

**Commissioner of Central Excise Vs. Precision Dies and Punching**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Aug-09-1999

**Judge :** J T J.H., G Srinivasan

**Appellant :** Commissioner of Central Excise

**Respondent :** Precision Dies and Punching

**Judgement :**

1. This application for stay of operation of the impugned order was argued by Shri Deepak Kumar. The respondents were presented by Shri M.R. Nadkarni Consultant. On hearing both sides it appeared that at this stage itself the main appeal could be taken up for disposal. With the consent of both sides, this was done.

2. The respondents filed a declaration under Rule 173 B on 1.4.98 declaring their intention to take benefit of Notification No.38/97 CE dt. 27.6.97. The notification requires the assessee to file an option to avail of the benefit of the notification and cautions that the benefit of the notification would be available from the date of exercising such option. This formal option was given by the assessees later i.e. on 3.7.98. The show cause notice was issued seeking to deny the benefit of this notification during the period 1.4.98 to 3.7.98.

The Assistant Commissioner after hearing the assessee confirmed the denial and resultant differential duty of Rs. 56,006.55. Against this decision the assessees filed an appeal, the Commissioner (Appeals) held as follows.

"However, it is matter of record that the appellants while opting for exemption under said Notification No.38/97 first time filed letter of option in the financial year 1997-98 along with declarations under Rule 173 B. The declaration filed by the appellants w.e.f. 01.04.98 was for the period in continuation of earlier declaration of the year 1997- 98. It is also observed that although appellants did not file a separate letter of option along with declaration No. 1/98-99 w.e.f 01.04.98, in the said declarations they claimed exemption under said Notification No. 38/97 for the period w.e.f.01.04.98 and declared that they are availing of Modvat Scheme. Taking into consideration the facts on record, I find that the lapse on the part of appellants of non filling of letter options can be considered as of technical nature.

As such appellants rectified their lapse by filing letter of option on 03.07.98 i.e. before the issue of Show Cause Notice, dt.

13.07.98. I therefore hold that for a technical lapse on part of appellants, they cannot be deprived of their claim of exemption when all other conditions have been fulfilled".

3. Against the order the revenue have filed the appeal as also an application for stay. In the ground of appeal it is claimed that the filing of option is mandatory and non filing thereof cannot be taken to be merely it take the lapse. It is claimed that during the period where there was no formal option, the Assistant Commissioner's order demanding duty was appropriate.

4. We have seen the text of the concerned notification. Paragraph 2 condition (1) requires a declaration to be filed for a particular financial year. However in the present case we find that this was a second period for which the assessee was availing of the benefit of this notification. The necessity of the option is obviously to put the department on notice of the assessee's intention. In the case of this particular assessee; the Department already stood on notice that the assessee had intended to take benefit of this Notification. In our view the Commissioner was justified in holding that the substantive benefit of the Notification was available in spite of the failure of the assessee to refile his option when filing the declaration under Rule 5. The appellant Commissioner insists that the filing of the declaration is a statutory requirement. Prima facie the claim has merit. We however observe

that an action taken at an earlier point is held to suffice for a later obligation. Thus Section 11B of the Central Excise Act, 1944 requires an application to be made for refund within six months of the relevant date. In a particular case an assessee had intimated to the department of his intention to take refund and then had subsequently filed a formal claim. The Collector held that counting from the relevant date, the formal claim was barred by limitation. The Tribunal in dealing with this issue held that first intimation was to be treated as an application for refund and that the limitation did not apply [Wood Working Centre v. Collector of Central Excise] 1996 (85) ELT 201. The view expressed by the Tribunal would also apply to the extension of the benefit of this notification. We find that the Commissioner was correct in giving relief to the assessee, in this case we uphold this order and dismissed the application for Revenue. The stay petition also stands disposed.

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