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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-02-1999

Reported in : (2000)(67)ECC575

Judge : J Balasundaram, A T V.K.

Appellant : Perfect Refractories and anr.

Respondent : Collector of Central Excise

Judgement :

1. These are two Appeals filed by M/s. Perfect Refractories and M/s.

Perfect Stoneware Pipes arising out of a common order dt. 15.5.92 passed by the Collector, Central Excise, involving the issue whether the crushed clay manufactured by Appellants No. 2 which is used in the manufacture of glazed stoneware pipes by the Appellant No. 2 is excisable and dutiable.

2.1. The facts in brief are that M/s. Perfect Pottery Co. Ltd. have three manufacturing units as under: i. M/s. Perfect Refractories, Jabalpur, manufacturing Firebricks and Fire clay and Mortars.

iii. M/s. Perfect Sanitary Pipes, Bharatpur, both manufacturing crushed clay for captive consumption in the manufacture of salt glazed stoneware pipes.

2.2. A show notice dated 13.7.91 was issued for demanding duty Rs. 22,87,896.20 ps. from Appellants No. 1 on the ground that after taking into account the

aggregate value of clearance of all the units for the purpose of Notification No. 175/86, the Appellant No. 1 had paid less duty during the period from 1986-87 to January 1991.

2.3. In the same notice dt. 13.7.91, the Appellants No. 2 were asked to pay duty Rs. 7,35,166.87 ps. in respect of "crushed clay" falling under Heading 25.05 of the schedule to the Central Excise Tariff Act, manufactured and removed during the period from 1986-87 to January, 1991 by suppressing the fact of manufacture of crushed clay and without following Central Excise Procedure and without payment of duty.

2.4. The Collector, Central Excise, in the impugned order confirmed the demand of duty as demanded in the notice and imposed a penalty of Rs. 5,00,000 on Appellants No. 1 and Rs. 1,50,000 on Appellant No. 2, holding that the batch mixture is prepared by taking different types of fireclay lumps grog (broken pieces of burnt salt glazed stoneware pipe) and common, earth; the mixture is grinded/crushed in order to mix it homogeneously; the mixture is screened to get desired mesh size; that as per Note 2 to Chapter 25 of the Tariff, Heading 25.05 covers the products which have been washed, crushed, ground, powdered, screemed, etc; that Tribunal has held in Ajanta Marbles and Chemicals v. C.C.E. 1991 (53) ELT 477 that the process of crushing, grinding, and sieving amounts to manufacture; that the crushed clay is marketable; that Explanation No. Ill to Notification No. 175/86; is not attracted as particular excisable product is not availing exemption under Notification No. 175/86, that by not taking the Central Excise Licence and by not declaring the fact regarding manufacture of crushed clay, they had suppressed the facts and extended period of limitation is available to the Department and accordingly duty is payable on crushed clay and the value of its clearances is includable while computing the aggregate value of clearance under Notification No. 175/86.

3. Shri G. Shiv Das, Ld. Advocate, submitted that crushed clay and Batch Mixture are the same things; that the impugned product is not marketable; that no evidence is adduced by the department to prove that the Batch Mixture prepared by the Appellants No. 2 is capable of being bought and sold in the market; that the

bills relied upon by the Department are of fireclay lumps and not Batch Mixtures of the composition made by the Appellant No. 2, that the mixture so prepared is not a standardised item available in the market. The Ld. Advocate also referred to the affidavits and letters of the manufacturer and dealers of salt glazed stoneware pipes according to which there is no commodity as "Batch Mixtures/Crushed clay" known in the market and that batch Mixture/Crushed clay is neither marketable nor is actually sold in the market. He also relied upon the decision in the case of Burn Standard Co. Ltd. v. C.C.E. Raipur, 1998 (24) RLT 537 (T) wherein it was held that "No evidence has been brought on record by the Revenue that this paste of clay is marketable in the paste form...marketability of a dry powder clay is not relevant for the purpose of considering the marketability of the paste of clay...." He further submitted that demand is hit by limit specified in Section 11-A(1) of the Central Excise Act as the issue involved is a pure issue of interpretation, that show cause dated 19.9.90 had been issued to M/s. Perfect Sanitarywares Ltd. demanding duty on batch mixture manufactured during the process of manufacture of salt glazed stoneware pipes and fittings; that the Collector, Indore held that the product is not dutiable under Heading 25.05 of C.E.T.A.; that it follows from this that the Department was aware that crushed clay was one of the intermediaries in the manufacture of salt-glazed stoneware pipes; that in February 1990 when the officers visited their factory, they were given all the information including the inputs and there was thus no suppression of facts; that further there is no positive act on their part to avoid payment of duty and as held by the Supreme Court in C.C.E. v. Chemphar Drugs and Liniments something positive other than mere inaction or failure on the part of the manufacturer conscious or deliberate withholding of information is required before it is saddled with any liability beyond the period of six months. He, further, mentioned that even on the question of crushing of line stone the matter has been held in assessee's favour in Bheraghat Mineral Industries v. Divl. Dy. Commissioner of Sales Tax and in Raymond Cement Works v. C.C.E. is against them, there are two different view and the Tribunal has consistently taken the view that proviso to Section 1-A cannot be applied in such a situation.

