

P.B. Traders Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-07-1999

Reported in : (2000)(68)ECC429

Appellant : P.B. Traders

Respondent : Commissioner of Central Excise

Judgement :

1. The applicant has sought for the waiver of the pre-deposit of duty amount of Rs. 80,22,475/-+ Rs. 12,03,372/- and the penalty of Rs. 92,25,846/- and for the stay of the operation of the impugned Order No.26/98 Commissioner-IV, Mumbai, dated 10-11-1998 pending disposal of the appeal and for such other relief deemed fit.

1. The applicant is engaged in the manufacture of Metallic Yarn falling within the scope of Chapter sub-heading 5605.00 of the Schedule to the Central Excise Tariff Act, 1985, and is availing the benefit of exemption under Notification No. 75/86, dated 10-2-1986. It has been filing the necessary declaration under Notification No. 13/92-C.E.(N.T.), dated 14-5-1992 for every year before the concerned Jurisdictional Assistant Commissioner of Central Excise. It is alleged against the applicant and it has failed to take registration under Rule 174 of the Central Excise Rules, and failed to file classification list and price list for the goods manufactured under Section 173B and 173C of the said Rules, and failed to account in the statutory records under Rule 173G(1) read with Rule 53, and Rule 226 of the said Rules. It is further alleged that effected the removal of the said goods from the factory premises without the cover of the valid Central Excise documents under

Rule 173G(2) read with Rule 52A of the Rules and failed to determine the Central Excise duty on the aforesaid Rules prior to removal under Rule 173F and failed to pay the Central Excise duty on the said Rules by making debit entry in the current account prior to the removal of the goods under Rule 173G(1) read with Rule 9(1) of the said Rules, and charged with the wilful contravention of the provisions under Rules 173B and Rule 173C and Rule 174 read with Rule 52A and Rule 173G(4), Rule 173G(2) read with Rule 53 and Rule 226, Rule 173G(1) read with Rule 9(1) of the Central Excise Rules.

2. Under Notification No. 76/86, dated 10-2-1986, (as amended) Handicrafts is exempt from the whole of the Central Excise duty leviable thereon. It is clarified under the Board Circular dated 25-4-1988 that zari items handicrafts are eligible for exemption under the said Notification. Whether imitation or real zari made from duty paid Metallised Polyester Film is also classifiable as handicraft and entitled to exemption as such in spite of withdrawal of exemption of metallise polyester yarn was doubted. The Board under the circular dated 29-5-1995 has observed that the office of the Development Commissioner (Handicrafts) had clarified that imitation or real zari made of gold, silver, thread or man-made metallic yarn made out of duty paid polyester film (metallised/lacquered) namely kasab, kelabatu, tilla, wire thread or zari thread and metallic yarn have been specifically classified as handicrafts, and as the Development Commissioner (handicrafts) treats such products as handicrafts, the same may be treated as handicrafts for the purpose of the above Notification. In 1996 (83) E.L.T. 13 (S.C.) in the case of CCE v. Louis Shoppe, it is laid down that the criteria for treating as handicraft, it should be predominantly made by hand though some machinery is also used, and it has a visual appeal in the nature of ornamentation or in-lay work or some similar work having artistic touch. On 19-12-1996 again the board has clarified the above criteria may be kept in view while deciding the cases. In view of the Board Circular dated.

25-5-1995.

3. In view of the above, the department felt that the metallic yarn manufactured by the applicant is not entitled to the benefit of the above exemption, and on the basis of further investigation. It has worked out the excise duty payable on the said

product cleared during the period from 1-4-1995 to 31-5-1998 to Rs. 68,93,024/- and Additional Duty of Excise on Textiles and Textile Article at Rs. 10,33,954/-. In respect to the goods cleared for export it is alleged that the applicants had not furnished proof of export in respect of the goods valued at Rs. 57,80,451/- and the duty liability has come Rs. 12,98,869/-. Wilful contravention of the provisions of Rule with deliberate intention to evade payment of Central Excise duty has been alleged in the show cause notice dated 3-10-1994 demanding the above duty under the provisions of Section 11A of the Central Excise Act, 1944 read with Rule 9(2) and or Rule 209 of the Central Excise Rules 1944, and also for imposing of penalty and for levying of interest and for the confiscation of land, building, plant etc. After the receipt of the reply and holding the personal hearing the order-in-original dated 10-11-1998 was passed confirming the demand and imposing penalty of equal sum.

4. It is further contended that the applicants has a prima facie strong case as the metallic yarn are correctly entitled for the benefit of the Notification, and there was no suppression of facts to invoke the longer period and the adjudication order is beyond the scope of show cause notice. It is passed in violation of the principles of natural justice. The Modvat credit claim is not taken into consideration.

