U.P. State Cement Corporation Vs. Collr. of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-16-1997

Reported in : (2000)(116)ELT557TriDel

Appellant : U.P. State Cement Corporation

Respondent : Collr. of C. Ex.

Judgement :

1. Captioned appeal is directed against the order of the Collector of Central Excise, Allahabad dated 24-5-1995.

2. The appellants, M/s. U.P State Cement Corporation Limited are engaged in the manufacture of cement falling under T.I.23 of the earstwhile Central Excise Tariff Act. The appellants have their factories at Churk, Dalla and Chunar. One of the raw materials used in the manufacture of cement is clinker. The appellants' factory at Churk and Dalla manufacture clinker. A major part of the clinker manufactured in the said factories are transferred to the Chunar factory for the manufacture of cement. The Chunar factory does not manufacture clinker but only manufactures cement. The movement of clinker is mostly in the wagons provided by Indian Railways and the wagons provided by the Railways were neither closed wagons nor were they foolproof wagons which made them vulnerable to leakage/pilferage etc.

3. The appellants were issued seven show cause notices between 5-4-1984 and 26-4-1985 demanding various amounts of duty relating to different periods on the

ground that the appellants did not follow the proper procedure in transporting clinker from their factories at Churk and Dalla inasmuch as they had failed to follow the procedure under Chapter of the Central 'Excise Rules,1944 : that they did not execute B-8 bond for the movement of disable goods at nil rate of duty: that they did not obtain L-6 Licence for such movement of excisable goods; that the entire quantity of clinker despatched from Dalla and Churk factories were not used in the manufacture of cement as per the requirement of Notification No.118/75, dated 30-4-1975 and that the quantity of clinker shown in the wagon replacement register were at variance with the quantity recorded in AR-3 and did not tally with the carrying capacity of wagons. The show cause notices also invoked the extended period of limitation under Section 11A of the Central Excise Act.

4. In the adjudication proceedings before the Collector, the appellants disputed the charges and denied the allegations contained in the SCNs.

The Collector, however, found against the appellants and confirmed the demand of Rs.1,39,191.36 and directed the Assistant Collector to recalculate the duty in relation to the six SCNs after allowing of 2% transit loss.

5. Appearing for the appellants, Shri M.P. Devnath, learned Advocate submitted that in respect of the six SCNs covering the period from Au-gust,1982 to December,1984, there was no allegation of mis-statement or suppression with intention to evade payment of duty, and in respect of show cause notice dated 5-4-1984 covering the period March, 1982 to July,1982 the demand related to the quantity of clinker removed from Churk factory without following the Chapter X procedure. The learned submitted that on similar proceeding initiated against the appellants for the subsequent period (1990 to 1993), the Hon'ble Allahabad High Court had held that the conclusion of the authority that only 2% shortage towards transit loss will be permissible was arbitrary and the Hon'ble Allahabad High Court had quashed the proceeding initiated against the appellants [U.P. State Cement Corporation Limited v Union of India -1996 (86) E.L.T. 6]. The learned Advocate submitted that all the six out of the seven show cause notices in the instant case related only to same matter of demand of duty on the quantity of cement not

received at the Chunar factory and in view of the decision of the Hon'ble Allahabad High Court referred to above, the order passed by the Collector on 19-5-1995 allowing the abatement of only 2% is liable to be set aside. He also submitted that apart from the merits of the case, the entire period referred to in the SCNs was barred by limitation, since there was nothing in the SCNs alleging mis-statement, suppression, etc. The same applied to the SCN dated 5-4-1984. In this connection, he relied on the Supreme Court decision in HMM Limited reported in [1995 (76) E.L.T. 497] in which it was held that in order to attract proviso to Section 11A(1), the show cause notice must contain a reference to its ingredients, such as mis-statement and suppression of facts with a view to evade payment of duty. Since none of the ingredients are present in the show cause notice, the show cause notice for the period beyond six months is barred by limitation.

6. Defending the impugned order, Shri D.K. Nayyar, learned JDR submitted that the appellants had clearly contravened the provisions of the Central Excise Act and the Rules by not observing the provisions of Chapter X of the Central Excise Rules in transporting clinker from Churk and Dalla factories to their Chunar factory without executing B-8 bond and without obtaining L-6 Licene for the movement of excisable goods. He submitted that their claim for huge quantity of losses as due to 'natural causes' were also not admissible. Further, for making a demand for the recovery of duty under Rule 196, there was no time limit and the time limit prescribed under Section 11A had no applicability to cases where the Chapter X procedure had not been followed.

7. I have considered the submissions made by both sides. I find from the order of the Hon'ble Allahabad High Court in U.P. State Cement Corporation Limited v. Union of India (supra) that the two contentions raised by the learned Advocate in this appeal, namely, issue of time bar and percentage of permissible shortage of 2% allowed by the adjudicating authority below has been set aside by the Hon'ble Allahabad High Court in the appellants' own case. On the question of shortage, the Hon'ble High Court had observed that the Department themselves had not disputed that the losses actually occurred in the handling and transporting of cement and clinker from two factories at Churk and Dalla to their factory at Chunar. The Hon'ble High Court had observed that according to Rule 196 duty

remission can be given to the goods lost or destroyed by natural causes or due to unavoidable accident during the transportation or during handling or storage in the premises approved under Rule 192. Since in the instant case, the distance between the place of despatch and the place of receipt was about 125 Kilometers and the cement clinker was admittedly carried in open trucks and open railway wagons neither of them is pilfer or spillage proof, any loss that occurs during transit have to be allowed as due to causes which are normal. Since Rule 196 allowed transit losses, these cannot be disallowed unless it could be shown that the losses claimed are fictitious and manipulated or deliberately caused for ulterior motive. The words 'natural causes/ while certainly referring to the forces of nature like flood and earthquake is not restricted to these alone and could be related to losses occurring in the normal course of handling, transport etc. On a consideration of material available, the Hon'ble High Court had held that the shortage only upto 2% alone is permissible under Rule 196 was arbitrary and the entire losses shown by the assessee was due to natural causes and accidents during handling of the material and its transport from one place to another and the shortage duly accounted for.

8. The Hon'ble High Court had also held that limitation period prescribed under Section 11A was applicable to Rule 196 also and since the show cause notice related to a period beyond six months without any allegation as to wilful mis-statements suppression of facts etc. time bar will apply.

9. The learned JDR while reiterating the findings of the adjudicating authority, left it to the Bench to decide the issue in the light of the Hon'ble Allahabad High Court judgment referred to above.

10. I find that the two issues raised by the appellants' Counsel, namely time bar and the percentage of shortage permissible under Rule 192 have been clearly dealt with in the aforesaid order of the Hon'ble Allabahad High Court. Following the ratio of the aforesaid order, I hold in favour of the appellants on both the points and allow the appeal.

11. Consequently, the impugned order is set aside with consequential relief to the appellants as per law.