

Duke and Sons Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-27-1998

Reported in : (1999)(107)ELT196TriDel

Appellant : Duke and Sons

Respondent : Collector of Central Excise

Judgement :

1. The appellants have two factories one at Pune and the other at Chembur, Bombay. At the factory at Pune, the appellants inter alia manufacture mango pulp, orange pulp and mango slices and syrup. These goods are packed in unit containers 3 Kgs., 5 Kgs. etc. 1.2 Of the total production, a part of it is cleared to the factory at Chembur by the appellants, where it is processed to make various drinks marketed as "Mangola". The remaining part is sold at the factory at Pune to outsiders.

2.1 Question involved herein is whether the appellants' goods transferred by them to their factory at Chembur are to be classified under Tariff sub-heading 2001.90, as contended by the appellants or under sub-heading 2001.10, as contended by the Revenue. In order to understand the controversy at hand we reproduce the relevant sub-headings :-----

Heading Sub-heading Description of goods.

Rate of	No.	No.	duty-----	(1)	(2)
(3)	(4)		-----	20.01	Preparations

of vegetables, fruit, nuts or other parts of plants, 2001.10 - Put up in unit containers and 15% ordinarily intended for sale.

2001.90 - Other Nil----- 2.2

The controversy before us is whether the transfer of the goods by the appellants from their factory at Pune to their factory at Chembur is to be treated as sale or not. It is stated at this stage that while transferring the goods from Pune to Chembur debit and credit entries are made in the accounts books of the two units at Chembur and Pune.

2.3 In 1984 a similar controversy had arisen in the context of Tariff Entry IB read with Notification 34/83-C.E. whether the transfer of product from Pune to Chembur was a sale or not. At that time the Revenue contended in order to deny the benefit of exemption Notification 34/83, that it was not a sale whereas the appellants had contented that the said transfer was a sale. This contention of the appellants was decided by the Commissioner (Appeals) in favour of the appellants vide order-in-appeal dated 30-10-1986. Department did not accept that contention and it filed an appeal before the Tribunal against the aforesaid order of the Commissioner (Appeals). The Tribunal while allowing the benefit of exemption to the appellants herein under Notification 34/83-C.E. upheld the order-in-appeal passed by Commissioner (Appeals), as aforesaid. In other words, the Commissioner (Appeals) order dated 30-10-1986 holding that it was a sale became final. As a result, the department on introduction of the new Tariff meanwhile w.e.f. 1-3-1986 had dropped its earlier decision because it had taken up the matter in appeal before the Tribunal. Later on, however, it issued show cause notice dated 13-10-1988 for the period 1-4-1988 to 5-10-1988 demanding duty on the said products treating them as sale under Tariff sub-heading 2001.10. It is this demand of duty which has been confirmed by the lower authorities which is in dispute before us.

3.1 Learned Advocate, Shri M.P. Devnath submits that the definition of Sale given in Section 2 (h) of the Central Excise Act, 1944 requires transfer of property from one person to another before a sale could be said to have been taken effect. In the present case the person at Chembur and at Pune remains the same i.e. the appellants herein and therefore, submits the learned Advocate it could not be said

to be sale and consequently goods would automatically fall under Tariff sub-heading 2001.90. In this view he submits that the demand of duty is not sustainable on merits.

3.2 In support of the above proposition, learned Advocate has relied upon two judgments under the Sales Tax Acts in the cases of (1) Mahendra Kumar Ishwarlal & Co. v. The State of Madras - XXI STC 72 and (2) U.P. State Cement Corporation Ltd. v. Commissioner of Sales Tax, U.P. - 43 STC 476 wherein it has been held that in order to constitute a transaction as of sale there must be two entities between whom transaction is effected. There cannot be a sale between the same person.

3.3 The learned Advocate has also submitted that the department was not treating these transactions as sale and was, therefore, following the instruction of the department by separately sticking a label mentioning "not for sale" on the goods while transferring the goods from Pune unit to Chembur Unit. Learned Advocate, therefore, stated that in view of the appellants following the procedure prescribed by the department it will not be correct for the department to raise any demands on the above scope even for the period of six months particularly due to the fact that during the period 1986 to 1988 the department just kept quiet and did not take any action.

3.4 Opposing the contention learned JDR, Shri A.M. Tilak submits that the correspondence relied upon by the learned Advocate was of the period when this issue was subjudice before the authority i.e.

Commissioner (Appeals), Bombay when he passed the order on 30-10-1986 upholding the contention of the appellants herein that the transaction between the Pune and Chembur Units is one of sale. He further submits that keeping in view only the dispute persisting between the department and the appellants for a long time, the Revenue has asked for a demand of only for six months and not beyond the period of six months as permissible under Section 11-A.3.5 On the main question whether it is a sale or not learned JDR submits that this question is no longer res Integra inasmuch as the dispute has been settled between the parties by virtue of Commissioner (Appeals) order dated 30-10-1986 which has become

final by Tribunal's order dated 26-12-1996. He, therefore, submits that this issue cannot be reopened at this stage. He, therefore, submits that the demand of duty for the period 1-4-1988 to 5-10-1988 is sustainable on merits as also on limitation.

4.1 We have carefully considered the pleas advanced from both sides. We agree with the submission of the learned JDR, Shri A.M. Tilak that the issue whether the transfer of goods, as aforesaid from Pune to Chembur is the sale or not is settled by Commissioner (Appeals) judgment dated 30-10-1986 having become final by Tribunal's judgment holding the transaction as sale. Therefore, the products would definitely fall under Tariff sub-heading 2001.10 as rightly held by the lower authorities. Further the question of limitation does not arise because the demand is only for the period of six months from the date of filing of R.T. 12 Return inasmuch as the show cause notice is dated 13-10-1988 and the demand for the period is 1-4-1988 to 5-10-1988.

4.2 In view of the aforesaid findings, we do not find any substance in the appellants' appeal and consequently we dismiss the same. At this stage, learned Advocate has submitted that since the transaction of transfer from Pune to Chembur has been held to be dutiable, therefore, the Chembur Unit will be entitled in the Modvat credit if it is shown to have complied that the inputs have been utilised in the final product and that the inputs had paid the duty. This plea was not taken before the lower authorities but nevertheless if the appellants satisfy the provisions of Modvat Rules, except the filing of the Modvat declaration, their plea should be considered by the authorities below and the benefit of Modvat credit should be extended if otherwise admissible to them. Question of confiscating the plant and machinery in the facts and circumstances of the case does not arise as the matter was subjudice before the higher authorities and the matter required resolution of disputed questions of law under the provisions of law.

Accordingly, we set aside the confiscation of plant and machinery and consequently set aside the redemption fine imposed in lieu of confiscation of plant and machinery. Likewise there is no justification for imposition of personal penalty of Rs. 50,000/-.