4. Finally, the Ld. Advocate submitted that even if the impugned product is held to be excisable, no excise duty is leviable in view of Explanation HI to Notification No.

175/86; that the impugned goods and finished goods both are specified goods under Notification No. 175/86 as these have been classified under Heading 25.05 and 69.04 of the Schedule to the Central Excise Tariff Act; that as per Annexure III where any specified goods (inputs) are used for further manufacture of specified goods within the factory of production, the clearances of such inputs for such use shall not be taken into account for the purpose of calculating the aggregate value of clearances. He mentioned that the sole ground for demanding duty on fire-brick and fireclay mortar manufactured by the Appellant No. 1 is thus incorrect; that it is immaterial that the stoneware pipes were cleared availing the exemption under a separate Notification No. 51/86 so long it is listed in Annexure to Notification No. 175/76. Reliance was placed on the decision in the case of J.C. Engineering v. C.C.E. , (ii) C.C.E., v. Gadgets India Ltd. , (iii) Universal Electrical Industries v. C.C.E. andDukat & Co.

(P) Ltd. v. CCE 5. Countering the arguments, Shri H.K. Jain, Ld. SDR., submitted that the Appellants are confusing between Batch Mixture and Crushed clay; that the Department is demanding duty at the stage of crushed clay and not at the stage of Batch Mixture; that in all the affidavits and letters produced by the Appellants, the question was not put correctly and that is why the Collector did not rely upon them. He also submitted that the process of crushing clay amounts to manufacture. He relied upon the decision in the case of Raymond Cement Works v. C.C.E. wherein it was held that crushing of lime stone into powder amounts to manufacture as a distinct commodity commercially recognised in market has come into existence. Regarding demand being time barred, the Ld. S.D.R. submitted that the Appellants had not declared the manufacture of crushed clay to the Department nor they had taken a Central Excise licence and this amounts to suppression of facts. With regard co Explanation III to Notification, he reiterated the findings of the Collector.

6. We have considered the submissions of both the sides. It is well settled law the marketability is an essential ingredient in order to be dutiable under the Excise Act. (See Bhor Industries Ltd. v. C.C.E. and Moti Laminates Pvt. Ltd. . It has been contended by the Appellants that the Department has not adduced any evidence to prove marketability of the impugned product. The Collector, in the impugned

order, has given his findings to the effect that the Appellants were confused in respect of crushed clay and Batch Mixture; the clay is definitely marketable as was evident from Bill dt. 7.7.90 of Satpura Minerals. The Appellants have rightly contended that Bills were for sale of clay itself which is one of their inputs also. They have given the process of manufacture of Batch Mixture according to which clay lumps, grog and common earth are mixed and then grinded. No evidence has been brought on record to show that the clay is first crushed and then it is mixed with grog and common earth. The Tribunal also has held in Burn Standard Co. Ltd., (supra), that paste of clay obtained by simultaneously crushing of clay and mixing with water at the intermediate stage in the manufacture of salt glazed stoneware pipes is not marketable as no evidence about its marketability was brought on record. In the present matter also the Department has not discharged the onus to prove that the product in question is marketable by adducing any evidence.

7. We also find sufficient force in the submissions of the Appellants that by virtue of Explanation III to Notification No. 175/86 no duty becomes chargeable from the appellants. Annexure II to the Notification No. 175/86 is as under:- Explanation III-- Where any specified goods, (hereinafter referred to as inputs) are used for further manufacture of specified goods within the factory of production of inputs, the clearances of such inputs for such use shall not be taken into account for the purposes of calculating the aggregate value of clearance under this Notification.

This Explanation came for consideration of the Tribunal in the case in Universal Electrical Industries v. C.C.E. in which it was held that Explanation III to Notification No. 175/86 clearly stipulates that where any specified goods "inputs" are used for further manufacture of specified goods within the factory of production, the clearance of such inputs for such use shall not be taken into account for the purposes of calculating the aggregate value of clearance under this Notification. There is no stipulation whatsoever in the Explanation that the final product manufactured therefrom should also be cleared availing exemption under the very same Notification. The only condition is that the final product should also be specified goods. The Tribunal also held in the case of J.G. Engineers v. C.C.E., Meerut Notification No. 175/ 86 CE is very clear that the value of clearances of the

inputs captively used in the manufacture of final product is not to be taken into account for the purposes of determining the duty liability of the appellants in respect the specified goods. The Tribunal held parts of power driven pumps captively used within the factory of production are not liable to duty. Following the ratio of these decisions the impugned product will not be liable to duty as it is one of the specified goods as per Annexure to Notification No.175/86 and it is used in the manufacture of Salt Glazed Stoneware Pipes falling under Chapter 69 which is also one of the specified goods as per Annexure to the Notification. As we are allowing the appeals on the issue of marketability and on the basis of applicability of Explanation III of the Notification No. 175/86, we are not considering the aspects of demands being time-barred. Both the appeals are allowed.

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