

Collector of Central Excise Vs. Basant Tubes Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-14-1997

Reported in : (1997)(95)ELT311TriDel

Appellant : Collector of Central Excise

Respondent : Basant Tubes Ltd.

Judgement :

1. The respondents herein manufacture iron and steel products falling under T.I. 25 of the Schedule to the erstwhile Central Excise Tariff.

Necessary permission for bringing in duty paid raw material viz. M.R.strips and skelp for the manufacture of C.R. strips and availing proforma credit thereon was granted to them in accordance with the provisions of Rule 56A of the Central Excise Rules, 1944. On 22-9-1982, they received 136.750 MTS of M.R. strips/coils from M/s. Jitendra Brothers, Bombay for which they filed D-3 intimations No. 68 and 69, dated 22-9-1982 and took proforma credit of duty amounting to Rs. 67,691.25 against the receipt of the said raw material without producing proper duty paying documents as required under Rule 56A. Therefore, a show cause-cum-demand notice for recovery of the amount of credit was issued on 15-7-1985, which demand was confirmed by the Assistant Collector. The lower appellate authority set aside the adjudication order on the ground that the demand was barred by limitation. Hence this appeal by the Revenue.

2. Notice for today's hearing has been received by the respondents. But they have not appeared. Hence, we heard the learned DR and perused the records.

3. The Collector (Appeals) has recorded that, from the annexure to the show cause notice (which is however not available before us), it is evident that the appellants had produced delivery challans issued by Jitendra Brothers of Bombay in token of having sold the goods to the appellants and that Jitendra Brothers had in turn received the goods from Jayantilal Chandulal and Company, Consignment Agent of Tata Iron and Steel Co. Ltd. He has further observed that there is no allegation of suppression of facts or wilful misstatement on the part of the appellants, in the show cause notice. Learned DR was not in a position to rebut this finding with reference to the show cause notice. The argument advanced before us that, if proper duty paying documents are not produced, the credit availed by an assessee will remain as provisional credit in the account and, therefore, the question of time bar does not arise, is not borne out by any of the provisions of Rule 56A, which inter alia, provides for taking of credit provisionally pending grant of permission by the Collector to avail proforma credit.

There is no dispute in this case that permission to avail of proforma credit had already been extended to the respondents. In the absence of any provision in Rule 56A for treating credit availed pending production of duty paying documents as provisional, we see no substance in this plea of the Department. Accordingly, we see no reason to interfere with the order of the Collector (Appeals) holding that the extended period of limitation is not available to the Department, uphold the impugned order and reject the appeal.

Sd/- 4. With due respects to Hon'ble Member (Judicial), my views and orders are as follows : I observe that in this case at the time of receipt of consignment no duty paying documents had been produced. Since D-3 intimation had however, been filed the Superintendent examined the matter and noting the absence of duty paying document directed the appellants to produce proof of payment of duty. Appellants however, could show only a certificate issued by the suppliers which did not indicate any of the prescribed details or the particulars of the payment of duty, if any paid. It was in these circumstances that the show cause notice was

issued. The Collector has however held the show cause notice to be time barred referring to Sub-rule 5 of Rule 56A but in my opinion he has erred in doing so inasmuch as it is not a case of error, omission or mis-construction on the part of the officer.

5. The Collector has also observed that there is no charge of wilful mis-statement, collusion or suppression of facts but again he has erred because the case is of a different character wherein the respondent has not complied with the basic requirement of Rule 56A to the effect that only duty paid goods duly accompanied by proof of payment of duty thereon in the form of GP 1 or other prescribed documents could be received under that Rule. In this case the respondent did not comply with this basic requirement which was essential for the purpose of taking/claiming benefit under Rule 56A.6. The Superintendent had noticed this omission and given appropriate direction and the respondent did not comply with the same. Therefore, it was a case of contumacious disregard of a substantive provision.

7. Since the remark was given right in D-3 intimation and the verification remained incomplete in the absence of proof of payment of duty which was required to be submitted the action acquired a tentative character that means the avilment was subject to production of proof of payment of duty. There is nothing on record to indicate that even subsequently the required proof was produced at any stage. Therefore, the credit taken by the respondent could only be treated as having acquired a provisional character and was subject to the fulfilment of the officer's direction to produce proof of payment of duty. The A.C.has rightly held that so called certificate issued by the supplier was not one of the prescribed documents and was not sufficient for the purpose of Rule 56A, in any case it did not contain the particulars of the payment of duty and other required information. He has therefore, rightly held that the respondents had failed to comply with the requirements for availing proforma credit on the duty paid on the material.