Substantial question of law as to the eligibility of exemption under the Notification No. 76/86-C.E., dated 10-2-1986, when the goods under reference has been specifically treated as handicraft by the Development Commissioner (Handicrafts) is involved in this case.

Recovery of duty and penalty on the legal issues is not justified. The applicants will be put to undue financial hardship if the pre-deposit of the confirmed duty and penalty is to be made. It will not be possible for them to recover the duty from their Customers now. The balance of convenience is in their favour. If the stay is not granted they will suffer irreparable injury. The waiver of the pre-deposit is requested and also the non-insurance of security. Unconditional stay is sought for.

5. In support to the above application, the Id. Counsel for the applicant has contended that the extended period of 5 years cannot be invoked unless there are specific allegations in the show cause notice with reasons. Mere mention of Rule

9(2) of Central Excise Rules or Section 11A it is not sufficient. The confirmation of the demand is not proper and correct. The non payment of duty is on a bonafide belief.

The product is correctly entitled for the benefit of exemption under Notification No. 76/86, dated 10-2-1986 and in view of the Board clarification dated 10-2-1986 it gains strength. There was no liability to pay duty. Subsequent different interpretation resulting in denial of exemption does not invoke the extended period. The adjudication order is beyond the scope of the show cause notice in light of the para 31 of the order that the man-made metallic yarn was covered under the erstwhile Tariff Item 15A(2) till 16-3-1972 and thereafter covered under Tariff Item No. 18 and the Notification No. 76/86 dated 10-2-1986 as amended was applicable to the goods specified in the erstwhile Tariff Item No. 68 and so the benefit is not available to the appellant. There was no opportunity to offer our comments on the said grounds. The show cause notice demanded Rs. 63,93,024/- Central Excise Duty and Rs. 10,33,954/- Additional Duty, but the impugned order confirms Rs. 80,22,475/- Excise Duty and Rs. 12,03,372/- Additional Duty. Without issuing any corrigendum to show cause notice and without giving us an opportunity to reply the same impugned order is passed, which is opposed to the principles of natural justice. There is a confusion regarding the collection of duty arrived at in the impugned order. The correctness of the duty demand is change, need, in Para 22 reply to the show cause notice. The condition No. 2 that the goods must be graced with visual appeal in the nature of ornamentation or in-lay work or some similar work lending it an element of artistic improvement, and such ornamentation must be of a substantial nature and not a mere pretence, to characterise the goods was an handicrafts as per the decision in 1996 (83) E.L.T. 13 (S.C.) in the case of Collector of Central Excise v. Louis Shoppe, there is no dispute and it is satisfied Metallised yarn has a visual appeal in the nature of ornamentation when used in the saree borders or garments as it renders to real artistic improvements in the said goods. This is sufficient for the correct classification and would correctly merit consideration as handicraft for the purpose of Notification. The metallic yarn is handicraft in unfinished or incomplete form produced with the aid of machinery which will be used in the production of handicraft predominantly by hand. Development Commissioner has specifically

treated the metallic yarn of the type involved in this case as handicrafts. There is substantial compliance in this case. Even if any doubt arises it should go to the manufacturer. There is no intention to evade payment of duty and denial of Modvat credit is not justifiable.

The exemption cannot be denied merely because it was not claimed at the time of clearance as the final product was considered as exempt from duty under the orders existing at the relevant time. The applicants have made out a prima facie case in their favour and also on the ground of limitation. The applicants have been filing declaration under Notification No. 76/86 claiming exemption, and had obtained registration certificate as insisted by the department and were paying duty. It was surrendered on the basis of the CBEC Circular clarifying the issue pertaining to handicraft is based on the judgment to the Supreme Court has referred above. There is no suppression of facts on the parts of the applicant and no grounds to impose penalty under Section 11 AC and to confirm the demand, the conditions to invoke those two provisions namely proviso to Sub-section (1) of Section 11A and Section 11 AC are similar, which are not existing in this case.

6. The Id. JDR for the respondents has contended in the course of the arguments that the show cause notice mentions clearly in para 9 of the show cause notice that the applicant have not disclosed the department that their products was 'handicraft' that the product should basically be manufactured by hand without help of any tools, apparatus, instruments, machines which are fully operated by power, at any time to the department either through their letter when they had surrendered their Registration Certificate or through the declaration filed with the department from time to time. They have misdeclared in their letter dated 20-10-1997 that both the criteria mentioned in the Supreme Court Judgment and the Board Circular are satisfied even though actually it was not so. This is done only with intention to claim exemption and evade payment of duty, knowingly they have claimed exemption by surrendering registration certificate, claiming that product is handicraft. The above facts remained suppressed from the department. In the light of this allegation the demand of duty in para 14 of the show cause notice is proper. The contention of the applicant that specific words are not mentioned in the show cause notice is not correct. The impugned order, has considered all the defence

set up by the applicant and discussed in detail in the light of the case law, has held that in view of this statement of the authorised representative of the applicant product was manufactured only with the aid of the electrically operated machine, and the two conditions are not fulfilled to attract the definition of handicraft as per the decision of the Hon'ble Supreme Court and also Board clarification remains unfulfilled.

