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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-29-1999

Reported in : (2000)LC94Tri(Mum.)bai

Appellant : Claridge and Co. Ltd.

Respondent : Commissioner of Central Excise

Judgement :

2. The appellants manufacture egg containers and other containers. On 1-5-1987 the Assistant Collector classified these products under sub-heading 4818.90 as against the claim of the assessee under 4819.19.

This order was challenged by the assessee. On 22-3-1988 the Collector (Appeals) ordered classification under Heading 4818.19. This was challenged by the department. The Tribunal in its order dated 17-10-1989 reversed the Commissioner's order. The appeal filed against this order was dismissed by the Supreme Court on 19-2-1991. Thus, classification under Heading 4818.90 sustained.

3. On 1-3-1988 classification list 105/88 effective from that date was filed once again claiming classification under Heading 4819.19. This was returned by the Superintendent on 16-3-1988. The list was re-filed on 5-4-1988 and was provisionally approved by the Assistant Collector on 10-6-1988. Quite sometime thereafter i.e., on 29-3-1989 the jurisdictional Superintendent directed the assessee to file the requisite bonds as required under Rule 9B of the Central

Excise Rules.

The assessee did not comply with this direction. Claiming benefit of the Collector (Appeals) order, they continued to clear the goods on payment of duty at the rates applicable to goods falling under sub-heading 4818.19 without filing of the bond in spite of the express directions of the department. This continued even when the order of the Collector (Appeals) in their favour was set aside by the Tribunal. On 19-2-1990 show cause notice-cum-demand notice was issued. In the annexure to the show cause notice the CEGAT order was cited. The assessees were asked as to why the classification list should not be finally approved in terms of that order and why the resultant differential duty not be confirmed and recovered. This notice covered the period 1-4-1988 to 31-12-1989. On 8-5-1990 an identical show cause notice was issued covering the period January, 1990 to 31-3-1990. The appellants replied to the notice. The Assistant Collector vide his order dated 21-10-1994 finally approved the classification of the contested products under Heading 4823.90 which was described in the annexure to the two show cause notices as the equivalent to classification under 4819.90 by virtue of the budget changes in the year 1988. He also confirmed the duty totally amounting to Rs. 57,55,992/-. Against this order the assessee filed an appeal. The Collector (Appeals) having upheld the impugned order, the present appeal is before us.

4. We have heard Shri Vipin Kumar Jain for the appellant and Shri K.L.

Ramteke for the Revenue.

5. Shri Jain fairly stated that he was not disputing the classification of the contested goods but would advance arguments on limitation. It is his submission that the facts before the Assistant Collector were such as would require provisional assessment to have been resorted to. It was claimed that the assessee had never filed B-13 bond. Referring to the judgment in the case of Usha Martin Industries Ltd. v C.C.E., 1987 (27) E.L.T. 728 and Nipha Machineries v. CCE [1990 (48) E.L.T. 549 (Tribunal)] it was claimed that the provisional assessment would become effective only when the bond was filed and not otherwise. Supreme Court's order in the case of Samrat International was sought to be distinguished. It was claimed that in the absence of a demand notice under Section 11A the

amount could not be confirmed and that in the absence of any such notice the upholding of the duty confirmed was wrong.

6. We have considered these submissions. Rule 173B speaks of approval of the classification list where for reasons set out therein the Assistant Collector is not in a position to accord approval to the classification suggested by the assessee, the Assistant Collector may order assessment to be provisional. This was so in terms of Sub-rule 2(a) of the said Rule, the wording of which was as follows : "(2) If in the declaration so filed under Sub-rule (1), any alteration becomes necessary in respect of any goods because of: (a) the assessee commencing production, manufacture or warehousing of goods not mentioned in that declaration, or" 7. The concerned classification list is on record which contains the order recorded in writing as to provisional assessment. Rule 9B sets out the procedure to be adopted by the assessee where such provisional assessment has been ordered. Sub-rule l(c) thereof is worded similarly as Sub-rule 2(a) of 173B. Rule 9B also authorises the Assistant Collector to direct the assessee to file a bond. This was so done in this case by way of a letter from the Superintendent dated 29-3-1989.

Admittedly there was a delay by the department in making such directions but the fact is that before and even after the receipt of this direction the assessee did not file the bond, but continued to discharge the burden of duty as determined by them and not as direction by the department.

