

Thacker Pulversing Co. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-07-1997

Reported in : (1997)(94)ELT359TriDel

Appellant : Thacker Pulversing Co.

Respondent : Collector of Central Excise

Judgement :

1. The issue to be decided in the above appeal which arises out of the order of the Additional Collector of Customs and Central Excise, Rajkot is whether the product manufactured by the assessee by grinding and sieving of cast iron scrap arising out of machining and turning of iron and steel castings, is cast iron powder falling under TI 25(5) of the Schedule to the erstwhile Central Excise Tariff.

2. The brief facts of the case are that the appellants are engaged in the manufacture of cast iron powder since 1973-74 in their Units situated in Udyog Nagar, Rajkot. They purchased cast iron scrap arising out of machining and turning of castings of iron and steel products known as 'bhuko' from the open market which they then grind and sieve for further use in the manufacture of chemicals. Since the Department was of the view that the product manufactured by them is classifiable under TI 25(5) of the CET w.e.f. 1-8-1983, on account of the revision of TI 25 from that date, and the Department found that the manufacture and clearance had taken place without obtaining central excise licence, without filing of classification list and price list, without main-tenance of central excise records and without payment of duty, a show cause notice was issued to the

appellants proposing recovery of duty of Rs. 37831.42 on cast iron powder manufactured and cleared during the period 1-8-1983 to 27-9-1983 and also proposing imposition of penalty. The appellants' defence that grinding and sieving of scrap in the form of granular powder does not amount to manufacture was negated by the adjudicating authority who confirmed the duty but dropped the penalty. Hence, this appeal.

3. We have heard Shri Devan Parikh, learned Counsel and Shri K.K. Jha, learned SDR and carefully considered their submissions.

4. The grievance of the appellants that the impugned order has been passed in flagrant violation of the principles of the natural justice inasmuch as the appellants were not heard before passing of the order, is not well founded - the reading of the order makes it clear that sufficient opportunities were extended to the appellants which they did not avail of - e.g., personal hearing was fixed on 20-10-1984 and adjourned to 22-8-1985 due to retest of the samples of the goods in question carried out at the request of the appellants. The matter was again adjourned to 5-9-1985 on which date, the appellants sought an adjournment once again on the ground that their Counsel was busy and the personal hearing was refixed on 23-9-1985; however, instead of appearing, the appellants sent a written request dated 14-9-1995 for cross examination of Chief Chemical Examiner, Kandla as well as Chief Chemist, CRCL, New Delhi who had carried out retest of the samples and the Assistant Director (Chemicals), National Test House, Alipore, Calcutta. From the above communication it is clearly established that the appellants were adopting stalling techniques, and cannot heard to complain that the adjudication order was passed without affording them adequate opportunities of being heard in person. Turning now to the merits of the matter, we find that the samples of the product were tested at the Customs and Central Excise Laboratory, New Kandla and the chemical examiner's report indicated that "each of the 5 samples is cast iron powder. It is not suitable for powder metallurgical applications." The appellants wanted their product retested at the National Test House at Calcutta while the Department agreed to have the retest done by the CRCL, New Delhi which had been specially set up for testing samples for the purpose of assessment of duty. The retest was carried out and according to the retest report, "each of the

5 samples is in the form of dark grey powdery material. On a visual examination, it is seen that each has been ground to different degrees. Each is composed mainly of iron together with carbon, carbon content in each case is more than 1.9% by weight and each passes through 1000 microns sieve completely, showing that the maximum dimension of particle is less than 1000 microns. As per IS : 5432-1969, 'Glossary of Terms relating to powder metallurgy', 'powder' has been defined as 'discrete particle of dry material with a maximum dimension of 1000 microns'.

From the above reports, it is clear that the product satisfied the test of cast iron powder falling under TI 25(5). In the face of this clear report from the CRCL, the appellants cannot seek to rely upon the report of the National Test House, Alipore, Calcutta issued to them to the effect that the samples may be categorized as cast iron borings and it is pertinent to note that the samples sent to the National Test House were different from the ones sent to CRCL, New Delhi and was also not forwarded under the supervision of the Central Excise officers and, therefore, cannot be taken into consideration. Further, the retest by the CRCL, New Delhi was carried out at the instance of the appellants and they are bound by it, as held by the Tribunal in the case of Eagle Mineral Products v. CCE, Ahmedabad reported in 1988 (38) E.L.T. 315 (Tribunal). Since the retest report is categoric. The denial of permission to cross-examine the Asst. Director (Chemicals), National Test House, Alipore and Chief Chemist, CRCL, New Delhi does not tantamount to violation of principles of natural justice. The appellants' contention that melting of cast iron scrap does not amount to manufacture is not correct as in this case cast iron scrap is the raw material and the processes applied to cast iron scrap result in the emergence of a distinct product commercially known as cast iron powder.

