

C.C.E. Vs. Gujarat Communication and

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-08-1997

Reported in : (1997)(96)ELT179TriDel

Appellant : C.C.E.

Respondent : Gujarat Communication and

Judgement :

1. This Revenue appeal is directed against the order dated 9-8-1989 passed by the Collector of Central Excise (Appeals). The respondents are manufacturers of Edit Control Unit. They had filed a classification list for the classification of their product which was approved by the Assistant Collector under Item 37BB of the erstwhile First Schedule to the Central Excises and Salt Act, 1944. Subsequently, however they filed another classification list on 15-9-1984 claiming classification under Item 68. This classification was approved by the Assistant Collector on 18-2-1985. Thereafter, they filed a refund claim amounting to Rs. 79,423.84 p. for the period 31-8-1984 to 22-3-1985 which was considered by the Assistant Collector who disallowed them the refund in respect of goods covered under gate passes 6 and 7 on the ground that they had not filed revised classification list on the particular date.

The remaining claim was sanctioned by the Assistant Collector after disallowing an amount of Rs. 10,039.29 p. The Collector filed an application under Section 35E(4) against this order. The relevant para of that order is extracted from the order of Collector (Appeals): "The Technical Manual, the write-up dated 15-9-1984 and 28-

1-1985 in respect of 'Edit Control Unit (RM 440) GCEL 103-16' clearly indicate that it is rightly classifiable under T.I. 37BB of the erstwhile tariff as this unit does Television image and sound recording and reproducing. Hence the duty at the rate of 25% adv. towards BED and 5% of BED towards SED paid by the assessee during 15-9-1984 to 22-2-1985 was correct. Therefore, the decision of the Assistant Collector to refund part of the duty paid on the grounds that the right classification would be under T.I. 68 is incorrect.

The refund of duty in respect of Gate Pass Nos. 9 to 11, dated 15-9-1984 and 24-9-1984 respectively granted by the Assistant Collector is also incorrect as the assessee had failed to observe all the provisions of Rule 233B of Central Excise Rules, 1944 inasmuch as the assessee had not delivered the letter of protest to the proper officer indicating the grounds for protest and had also not made the endorsement: 'duty paid under protest' on the relevant RT 12s." 2. In the Revenue appeal, the Revenue contended that gate passes Nos. 6 and 7 do not bear any protest endorsement and that in the other gate passes, even though payment of duty was indicated under protest, other requirements under Rule 233B were not followed and therefore, the refund was time-barred. They also contend that classification of goods had not been determined by the Collector (Appeals). The complete order under Section 35E(4) is not available in the file. However, from the extracts quoted from Collector (Appeals) order it is seen that the Collector had also raised question of classification apart from time bar in respect of gate passes No. 59, 84 and 89. The Collector (Appeals) in regard to classification has held that the department has now in an indirect manner tried to review the classification by filing this application which is not permissible, since classification under Item 68 had not been reviewed. We are afraid that this is not a correct position in law. An erroneous refund can be considered in terms of Section 11B even without modification of classification list. Collector (Appeals)'s finding in regard to the payment of duty under protest however, cannot be faulted since once gate passes are endorsed with the remark 'payment under protest', it is deemed to be a substantial compliance with the requirement of law since Rule 233B is only directory and not mandatory. We however, note that the Collector (Appeals) has not given any finding in regard to classification and the matter of time bar appears to have been raised in the application under Section 35F only as a matter of

additional ground. We are of the view that the learned Collector ought to have arrived at correct classification while dealing with the refund claim. We therefore, set aside the impugned order and direct the Collector (Appeals) to examine the matter de novo after affording the respondents a reasonable opportunity of being heard.

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