8. Shri Jain would plead that where the assessee chose not to fulfil the burden cast upon him under the law, the department would suffer the consequence by having to forgo the duty. It is not so. We have seen the judgments relied upon by Shri Jain. We need not rely on the Usha Martin judgment, which was passed about a decade before the law was finally settled by the Supreme Court. In the cited judgment of Nipha Machineries it was the assessees who had claimed provisionality of the assessment on the ground that they had not filed any bond. The Tribunal on related facts held that assessment was not provisional. Therefore there is no ratio to be derived from this judgment. Great stress was laid by Shri Jain on the Tribunal judgment in the case of Universal Paper Mills Ltd. v. C.C.E., 1998 (97) E.L.T. 349 which was subsequent to the Supreme Court judgment in the

case of Samrat International reported in 1992 (58) E.L.T. 561. In this case the Tribunal was dealing with a demand notice. On the issue of limitation the department had claimed provisionality of the assessment. In dealing with various arguments the Tribunal in paragraph 5.4 made the following observations: "This declaration by the appellant was more than enough to warn the department to check the appellant's sales bills and to decide timely the issue arising from such checking or atleast safeguard revenue either by directing provisional assessment or by issuing show cause notices from time to time within the normal time limit of 6 months and keeping them in abeyance till final decision of the Apex Court." 9. The Tribunal in the cited judgment held that in the case before them the assessment was not provisional and it proceeded to give their judgment. Later the judgment of the Supreme Court in the case of Samrat International come up for discussion of the Tribunal. It is not that the Tribunal doubted the applicability of Samrat International judgment where the assessment was provisional. In paragraph 5.6 of the judgment the Tribunal observed that in the case of Samrat International the provisional payment of duty was at higher level than the price finally approved and therefore the question of filing of bond did not arise.

The Tribunal observed that the observation of the Court would not fit in with a situation where on final assessment a demand of duty from the assessee was involved.

10. We would refrain from commenting on this analysis made by the Hon'ble Tribunal on the Supreme Court judgment, but would retain to the observation that this judgment would not become applicable in the situation before us. We have also seen C.C.E. v. Pharmasia Pvt. Ltd., 1989 (41) E.L.T. 77. In this judgment the Tribunal held that goods earlier cleared could not be assessed to provisional duty. The facts narrated in the judgment observed that clearance made in the past on the basis of finally approved price lists would not on later date be deemed to have been provisionally assessed. It was in this context that the Tribunal observed that goods already cleared could not be assessed to provisional duty. In the present case Shri Jain raises this for the period 1-4-1988 to 10-6-1988 i.e., before the receipt of the letter indicating about the provisionality of the assessment. We take cognizance of the arguments made by Shri Ramteke that the classification list

itself is effective from 1-3-1988 and therefore the goods covered therein could not be termed to be "already cleared". We note that the classification list was to be claimed effective from 1-3-1988 and therefore this judgment does not come to the rescue of the assessee.J.K. Cotton Spinning & Weaving Mills v. C.C.E., 1989 (23) ECR 385, which does not assist either side. The Supreme Court in the case of Serai Kella Class Works Pvt. Ltd. v. Collector, 1997 (91) E.L.T. 497, observed that where the demand was a consequence of finalisation of assessment there is no requirement of a show cause notice under Section 11 A. The latter provision would come into effect only when the assessment were finalised and after the finalisation there was demand for short levy.

The finalisation of an assessment and raising a consequential demand is not governed by the time frame prescribed under Section 11A or Rules enabling demands to be made. In the present case there is no doubt that the demands were the result of finalisation of the assessment. The classification made by the Assistant Collector forming the basis of the demand ultimately having been upheld by the Supreme Court cannot be questioned. We therefore find no force in the arguments of Shri Jain that the demands suffer by limitation.

12. Shri Jain did not press his arguments on res judicata. In the submissions before the Commissioner (Appeals) the assessee had pleaded that no abatement had been allowed for admissible deduction towards tax, duty, etc. which were allowable under Section 4 of the Central Excise Act, 1944. It was claimed on this ground the quantum of duty was wrongly calculated. We find that the Commissioner (Appeals) did not deal with this argument at all. This claim is valid in law and needs to be examined and corrections need to be made to the quantum of the demand.

13. Therefore upholding the impugned order, we remand the proceedings back to the jurisdictional Assistant Commissioner for the limited purpose of re-quantification of the demand on the deductions being allowed in terms of Section 4 of the Act.

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