Jyoti Refinery Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-04-1998

Reported in : (1999)(112)ELT571Tri(Mum.)bai

Appellant : Jyoti Refinery

Respondent : Commissioner of Central Excise

Judgement :

1. Brief facts of this case is that the Appellants are engaged in refining precious metals and also manufacture chemicals made from precious metals as well as wire strips and plates all of which, during the relevant period fall under Tariff Item 68. By the impugned order captioned above the Commissioner of Central Excise, Mumbai-I held that the Appellants employing more than 9 workers and therefore was liable to be treated as a factory under Section 2(m) of the Factories Act, 1948 and were disentitled to the benefit of exemption under Notification 46/81, dated 01-03-1981. The Commissioner also rejected the Appellant's contention that they employed only 6 workers and held that certain persons employed by the two other concerns were the workers of the Appellant. The Commissioner directed the Assistant Commissioner to re-compute the Appellant's duty liability for the period 1-2-1985 to 31-7-1985 and imposed a penalty of Rs. 10,000/- on the Appellant. He ordered confiscation of the goods valued at Rs. 80,457/- levying a redemption of Rs. 20,000/- and payment of duty of Rs. 9,654.84 on the confiscated goods. The Commissioner confiscated the machinery of the Appellant under Rule 173Q(d) Central Excise Act, 1944 (sic) with a redemption fine of Rs. 20,000/-. He imposed

a penalty of Rs. 10,000/- on the Appellant.

2. The department's case is that the units called Jyoti Engineering & Plastics, and Jyoti Electronics situated in the same premises under the same shed are employing 3 workers each and are utilising the services of all these three workers in Appellant Jyoti Refinery as and when required though some of the workers are shown on the muster roll of the other companies. Therefore the officers visited the premises of Appellant Jyoti Refinery on 10-7-1985 and made enquiries and recorded statements of S/Shri Rajesh J. Parekh, Jaisukhlal Jamnadas Parekh, two of the partners of the company and three workers found in the factory premises namely S/Shri P. Victor, Mahadev, Anantrao, Jaikumar whose names were not appearing on the muster roll of the Appellant Jyoti Refinery. Another statement of Shri Malikarjun was also recorded who stated that the workers were utilised in all the companies irrespective of muster roll on which they were shown. But the partners stated that Victor, Mahadev and Jaikumar are not working for Jyoti Refinery. They said Victor is a contractor undertaking job work of manufacturing of furnaces and doing repair work and the two persons are office boys doing only office work. On further enquiries and based on further statements the department came to the conclusion that in all 20 workers actually worked in Jyoti Refinery though their names are shown on different muster rolls.

3. It was further the case of the department that since August, 1982 Jyoti Refinery has been evading payment of Central Excise duty by mis-declaring the number of workers employed by them by showing the names of such workers on the muster rolls of Jyoti Engineering & Plastics and Jyoti Electronics, which are their sister concerns, have employed, the department found one Ms. Jayashree N. Parekh whose name is shown in the muster roll of M/s. Parekh Platinum and their salary paid through the same firm, as admitted, working for the Appellant. All the partners of the companies are family member related to each other.

On the basis of the above, show cause notice was issued on 21-1-1986 to Jyoti Refinery alleging that they have by willful suppression of facts with an intention to evade Central Excise Duty manufactured and cleared 79,25,38,787 kgs. of precious metals and chemicals falling under 68 of Central Excise Tariff Act, 1985 from their factory premises during the period 1-8-1982 to 31-7-1985. Out of these goods 18441 gms. were seized by the officers from their factory premises on 23-7-1985 under regular panchnama on the ground that these goods have been manufactured by the Appellant without taking out Central Excise Licenses. It was alleged in the show cause notice that the Appellant have wrongly availed the concession under Notification 46/81 and duty demand of Rs. 2,42,35,598.72 on the irregular clearances as well as the duty of Rs. 9,654.84 on the seized goods was demanded. On considering their reply, the Commissioner of Central Excise, Mumbai-I passed the impugned order already referred to above.

4. The ld. Counsel Shri Shyam Diwan appearing with ld. Counsel Shri Prakash Shah for the Appellants submitted that in this case on the question of limitation the Commissioner himself has held in the order that the extended period under Section 11A of the Central Excise Act, 1944 cannot be invoked for demanding duty for lack of evidence of suppression of facts and hence the Commissioner has restricted the demand in this case only for the period 1-2-1985 to 31-7-1985 i.e.

normal period of 6 months. The learned Counsel submitted that in regard to the number of workers they had given declaration in April, 1984 up to period March, 1985. This declaration was for claiming exemption under Notification 46/81 and declaring that the unit is not covered under the Factories Act, 1948. This declaration had been verified and found correct. After verification the department has also allotted code number to the Appellants as an exempted unit. On 19-9-1984 again a fresh declaration was given for the period 1985 to 1986 which was also verified and accepted by the department. On withdrawal of the Notification 46/81 the Appellants had taken Central Excise Licences.

