

India Cements Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-06-1984

Reported in : (1985)LC124Tri(Delhi)

Appellant : India Cements Ltd.

Respondent : Collector of Central Excise

Judgement :

1. 201.10 tonnes of cement cleared on payment of duty by India Cements Limited were brought back to their factory and reprocessed in accordance with Rule 96ZV of Central Excise Rules, 1944 and, thereafter, cleared (a second time) in October 1978, this time without payment of duty. At the time of this (second) clearance, notification 198/76- CE was in operation. The factory, therefore, included this cement in its figures for computing the total clearance for the year 1978-79 under this notification.

2. The Assistant Collector rejected this and excluded the 201.10 tonnes from his calculations. The Appellate Collector of Central Excise of Madras by Order No. 2095/80 dated 22-11-80 agreed with the Assistant Collector saying that non-duty paid clearances were not entitled to notification No. 198/76-CE concessions.

3. The learned counsel for India Cements Ltd. argued before us that the lower authorities were wrong in their understanding of the law. If notification 198/76-CE was meant to exclude cement reprocessed and cleared under Rule 96ZV, there would have been a specific provision to such effect. The factory crossed its base

clearance on 17-2-79. The scheme was to encourage factories to produce more and more and to do this, duty concession was made on certain clearances. There was nothing anywhere that would allow an interpretation that clearance of reprocessed cement under Rule 96ZV would be outside the scope of the concession. The counsel read out notification 198/76- CE to demonstrate that even clearances under Rule 96ZV was not disentitled to its benefits. He pointed out that the notification makes special mention whenever any category of goods are to be excluded. He also read Rule 96ZV to emphasize his point.

4. The learned counsel for the department said that the Rule 96ZV did not talk of "clearance", it talks of delivery. Notification 198/76-CE bestows its concessions only within the narrow category of goods-clearances. Only clearance figures in this notification. The 201.10 tonnes was not production from new and fresh raw material but only from cement which, because of some unsatisfactory property, had to be brought back to the factory and reprocessed. It was not a quantity of cement "produced" during the relevant time. Production must have been only the creation of a goods which had never existed before.

A reprocessed goods is only "reprocessed"- it cannot be produced. Its production was completed before its reprocess.

5. It appears to us that the action of the lower authorities was correct but for the wrong reasons. The claim had been so far that the concessional duty calculation should be conferred on the 201.10 tonnes reprocessed cement and this is what the Assistant Collector rejected.

In its appeal to the Appellate Collector, the factory advanced its claim to concessional duty on the 201.10 tonnes saying "excise duty relief granted under notification 198/76-CE is applicable to cement cleared from the factory on payment of duty". Note the last four words.

Then it urged "We, therefore, submit that the said quantity of 201.10 tonnes of cement was correctly included in our claim for excise duty relief under notification 198 of 76". There may be little doubt then that India Cements asked for duty relief on, among other quantities, the 201.10 tonnes of cement.

6. However, at the time of hearing, in answer to question from the Bench, the learned counsel said that the 201.10 tonnes is sought only to be included in the clearances before the concessional clearances are reached. This, he argued, would help the factory enter the concessional area earlier. This is true enough, but it is a new case and one that was never presented to the lower authorities and, therefore, was never before examined.

7. We cannot agree that the 201.10 tonnes can be included in the clearances in the way India Cements asks. Let us note again, that the full duty clearances were crossed on 17-2-79 ; the 201.10 tonnes were cleared (first time) in 1976 or, perhaps, a little before this. We do not know the details of calculation of base period and base clearances, but it is not impossible that these 201.10 tonnes formed part of the base clearance. At any rate, the factory has shown no figures of calculation. It is easy to see from this that the 201.10 tonnes can play no part in the calculation of the clearances under concession in notification 198/76-CE, because its clearance had already formed part of the calculation that formed base clearance. We cannot have a quantity of goods play more than its due and proper role.

8. The notification 198/76-CE is a scheme of incentives to factories to increase their production. This is the reason why base periods and base clearances are given to enable the Central Excise assessors to judge if a factory had achieved well enough to earn the bounty. And different base periods and base clearances have been fixed for different kinds of factories. For example, a factory that cleared the specified goods for the first time on or after 1-4-76, the base period will be 1975-76 and the base clearances will be taken as nil, and so on and so forth.

