Atita Traders Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-05-1998

Reported in : (1998)(101)ELT321TriDel

Appellant : Atita Traders

Respondent : Collector of Central Excise

Judgement :
1. In the present appeal M/s. Atita Traders, Ahmedabad have challenged the order of the Collector of Central Excise, Ahmedabad dated 25-8-1989 demanding a duty of Rs. 40,424.50 and imposing a penalty of Rs. 10,000/- on them.

2. At the outset ld. Counsel for the appellants fairly stated that the order-in-original mainly dealt with the question of clubbing of clearances of the present appellants and that of two other firms, namely, Ananta Chemicals and Plastics Pvt. Ltd. and Aparajita Traders.

He also stated that the appellants were raising the question of dutiability of the products for the first time before the Tribunal.

Since the question went to the root of dispute he would seek leave to make submission on the said question. The ld. DR objected to the raising of the said issue since the question of excisability had not been raised before the lower authorities, it cannot be raised before the Tribunal at this stage as this would necessitate fresh enquiry and investigation into the matter. On a perusal of the

SCN and the order-in-original we observe that the questions considered by the adjudicating authority were relatable to the clubbing of the clearances by the three units and no dispute relating to the question of 'manufacture'of the product, namely, pigment paste, was considered earlier. The point raised by the ld. DR, therefore, appears to be borne out by the facts.

3. On the question of allowing the plea as to 'manufacture' being raised at the Tribunal stage, it is no doubt true that a question of fact is not generally allowed to be raised for the first time at the second appeal stage. However, a discretion has been given to the Tribunal by Rule 10 of the CEGAT Appellate Tribunal Procedure Rules, 1982 to allow the appellants to raise additional grounds which are not taken in the Memorandum of Appeal. Therefore, a certain discretion is vested in the Tribunal in such matters. Where a question of fact is raised which goes to the very root of the appeal, we are of the view that the Tribunal has a duty to allow the same. It is all the more so when a question of law is raised as there can be no bar to a question of law being raised at any stage, even at the second appeal stage. We notice that the question whether the manufacture of a product is complete or not has been held to be a mixed question of law and fact (Hindustan General Electric Corporation v. Supdt., AIR 1964 Patna 248).

In any given facts of a case this will depend on the construction of the expression 'manufacture' as given in Section 2(f) of the Central Excises and Salt Act, 1944. Just because such a question was not raised at the stage of Order-in-Original, it cannot be contended that the Tribunal cannot entertain the same for the first time since the question of manufacture goes to the very root of the matter. We, therefore, reject the ld. DR's objections on the point and proceed to hear the submissions made by the ld. Counsel for the appellants on the question of 'manufacture' of the product in question, namely, pigment paste.

4. It is contended on behalf of the appellants that pigment paste is nothing but a semi-fluid form of pigment powder and no process of manufacture is involved in making pigment paste. They have relied on a judgment of the Bombay High Court and the Tribunal to contend that conversion of dyes into paste through diluting agents, like water, glycerin, etc., do not amount to manufacture as no article with a

distinctive name, character or use has come into existence. Reliance was placed in this connection on the Bombay High Court judgment in Sandoz India v. Union of India and Ors., 1980 (6) E.L.T. 696 (Bom.). It is seen that in this case the High Court had held that a mere change in the state of pigment and its conversion into liquid state by the addition of dispersing agents would not amount to manufacture. He also cited the Tribunal's order in Jyoti Laboratories v. Collector of Central Excise, Cochin, 1994 (72) E.L.T. 669 (Tribunal) by which the Tribunal by a majority had held that a physical mixture of already standardised, formulated and prepared ingredients and dissolving them into boiling water would not bring into existence a new product.

5. Since a legal plea involving the basic issue of manufacture of the item itself has been raised which goes to the root of the matter, we are inclined to accept the plea of the appellants for reconsideration of the matter afresh. Though the point has not been dealt with by the original adjudicating authority, in our view this should not stand in the way of its being considered afresh. Accordingly, the matter is remanded to the original adjudicating authority to consider the question of manufacture of the product in dispute for purposes of Section 2(f) of the Act. The said authority will go into the question de novo and pass as appealable order in accordance with law after giving due opportunity to the parties for being heard.

6. The appeal is allowed by way of remand and disposed of in the above terms.

7. While I fully agree with my ld. colleague that question relating to manufacture or excisability of goods can always be raised for the reasons mentioned in para 3 [I will go one step further and say that Tribunal can allow even additional evidence to be taken on record on a sufficient cause being shown and in terms of Section 23 of the CEGAT (Procedure) Rules and thereafter remand the matter, if necessary].

However, the point is whether in the present case a new point is being really raised? I am afraid that both the sides have not made correct submissions, in this regard, inasmuch as a perusal of the order-in-original shows that a point regarding the issue of manufacture had been raised by the appellants at the original stage as evident, inter alia, from the following extracts of relevant parts of the order-in-original:Page 5: Reply to show cause notice was filed by M/s. Aparajita Traders on

9-9-1987...In their reply..."they have contended that they did not manufacture pigment paste at any time by only manufactured silicon emulsion"... silicon emulsion prepared by them does not amount to manufacture and is not liable to duty.Page 6: A defence reply was also filed by M/s. Atita Traders on 29-8-1987...They have also challenged that silicon emulsion prepared by them does not amount to manufacture.

8. In view of the above position, it cannot be said that the point raised by the ld. Counsel was an entirely new point. Since it was raised at the original stage the Collector was required to record a finding on this basic issue before proceeding further in the matter but has not done so. Hence, the matter is required to be remanded.

9. Before parting I may mention en passe that it is not a question of a process being simple or complex but being of such a nature which results into coming into existence of a new commodity known to the market with a distinctive name, character and use and the whole issue has to be examined w.r.t. Section 2(f) and the relevant case law after due enquiry. The Collector may therefore give the appellants an opportunity of being heard in the matter and thereafter pass a speaking order.