We, therefore, hold that the product in question viz. cast iron powder is an excisable product falling under TI 25(5) of the erstwhile Central Excise Tariff, uphold the impugned order and reject the appeal.

5. Ld. Counsel has stated before us that the appellants were engaged in the production of cast iron granular powder from the duty paid cast iron scrap i.e. borings obtained from machining and turning of castings of iron and steel and known as "BHUCKO". Since its grains are not of uniform size and have rough

surfaces, the material is required to be processed by grinding and serving and the product so obtained is marketed as granular powder for use in the manufacture of chemicals and dyes. When the product known as cast iron powder was for the first time made liable to Central Excise duty under Tariff Item No, 25(5) w.e.f.

1-8-1983, they visited the Local Central Excise Officers and personally disclosed to them the product manufactured, the raw materials used and the process of manufacture undertaken and the finished product and requested them to let them know whether the product is excisable or not but they could not clarify. However, when nothing was heard from the Central Excise Officers, the appellants had addressed a letter to the Central Excise Authority at Rajkot requesting him to let them know and were given to understand that it was doubtful whether it will be subject to duty. The appellants then indicated that in case of any doubt, they would like to obtain the Central Excise licence and follow the procedure so as to avoid any complication in future. Accordingly, they applied for Central Excise licence on 29-9-1983 and started to clear the product on payment of duty after issue of licence, filing of classification list and price list etc. Subsequently as desired, they have also supplied copies of the invoices, delivery challans, particulars of goods cleared and freight paid during the period 1-8-1983 to 27-9-1983 and also gave a statement which was recorded on 1-10-1983 mentions that duty, if any, payable could be paid on the actual quantity cleared during the period 1-8-1983 to 27-9-1983 when the exact amount of duty to be paid is ascertained by the department and intimated to them.

6. Thereafter, the Additional Collector, Rajkot issued a show cause notice. They filed a reply pleading that the product is not cast iron powder classifiable under Item No. 25(5) as it is in the form of granules; hence it was not dutiable. They also mentioned that M/s. MMG Corporation, Limbdi (under the jurisdictional control of Rajkot Collector) were manufacturing the very same product but it had not been classified as cast iron powder and no duty was being levied.

7. Thereafter, Central Excise officers had drawn a sample of the product and sent it to the Chemical Examiner, at Kandla and thereafter supplied a copy of the test report. The appellants had thereupon requested for retesting of the sample at

Alipore Test House but the Department agreed for retest only at C.R.C.L., New Delhi.

8. They had however, themselves sent a sample of the product to the National Test House (NTH), Alipore and in this respect a test certificate was issued. According to this certificate, each of the sample is of cast iron and the product can be categorised as 'cast iron borings'.

9. The appellants therefore, wanted to examine the Chief Chemist, New Delhi and the Assistant Director, NTH, Alipore but the request was not allowed.

10. It was their contention that the Additional Collector should have allowed their request for examination of the expert witness in the interest of justice in view of the ruling given by the High Court of Gujarat at Ahmedabad in the case of Arunodaya Mills Ltd. and Anr. v.UOI reported in 1985 (21) E.L.T. 390 (Guj.).

11. The appellants were served impugned adjudication order without reply to their letter dated 14-9-1985 and without giving them any hearing.

12. It was their grievance that principles of natural justice had not been duly observed.

13. It was also their contention that merely grinding and seiving of scrap does not amount to manufacture in view of the CEGAT order in the case of Gujarat Reclaim & Rubber Products Ltd. reported in 1983 (14) E.L.T. page 2401.

14. It was their submission that the order of Additional Collector has resulted in discrimination between them and M/s. MMG Corporation who were manufacturing similar product on which the department had not levied any duty.

15. It was also their submission that in any eventuality, the test result of the Chief Chemist could not be applied for the preceding period but only prospectively for the period after 27-4-1984.

16. Moreover, iron powder was exempt from Central Excise duty w.e.f.

1-3-1984 vide Notification No. 209/83 as amended by Notification No.39/84-C.E., dated 1-3-1984.

17. It was also their contention that the Additional Collector had calculated total quantity on the basis of delivery challans showing approximate weight but the actual weight is ascertained after the weighment of the truck at the weigh bridge and therefore, it was the invoiced quantity which ought to have been taken into account.

