

Foam Tek Systems Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-19-1997

Reported in : (1998)(104)ELT137TriDel

Appellant : Foam Tek Systems

Respondent : Collector of Central Excise

Judgement :

1. The appellants are alleged to have manufactured and cleared electric motors and cheese winding machines without following Central Excise procedures and without payment of duty during the period 11-4-1986 to 31-3-1987. The appellants were issued a show cause notice dated 4-6-1987 for the period from 4-12-1986 to 31-3-1987 by the Superintendent of Central Excise. Subsequently, however, a revised show cause notice dated 30-6-1988 covering the period from 11-4-1986 to 31-3-1987 was issued by the Additional Collector. This show cause notice mentions that it includes the period already covered in the show cause notice issued by the Superintendent of Central Excise. The Additional Collector in his order demanded excise duty at standard rates for the clearance of goods during the period 1-4-1986 to 30-6-1986 in respect of cheese winding machines. He also confirmed differential duty on the value of electric motors and cheese winding machines which were cleared after Notification 46/81 was rescinded.

2. Arguing for the appellants, learned Consultant submits that they have filed declarations both in respect of electric motors and cheese winding machines. Up to August, 1985, they were exempted under Notification 46/81 and subsequently

they were covered under exemption Notification relating to small scale industries. In any case, he submits that the mere non-filing of declaration would not take away the substantive benefit under law and cites in this connection the case reported in 1997 (92) E.L.T. 703 (Tribunal) in the case of Lokhandwala Construction Industries Ltd. 4. We have heard both sides. We find that the Collector himself in regard to cheese winding machines, admits that the appellants had filed two declarations one in April, 1985 in respect of T.I. 68 and the other in June, 1986 relating to electric motors for the year 1985-86. He has, therefore, given benefit to them for the financial year 1985-86. He, however, holds that the Notification 46/81 was rescinded and, therefore, the declaration filed in regard to this Notification was not valid to avail small scale concession under Notification 175/86. At the same time, however, he holds that nothing precludes them from availing concession during this period under Notification 46/81. He, however, holds that since this Notification has been rescinded in August, 1985, they were required either to avail the small scale concession under the new Notification 175/86, dated 1-3-1986 or to pay excise duty at the standard rate in case they had not fulfilled the condition specified in this Notification. He goes on to record that the appellants continued to avail exemption under Notification 46/81 even when it was rescinded and, therefore, they are not eligible to SSI exemption. After having recorded all this, while proceeding to impose penalty, the Additional Collector records "I keep in view that the Unit is a small scale unit and in any case would be eligible for small scale concession had they resorted to following the proper procedure". We are constrained to note that this is not a correct proposition of law. A substantive benefit otherwise available under law cannot be nullified through a procedural irregularity. The Tribunal in the case of Lokhandwala case [1997 (92) E.L.T. 703 (Tribunal)] held that the benefit of Notification [175/86] cannot be denied for non-filing of the declaration when the requirements of Notification in question are otherwise satisfied. The Tribunal relied upon its earlier decision reported in 1995 (79) E.L.T.147. Apart from this, the very fact that they were otherwise eligible to small scale exemption as recorded by the Collector himself indicated that there could possibly be no suppression, collusion, fraud, or wilful misstatement with intent to evade payment of duty. In regard to electric motors we agree with the learned Consultant that show cause notice did not raise any charge and confines

itself to cheese winding machines. The learned Consultant is also correct in arguing that the show cause notice proposes recovery of duty only for the period beginning from 11-4-1986 whereas the Assistant Collector had quantified the short levy even in regard to the prior period. Such action obviously cannot be sustained. Considering the facts and circumstances and the fact that the Additional Collector himself conceded that what was involved was a mere procedural irregularity and the appellants were themselves otherwise entitled for the exemption, are of the view that apart from the merits of the case, the demand itself having been raised beyond the statutory period of six months is time-barred since the ingredients justifying the extended period under the proviso to Section 11A are totally absent here. We also note that the Additional Collector has not quantified the extent of short levy involved and yet has gone on to impose a penalty of Rs. 25,000/-. Penalty is a measure of gravity of offence and has to bear a direct relationship to the extent of the gravity. Penalty, therefore, without quantifying the duty could not have been levied as such. Since we have held that the demand itself raised through the show cause notice dated 30-6-1988 for the period 11-4-1986 to March, 1987 is time barred, the penalty also in these circumstances is not sustainable and is, therefore, set aside.

5. In view of this we set aside the impugned order and allow the appeal.

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