

Asha Celluloid Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-10-1997

Reported in : (1998)(98)ELT768TriDel

Appellant : Asha Celluloid

Respondent : Collector of Central Excise

Judgement :

1. The appellants herein are engaged in the manufacture of Celluloid Nitrate Sheets falling under Chapter sub-heading 3920.32 of the Schedule of the CETA, 1985. They had claimed concessional rate of duty in terms of Notification No. 269/86, dated 24-4-1986 for the reason that their final product was manufactured out of duty paid goods falling under Headings 39.01 to 39.15. Since the Department was of the view that the raw material was non-duty paid inasmuch as the appellants had taken credit of duty paid on the inputs, a show cause notice was issued on 14-2-1991 proposing recovery of differential duty of Rs. 5,37,749.25 on Celluloid Nitrate Sheets manufactured and cleared during the period from May, 1986 to November, 1987 under the proviso to Section 11A of the Central Excise Act, 1944. The allegation in the show cause notice was that the appellants had wrongly availed the benefit of the notification while suppressing the fact as regards non-duty paid character of the inputs in the classification list filed by them. The notice also proposed imposition of penalty. The Collector of Central Excise vide his order dated 18-9-1992 accepted the contention of the assesses that inputs did not become non-duty paid if credit of the duty paid thereon is taken; however, he

confirmed the demand on the ground that the appellants were using Nitrocellulose falling under the Chapter sub-headings specified in the notification along with other materials such as Camphor and Carbonate both of which fall under Chapter 29 which was not a specified Chapter in the Notification No. 269/86. He applied the extended period of limitation on the ground that the appellants had suppressed the fact that they were using materials falling under a Chapter other than the one specified in the notification (although along with Nitrocellulose falling under the specified heading namely, Chapter 39). He also imposed a penalty of Rs. 50,000/- on the appellants herein. Hence, this appeal.

2. We have heard Shri A.C. Jain, learned Advocate and Shri H.K. Jain, learned SDR.3. The principal submission of the learned Counsel for the appellants is that the order confirms the demand on a ground other than the one alleged in the show cause notice as the show cause notice did not contain any allegation that the benefit of Notification No. 269/86 was not available for the reason that the manufacture of Celluloid Nitrate Sheets was out of materials falling under Chapters specified under the notification along with materials falling under Chapters not specified therein. The only ground on which the show cause notice proposes recovery of differential duty is that the inputs lose their duty paid character once credit of duty paid thereon has been taken by the assessees. His further submission was that the use of the materials falling under Chapters/Headings which are not specified in the notification is not a bar for avilment of the "notification since admittedly, the appellants were making their final products out of Nitrocellulose which was the principal ingredient for the manufacture of Celluloid Nitrate Sheets and Nitrocellulose which was the principal ingredient was falling for classification under the Chapter subheadings specified in the notification. He submits that the notification nowhere stipulates that the final product should be exclusively made from the materials falling under the specified Chapters. In support of his contention, he cited the order of the Tribunal in the case of Eagle Flask (P) Ltd. v. Collector of Central Excise, Pune reported in 1994 (71) E.L.T. 765 (Tribunal). On the aspect of applicability of the extended period of limitation, learned Counsel submitted that although the appellants had not disclosed in the classification list that they were using inputs falling under Chapter 29 (which is not a Chapter specified in Notification 269/86), along with the principal