18. Ld. Counsel relied upon the orders reported in 1978 (2) E.L.T. (J 500), 1985 (21) E.L.T. 390,1984 (18) E.L.T. 547,1995 (75) E.L.T. 595 and 1996 (81) E.L.T. 523 in support of his above contention.

19. Ld. DR drew attention to the impugned order-in-original and reiterated the department's view as contained therein. He emphasised in particular that the sample sent to NTH, Alipore by the appellants on their own could not be relied upon as it was not drawn under the supervision of Central Excise Officers and could not be considered as representative sample. Therefore, the Alipore Test House's report also could not be taken into consideration by the Additional Collector.

Furthermore, the sample was tested twice by the departmental officers and since retest was done at the behest of the appellants, he was bound by the results thereof. According to this test report, the product was in the form of cast iron powder, therefore, it was classifiable and dutiable under Tariff Item No. 25(5) of the old Tariff.

20. The appellants had been given sufficient opportunities for making their submissions before the Additional Collector and in the above circumstances, there was no cause for allowing cross examination of the expert of Alipore Test House or the departmental one; Therefore, there was no violation of the principles of natural justice.

21. The party has been simply adopting delaying tactics; therefore, the Addl. Collr. had no option but to pass the impugned order without further waiting.

22. Since the iron and steel powder is a commodity known in the market; therefore, it was excisable as per the Supreme Court decision in the case of DCM's case. The Tribunal's order in the case of Gujarat Reclaim & Rubber Products Ltd. and Other case law cited by the Id. Counsel is not applicable to the facts and circumstances of the present case.

23. As far as MMG Corpn. is concerned, the Department has started proceedings against them as well and therefore, there was no question of discrimination.

24. As regards the party's contention about abatement of freight charges, the value for the purpose of assessment and the quantity taken into account is concerned, they had not produced any evidence in support of their contention before the Additional Collector.

Furthermore, the appellants have ultimately taken the Central Excise licence and the Addl. Collector had himself refrained from imposing penalty but the duty due was naturally required to be paid.

25. Id. DR also relied upon the orders in the case of Mahendra Nath Chatterjee reported in 1977 CENCUS 43 D(Cal.), AIR 1967 (Cal.) 80 - Kishan Lal Aggarwal, 1988 (38) E.L.T. 315, Eagle Mineral Products and 1995 (76) ELT 340 (Tribunal) - Raymond Cement Works in support of his contentions.

26. I have considered the above submissions. In view of a clear and specific report of the National Test House, Alipore, Calcutta and its certificate regarding the samples sent by the appellants themselves in this regard, it was not necessary to allow cross-examination and the denial of such a request in this regard did not amount to violation of principles of natural justice. Apart from other things, cross-examination is more a part of procedural justice and in this case, it does not jeopardize the appellants case.

The report clearly shows that the sample is that of cast iron borings.

The percentage of various elements as well as the mesh sizes have also been given; But there is no dispute that the product mainly consists of iron in granular form; and that it is categorised as iron borings also does not have a direct bearing

inasmuch as the issue here does not relate to classification or categorisation as such; and There is also no dispute that the raw material (input) was scrap in the form of iron granules; even the process to which it is subjected is also not in dispute. The only question is whether this process is a manufacturing process which results in conversion of the coarse uneven granules of the raw material into a distinct product in the form of a powder (iron powder).

27. Whether the particles of the product were of a particular dimension which will allow them to be considered as those in powder form is therefore material. In this respect, the Department has rightly relied upon the ISI Glossary of Terms relating to Powder Metallurgy which shows that powder consists of 'discrete particles of dry material with a maximum dimension of 1000 microns' and the Central Revenue Control Laboratory had tested the samples and found that each sample is composed mainly of iron together with carbon, carbon contents in each case is more than 1.9% by weight and each passes through 1000 micron sieve completely showing that maximum dimension of particle is less than 1000 micron. Hence it is obvious that the product is in the form of cast iron powder which is produced by subjecting 'BHUCKO' to grinding and sieving. I, therefore agree with the conclusion of my Id. Colleague that the product in question was classifiable under T.I. 25(5).

28. I also notice that the Id. Collector has rightly refrained from imposing penalty in the circumstance of this case and therefore there was no cause for any grievance on this score. However, the demand having been issued within the normal period of limitation the order in respect of the demand was required to be confirmed. The appeal is rejected as already announced in the open court.

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