The applicants have no prima facie case either on merits or on limitation. The impugned order also contains the explanation for confirming the higher demand.

7. Perused the show cause notice/reply, and the documents produced in this case, and impugned order. From the perusal of the stay application regarding the grounds on which the stay is sought for. It is seen that, as contended by the applicants the substantial question of law as to the eligibility of exemption under the Notification No. 76/86-C.E., dated 10-2-1986 is involved in this case. Even the show cause notice is attacked on the question of limitation citing the case laws. So also on the merits of the case. The main question to be decided is whether the product manufactured by the applicant is handicraft to attract the notification in the light of the Supreme Court Judgment relied on by the department and the Board Circulars, and notification, and the processes of manufacture of the product in question, requires detailed consideration in the background of the case laws relied on by the applicant. This can be done only at the stage of deciding the appeal on merits. So also regarding the question of invoking longer period of limitation as it depends upon the detail appreciation of the facts in this case. Both the issues are arguable requiring a detail consideration, which cannot be done at this stage.

8. The admitted fact is about the requirement of the fulfilment of the conditions to attract definition of handicraft for the grant of exemption under the Notification No. 17/86. Accordingly, the product must be predominantly made by hand. It does not matter if some machinery is also used in the process. It must be graced with visual appeal in the nature of ornamentation or in-lay work or some similar work lending it an element of artistic improvement. Such ornamentation must be of a substantial nature and not a mere pretence. Even as per the applicant only second condition is fulfilled in this case. In such a situation whether the benefit of the notification can

be given or not regarding the duty is a matter of debate. As contended by the Id. JDR, the statement of Miss Priti Shah, authorised representative of the applicant dated 17-10-1997 discloses that the process of manufacture like cutting of Metallised Polyester Yarn in Pancakes, slitting of it into yarn and winding of the yarn on reels were carried on with the help of machines. All the machines required for the above mentioned processes were electrically operated. This was confirmed on the visit by the officers on 13-11-1997. It is also found on examination of the product that the metallic yarn did not have visual appeal in the nature of ornamentation or in-lay work on some similar work lending it an element of artistic improvement. So from the above it is seen that as contended by the JDR, the process of manufacture and the external appearance of the metallic yarn prima facie does not fulfil the conditions as above. Admittedly, the manufacturing process does not disclose any hand work. So for the claim of the benefit of Notification regarding the exemption of duty the applicants have no prima facie case.

9. Now coming to the question of limitation as pointed out by the learned JDR the show cause notice contains the suppression and misdeclaration and the wrong claim on the exemption with an intent to evade payment of duty are specifically mentioned in the show cause notice. Para 9 alleges the suppression of fact from the department by the applicant both under declaration under the letter of surrender of the registration certificate and also the misstatement about the fulfilling of the two criteria mentioned in the said Circular to claim the eligibility of exemption under the Notification knowingly that the applicant are not fulfilled the said condition. Para 10 of the show cause notice also mentions about the clearance of the goods under the various bills as per the Annexure 'A' for the year 1995-96 without determining the Central Excise Duty and paying even though the applicant was knowing that the clearances should have been effected on payment of Central Excise duty. Para 14 of the show cause notice contains the contravention of various rules wilfully deliberate intention to evade payment of duty. The demand was made under para 15 Clause (a) and (b) mentioning specific period from 1-4-1995 to 31-5-1998 under the provisions of Section 11A of the Central Excise Act read with Rule 209 of the Central Excise Rules. In the impugned order the adjudicating authority has considered the case of the applicant

in para 33 and 34 about allegation of suppression, misdeclaration alleged show cause notice and has held that the claim was false and it was only with the intention to evade payment of duty on the product manufactured. As contended by the Id. JDR the impugned order contains each and every contention of the applicant and finding is supported by reasons. Prima facie it is not a bad order. So under these circumstances the contention of the applicant to waive the pre-deposit and stay the recovery cannot be accepted.

10. Looking to the facts and circumstances of the case and the stay application relief, to pursue the appeal, the applicants should make pre-deposit of duty amount atleast. So the following order is passed.

For the reasons discussed above, the stay application is allowed in part and the applicant is directed to make pre-deposit of about Rs. 40 lakhs (Forty Lakhs) towards the duty demand within two months from the date of receipt of the order, subject to which the pre-deposit of the balance amount of duty and penalty is waived and the recovery is stayed. Compliance of the stay order should be reported on 31-1-2000 failing which the appeal will be liable to be dismissed without any further notice.

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