The learned Counsel referred to the certificate obtained by the Appellants from the Chief Inspector of Factories certifying that the Appellants premises is not a factory within the meaning of Section 2 (m) of the Factories Act, 1948. It was contended that the Central Excise department has to accept such a certificate from an authority empowered under the Factories Act. Reference was also made to the communication addressed to the other unit Jyoti Electronics dated 24-10-1983 by the Factory Inspection Office, Bombay directing to apply for registration and grant of license as soon as the number of workers employed by them exceed 9. Similarly in respect of the other 3rd unit Jyoti Engineering & Plastic Industries also there is a certificate from the Chief Inspector of Factories dated 24-4-1986 certifying that their premise is not a factory within the meaning of Section 2 (m)) of the Factories Act. It was further contended by the learned Counsel that constitution of the firms is different and their manufacturing activities is also different. They have separate registration for sales tax purpose and maintains separate books of accounts. The Appellants have also given detailed particulars of what each of the workmen is doing in their respective unit and the learned Counsel further pointed out infirmities in the statements recorded from the various workmen, like recording of statement in English from workers who are not familiar with that language, partners have been taken as workers which is erroneous as they are not covered by the definition of workers in the Factories Act. The learned Counsel submitted that on cross-examination the department's case has not been supported by the witnesses. Therefore, it was pleaded that the personal penalty and the confiscation of the goods is bad in law as there is nothing on record to Show contumacious conduct by the Appellants.

5. Shri K.L. Ramteke, the ld. DR referred to the detailed reasoning given by the Commissioner in the impugned order and submitted that there is sufficient material evidence on record in the statement of the workers themselves and partners to hold that more than 9 workers are employed in the Appellants unit and by making use of the neighbouring units and sister concerns they had wrongly availed of the exemption under Notification 46/81.

6. We have considered the rival submissions. The Notification 46/81 grants exemption to all goods falling under Item 68 of the old Central Excise Tariff. There is an explanation to the Notification to the effect that in the Notification expression "factory" has the meaning assigned to it in clause (m) of Section 2 of the Factories Act, 1948.

Under Section 2(m) of the Factories Act, "factory" means any premises including the precincts thereof where 10 or more workers are working or were working on any day of the preceding 12 months and the section also defines worker as "a person employed directly or through any agency, whether for wages or not, in any manufacturing process or in cleaning any part of machine or premises used for manufacturing process or in any act of work incidental to or connected with the manufacturing process." The department's case is that the Appellants and the two other units which are located near each other and are sister concerns managed by the same family have so arranged as to show that the number of workers in each unit is less than 10 so as to fall outside the scope of the definition of factory in the above said Act. The Commissioner relies on the evidence of the statement of persons found working in the units as well as those of partners on the reasoning that there is nothing in the Notification 46/81 which states that the appropriate authority for determining whether or not a particular unit is a factory or otherwise is Inspector of Factories and that their decision is binding on the department for grant of exemption under Notification 46/81. The Commissioner has gone on to conclude that what is required for treating a unit as a factory or otherwise under the Factories Act is the number of workers working which involves a simple process of counting of heads. If the Central Excise officers on a particular day of visit found the number of workers as more than 9, denying the benefit of Notification to that unit would be in order according to the adjudicating authority. The Commissioner has observed that the statements of the persons recorded on the spot on the day of officers visit fairly indicate that the refinery was utilising their services right from the beginning of the formation of the 3 units. On an examination of these lines of reasoning by the Commissioner we find that the exemption Notification laid down that the for the purpose of Notification 'factory' has the same meaning as under the Factories Act.

Admittedly in this case there are certificates from the authorities empowered under the Factories Act certifying that the Appellant unit as well as the other 2 units concerned do not fall within the definition of 'factory' under the Act. It is well settled that the Central Excise authorities are not expected to go behind the certificate issued on other enactments by the competent authority empowered thereunder. Apart from this it is also recorded in the impugned order that the yearly declarations filed by the Appellants for seeking exemption under Notification 46/81 had been accepted by the department and exemption code number has also been allotted to them. The yearly declarations have been accepted after due verification by the jurisdictional Central Excise officers. The Superintendent of Central Excise is seen to have visited the Appellant's premises on several occasions in connection with the declarations for exemption under the Notification and the visits of these officers are recorded in the visitors' register maintained by the Appellants. It is only having regard to this situation and the implication thereof that the Commissioner in the order has held that the longer period for demanding duty cannot be invoked in this case under Section 11A of the Central Excise Act, 1944.

Because of these circumstances it follows that there has been no suppression with intention to evade duty. Therefore the conclusion of the Commissioner in this case to demand duty although for the normal period of 6 months is absolutely based on the statements obtained by the department following the visit to the unit, but it has been brought out by the defence that some persons taken as workers will not fit in the definition of the term workers, which again defined in the Factories Act. The department cannot be including e.g. the person who had came for repairing job as a worker. Some of the witnesses who were cross-examined have also not supported the department's case. In these circumstances the demand for duty on the ground that the Appellants fall within the definition of 'factory' under the Factories Act is not well founded and is not based on tangible evidence. On the other hand, the Appellants have led sufficient evidence to support their case as seen above. In these circumstances the impugned order is set aside and the appeal is allowed.