goods must contain elements contained in the table provided in the chapter notes containing elements other than copper specified in the copper alloys and master alloys provided, the proportions of copper and elements should be as specified in the clauses relating to copper alloys and master alloys. In the same way, copper zinc base alloys (brasses) copper tin base alloys (bronzes) etc.

also provide for the proportion of copper and other elements specified in the notes. Therefore, it cannot be denied that in this case the assessee is entitled to the benefit of the notification.

16. It has been held in the case of Bama Metal Industries (supra) that the use of small quantity of zinc or brass in the manufacture of end product being a technological necessity is required to be accepted for grant of the exemption. We respectfully follow the said decision. It is to be mentioned here that the Tribunal in another case of Siotia Metal Industries (supra) had followed the decision of the Tribunal in Bama Metal Industries case. Hence, following the decision of the said two cases we have to accept the case of the assessee appellants and reject the case of the department as the arguments of the department have been rejected by the Tribunal earlier in the above said cases.

17. Hence, in our view the appeal of the assessee is allowed, setting aside the Order-in-Original dated 13-10-1995 passed by the adjudicating authority. Consequential relief, if any, is to follow.