ingredient falling under the specified Chapter, the appellants had filed a Modvat declaration in terms of Rule 57G in which this information was disclosed to the Department and he draws our attention to the declaration in question. He, therefore, submits that on a combined reading of the classification list and the Modvat declaration, the appellants could be held to have disclosed all the information relevant for the purpose of determining their eligibility to the benefit of the notification. In these circumstances, he prays that the impugned order demanding duty and imposing penalty may be set aside and the appeal upheld.⁴ In reply, learned DR submits that since the show cause notice seeks to recover differential duty by denial of the benefit of Notification 269/86, it is implicit that the other condition in the notification namely, that the final product viz. plastic films or sheets of thickness not exceeding 0.25 mm and falling under specified sub-headings of Heading 3920 and cellular (excluding polyurethane) films or sheets falling under sub-heading 3921.11 or 3921.12 of the Schedule to the CETA, 1985 must be produced out of goods falling under Headings 39.01 to 39.15 of the Schedule must be satisfied and since the condition prescribed under the proviso has not been fulfilled inasmuch as the appellants used other materials also (other than those falling under 39.01 to 39.15), the benefit has rightly been denied. In view of the above, he submits that it is not correct to contend that the demand has been confirmed in the impugned order on a ground totally different from that raised in the show cause notice. He further contends that the extended period of limitation is available to the Department since the appellants did not disclose in the classification lists filed by them during the relevant period, the fact that they were also using inputs other than those falling under the specified headings (along with inputs falling under the headings specified) in the manufacture of Celluloid Nitrate Sheets.

5. We have carefully considered the submissions of both the sides.

After perusal of the show cause notice and the impugned order, we agree with the learned Counsel that while the show cause notice only alleges that the inputs on which duty was paid but credit taken thereafter were non-duty paid inputs and therefore, the appellants had wrongly availed the benefit of Notification No. 269/86, the adjudicating authority has dropped this charge in para 17.3 of the

impugned order but confirmed the demand on the ground of use of non-specified inputs (along with specified inputs) in the manufacture of the final products, as seen from paragraphs 18, 18.1 & 19.1 of the impugned order. For this reason, the impugned order is required to be set aside as not sustainable.

Further, we also find that the Tribunal has held in the case of Eagle Flask (P) Ltd. cited supra that in the absence of any stipulation in Notification 182/82-C.E., dated 11-5-1982 that articles of plastics falling under T.I. 68 should be produced exclusively or wholly out of artificial resins or plastic materials or cellulose esters and ethers in any form falling under T.I. 15A(1), the products made predominantly out of inputs falling under T.I. 15A(1) and having some admixture of inputs falling under T.I. 15A(3) were also eligible for exemption under the notification. In the present case also, Notification 269/86 does not stipulate that the final products specified thereunder should be produced exclusively or wholly out of materials falling under Headings 39.01 to 39.15 of the Schedule to the CETA, 1985. Therefore, applying the ratio of the Eagle Flask (P) Ltd. case, (supra), we hold that the Celluloid Nitrate Sheets manufactured both out of specified inputs and non-specified inputs would be eligible to the benefit of the notification. We also hold that the extended period of limitation is not available to the Department since a combined reading of the classification list and the Modvat declaration filed before the Excise authorities clearly shows that the appellants had disclosed to the Department that they were using Camphor, Carbonate, etc. falling outside Chapter 29 along with Nitrocellulose falling under Chapter 39 in the manufacture of Celluloid Nitrate Sheets.

6. In the light of the above discussion, we hold that the demand of duty and penalty are not sustainable and accordingly set aside the impugned order and allow the appeal.

7. While agreeing with the conclusions of the Hon'ble Member (J) it may be mentioned that I had occasion to indicate in the Court that apart from the fact that the adjudicating authority himself had dropped the charge levied in the show cause notice even in respect of merits the aspects which were required to be taken into consideration included, inter alia, the aspect of technological necessity.

The appellants had taken this point although not in so many words and in such a pointed way but the authorities below were required to keep in mind this aspect even before issuing the show cause notice and if necessary to incorporate the questions which may arise in this connection in the show cause notice, give due opportunity to the assesseees to meet them and then record a finding. However, in this respect even at this stage the point has not been squarely met with even though in a number of Tribunal orders, this aspect has loomed large directly or indirectly or has been at the back of the decision; And it was therefore expected that the department would come out with the relevant technical material w.r.t. the Collector's observations and findings and the case law cited above. Even otherwise once the specified item is the principal input or ingredient, use of other items (in addition) in a small proportion hardly matters until and unless the latter could be shown to make a substantial or significant difference or their use was banned explicitly or by necessary implication. Therefore, in my opinion even on merits the department's case has remained unsubstantiated. I therefore, agree that the impugned order is required to be set aside and the appeal is required to be allowed.

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