Evidently, therefore, it must be a kind of clearance that can figure in such a scheme and as pointed out by the learned counsel for the department, the clearances envisaged by this notification can only be the clearances which had been made possible by production. Mere clearances can have no meaning in this scheme for the obvious reasons that it is a scheme to encourage productivity and not merely to increase clearances and we can understand this easily because while clearances do not add to the total wealth, production does. Clearance may

add to commerce and trade, but it does not and cannot add to wealth. The learned counsel for the department is, therefore, right when he emphasized that production lay behind the scheme and must play a decisive role, if the scheme is to exert its full part to initiate and trigger higher production.

9. The counsel referred to Rule 96ZV and pointed out that the rule talks of the damaged and reprocessed cement being "delivered without payment of duty". This is in contrast to what notification 198/76-CE, dated 16th June, 1976 speaks about. This notification allows concessions of clearances and not deliveries. It is clear from this, that notification 198/76-CE does not permit within its scope removals which are merely deliveries as like those delivered under Rule 96ZV. We are in agreement with this interpretation.

10. We would, however, like to examine for ourselves Rule 96ZV and its scope. This is how notification goes (only relevant portion reproduced)- Cement, which has been damaged after deposit in the store-room on the approved premises of a factory or after its delivery on payment of duty, may be returned to the same or any other cement factory to be reprocessed or for further manufacture, and, where duty has been paid on such cement, its equivalent to the recoverable weight of the reprocessed cement based on the chemical analysis of the damaged cement may be delivered without payment of duty.

11. This rule does not require the very same cement brought in after the reprocess or remanufacture to be removed. It only requires the equivalent to the recoverable weight of the reprocessed cement to be taken out for delivery. There is no way by which anybody can tell this reprocessed cement when it goes out, as the cement that came in for reprocess. The reasons are obvious : which is that the damaged cement would have been reprocessed with prime or fresh cement and, therefore, does not form a recognizable quantity set apart from other cements.

12. To arrive at the dividing line between full duty clearances and concessional duty clearances, one must look at clearances on which payment of duty has been made at the full rate before one reaches the dividing line. Removal of damaged goods reprocessed or the equivalent thereof does not contribute to clearances and cannot, therefore, form part of clearances for the purpose of calculating the

dividing line.

13. During the argument it came out that the demand made by Central Excise for recovery of the duty of Rs. 3431.26 from Indian Cements Limited was time barred. There is some doubt about this. This demand was issued on 16-10-79. The factory reached the dividing line (base clearances) on 17-2-79, which means the clearances after 17-2-79 were the ones that would have received concessional duty clearances.

14. The absence of the 201.10 tonnes of cement would mean the factory would reach the dividing line later than 17-2-79. But we do not know when that would be. It is possible that if the last concessional clearances in that year are taken into account as the ones on which short payment of duty has occurred, then the demand could be within time. Unfortunately, we have no details for ascertaining these things, so we will leave this matter alone and proceed only to deal with the matter as if the demand was barred by time under Rule 10.

15. The duty demanded was paid by the factory, albeit, as the counsel for India Cements said, under protest. The question that, therefore, arises is, should the Tribunal order the Central Excise to return this money as it was recovered under a demand that was time barred. We think not. We have discussed sufficiently to demonstrate that the factory was not entitled to inclusion of the 201.10 tonnes in any calculation under notification 198/76-CE. The factory, therefore, received the money now demanded in excess of what it was due to it. The demand, therefore, was quite correct to the extent that the money demanded was due to the Central Excise revenue. The only flaw in the demand was that it was issued outside time. In normal circumstances, if the demand is barred by time, it is a dead demand and no more need be said about it and the demand issuing office cannot enforce such a demand. However, this demand was paid by factory, although it says it paid it 'under protest'. Having paid the demand, therefore, and seeing that the money rightfully belonged to the department, we cannot say that the department had no claim to it and should refund it. As we have said, it is money that was due and can be lawfully received into the revenue treasury. It was received not on account of any enforcement of the demand or any coercion applied by the department. Had

there been such coercion or enforcement, this Tribunal will not hesitate to order to immediate return of the money, because coercion/enforcement makes receipt of such money, even if lawful due, illegal. There were no such steps in the recovery of this money : the factory voluntarily paid it even if 'under protest'. Since the money is lawfully and justly receivable into Central Excise account it will not be correct to pass an order to Central Excise to return it.