8. Further, in the above circumstances, the show cause notice could not be considered as time barred.

9. I, therefore, set aside the impugned order and accept the department's appeal.

10. In view of the difference of opinion between Hon'ble Member (J) and the Vice President, the matter is submitted to Hon'ble President for reference to a Third Member on the following point: 1. Whether in the facts and circumstances of the case the show cause notice was time barred? 2. Whether in view of non-compliance with the substantive requirements the demand was justified and was required to be upheld Sd/- Sd/- Jyoti Balasundaram) (S.K. Bhatnagar) Member (J) Vice President dated 21-5-1997 dated 20-5-1997 11. The point of difference has been enumerated at page 7 of the order.

Ld. Member (Judicial) has held that there is no provision under Rule 56A for treating credit availed pending production of duty paying documents as provisional, and therefore, even for recoveries for taking wrong credit for one reason or the other, the department is required to issue show cause notice within six months as provided under Section 11A of the Central Excise Act. Ld. Member Judicial has also held that there is no allegation of suppression of facts or wilful mis-statement on the part of the appellants, in the show cause notice. Hence demands are barred by time.

12. On the other hand as can be seen from the order of Hon'ble Vice President, Hon'ble Vice President has taken a view that the credit taken by the respondent could only be treated as having acquired a provisional character and was subject to the fulfilment of the officer's direction to produce proof of payment of duty.

13. I have heard Id. DR. The respondents were not present at the time of hearing and the notice has come back undelivered. In the impugned order Id. Collector has referred to Rule 56A(5)(1) wherein time limit of six months has been prescribed for recovery of duty when credit has been allowed on account of error, omission or mis-construction on the part of an officer and having been found that there is no allegation of wilful mis-statement, collusion or suppression of facts on the part of the manufacturers. Ld. Collector has held that the demands are barred by time. He also noted from the annexure in the show cause notice that the appellants had produced the delivery challans along with the D-3s filed by them, and as such it cannot be said that they did not produce any documents. He held that the appellants did produce delivery challans issued by M/s. Jitendra Brothers of

Bombay in token of having sold the goods to the appellants and that the said M/s. Jitendra Brothers had received the goods from M/s. Jayantilal Chandulal and Co., Consignment Agent of Tata Iron and Steel Co. Ltd. 14. I agree with the views expressed by Id. Member (Judicial). Reliance can be placed on the judgment of Hon'ble Bombay High Court rendered in the case of Bharat Bijlee Ltd. v. Collector of Central Excise, Bombay 1996 (83) E.L.T. 496 (Bom.) wherein Bombay High Court held that Rule 56A(5) clearly sets out that for recovery of credit allowed under Rule 56A(2), the Notice is to be served within six months from the "date of such credit". It is further held period of limitation in this case would, therefore, commence from the date of availing of proforma credit and not from the date of order directing refund of duty to M/s.

Devidayal. It is clear from the judgment of Hon'ble Bombay High Court that for recovery, the period is six months or five years as the case may be as laid down under Rule 56A(5) of the Central Excise Rules, which has to be read along with Central Excises and Salt Act, 1944.¹ I would further like to observe that the term "provisional use" used in Rule 56A "2A pertains to utilising the credit on the assessee seeking permission on an application and pending the grant of such permission.

The rule itself says that if the permission to avail of the procedure under the rule is eventually refused, then duty due on the goods cleared on the strength of the provisional credit referred to above, shall be paid forthwith (and without any demand being made by the proper officer in this behalf) by adjustment in the account-current maintained by the manufacturer in terms of Rule 9 or Rule 173G, as the case may be, or in cash." I notice that the department itself has not proceeded under this Rule. Id. Collector has rightly held that the recovery has to be made as per Rule 56A(5) and in terms of Rule 56A(5)(i), the time limit is six months. In that view of the matter, I agree with Id. Member (J) in this matter. The papers may be placed before the original bench for passing the final order.

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