17. I entirely agree with the findings of my learned colleague Shri Syiem but would like to add as under :- It is for the first time that during the course of arguments before us it came out that the demand made by Central Excise for recovery of the duty for Rs. 3,431.26 from the appellants was time barred. Earlier, this point was not raised before any authority. Even in the grounds of appeal this point has not been taken. It is nowhere on record that the appellants were forced to pay this duty amount or that any coercive measures were adopted by the department to make the appellants to pay that duty amount. What is apparent is, a demand was raised by the Department for the payment of the duty amount which the appellants were to pay and in pursuance of that demand, the appellants paid that duty amount which might be barred by time. There is nothing on record to show and prove that the payment was made under protest and even if it was so, it does not make any difference.

18. The question arises whether the appellants can now come forward with the plea that the time barred duty amount, which they had paid in pursuance to the demand notice, should be ordered to be refunded back to them 19. The answer is no. As has been laid down in a decision of Kerala High Court, Official Liquidator Palai Central Bank Ltd. v. Josef August Kayalo Ckakan House Palai (AIR 1966 Kerala 121), limitation only bars the remedy, the right is not extinguished. If the claim of duty amount was barred by time, the remedy to recover that amount was barred but the right was still in existence. So, the department is well within its right to retain the time bar duty amount which was legally due to it from the appellants.

21. I have to regretfully disagree with my learned colleagues' finding in respect of the question of time-bar. The demand notice for Rs. 3,431.26 was issued by the Supdt. Central Excise on 16-10-1979 under Rule 10(i) (a) of the Central Excise

Rules. It is clear from the notice that the demand is in respect of a quantity of 201.10 tonnes of cement cleared during the financial year 1978-79 but after 17-2-1979 on which date the appellants exceeded the base clearance. Even if it is taken that the said 201.10 tonnes were cleared on 31-3-1979, the last day of the financial year 1978-79, the notice would still be hit by the time limit of six months stipulated in Rule 10. An extended period of five years is permissible in terms of the said rule in specified circumstances, viz. fraud, collusion, wilful mis-statement or suppression of facts but these have not been urged in the show cause notice. Therefore, the extended period is not available in this case.

Thus, the notice is clearly hit by limitation. The fact that both the Department and the appellants were oblivious to this fact would not, in my view, mean that the amount could have been lawfully demanded from the appellants or that the appellants were under a legal obligation to meet the demand. If the Department had made known the position to the appellants and made a request (not a demand) for voluntary payment and the appellants had paid up with eyes open, the situation may well have been different. As it is, the Department ostensibly issued the demand as if it were within time and the appellants too met the demand oblivious as to the correct legal position. Now that the point has been raised-and a legal submission can be made at any stage in the proceedings-the law must take its course and the demand must be held to be hit by limitation and the amount paid ordered to be refunded to the appellants.

22. With respect, I think the result of the proposition that limitation does not extinguish the right but only bars the remedy would be that the Respondent, in this case, had a right to recover the amount by recourse to any other legal course open to him but not by recourse to Central Excise Rule 10 since limitation had, as on the date of invoking the right to demand the amount by recourse to that rule, extinguished that remedial right. To quote the Kerala High Court in AIR 1966 Kerala 121- "But, in so far as the particular remedial right to which it applies is concerned, limitation undoubtedly extinguishes the right. It is, however, important to remember that limitation extinguishes only the particular remedial right which is its victim and that, since it leaves the substantive right unaffected, that right can still be enforced in other ways, if other ways are available, not merely indirectly by

the enforcement of lien or by obtaining a fresh promise, or by reason of payment notwithstanding the bar being safe from recall, but also in a positive and direct manner."

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