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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Calcutta

Decided On : Aug-03-1984

Reported in : (1984)(18)ELT609Tri(Kol.)kata

Appellant : Collector of Central Excise

Respondent : Indian PIn Mfg. Co. (P) Ltd.

Judgement :

1. The Collector of Central Excise, Calcutta has filed an appeal being aggrieved from Order No. 631/Cal/83 dated 26-4-83 passed by the Collector (Appeals), Central Excise, Calcutta.

2. Briefly, the facts of the case are that the respondent, M/s. Indian Pin Mfg. Co. (P) Ltd. of 67, B.T. Road, Titagraph, 24-Parganas, are the manufacturer of excisable goods falling under Tariff Item 68 of the First Schedule to the Central Excises and Salt Act, 1944 holding Central Excise licence in form L-4 No. 22/NES/75. The respondent had filed a claim for refund of Rs. 11,303.02 being the amount paid as Central Excise duty on the goods subsequently rejected and returned to their factory under Rule 173-L of the Central Excise Rules, 1944 which provided refund of duty paid on goods removed from the factory but returned afterwards for remaking, refining, reconditioning and such other similar process. Accordingly, the learned Asstt. Collector had issued a show cause notice to the respondent and in reply to the same the respondent submitted that the goods were defective, unusable and unfit for marketing any longer and they wanted destruction of the same.

The Asstt. Collector had rejected the claim of the respondent. Being aggrieved from the aforesaid order the respondent had filed an appeal before the Collector (Appeals), Central Excise, Calcutta. Before the Collector (Appeals) the respondent had contended that the goods were defective and were returned by the customer and were received by them at their factory and since these goods could not be re-processed the same were to be treated as waste and the refund submitted by them in respect of duty paid on such rejected pins should be allowed. The Learned Collector (Appeals) had held the defective 'articles which cannot be sold in the market, are not goods and as such no excise duty can be levied on such goods. Accordingly, he had allowed the appeal and set aside the order of the Asstt. Collector. Being aggrieved from the aforesaid order, the Revenue has come in appeal before this court.

3. Shri B. Bhowmik, the learned Jr. D.R. has appeared on behalf of the Revenue and has pleaded that the respondent had filed the refund application under Rule 173L of the Central Excise Rules, 1944. He has pleaded that the goods filed under T.I. 68, were cleared after payment of excise duty and the respondent had received back the goods from its customers, but not for re-processing. He had referred to the Commentary on Central Excise by Tarapurwalla & Parikh, 2nd Edition, page 63.

Excise duty is a tax on manufacture of goods. The taxable event is the manufacture of goods. This is the Constitutional concept of excise duty. He has pleaded that the finding of the Collector (Appeals) is wrong in law as he has held that the goods which are the goods which are rejected in the market are not goods for the purpose of levy of excise duty. He has referred to the judgment of Union Carbide v. Asstt.

Collector, Central Excise and Ors., reported in 1978 E.L.T. (J 180). He had laid emphasis on para 8 of the said judgment. The Hon'ble Calcutta High Court had observed that excise is a tax on the production or manufacture of excisable goods. It is not necessary to attract excise duty that the goods should be sold or are salable. If the excisable goods are produced or manufactured that is sufficient to attract duty.

Whether the goods are consumed, sold or not used thereafter is wholly irrelevant. The Hon'ble Calcutta High Court had come to the conclusion after taking into consideration the following judgments : "(1) In re : Central Provinces and Berar-1939 Federal Court Reports, page 18.

(2) The Province of Madras v. Messrs Boddu Paidanna & Sons- 1942 Federal Court Reports, page 90.

(3) Governor General in Council v. Province of Madras-1945 Federal Court Reports, page 179.

(4) Chhottabhai Jettabhai Patel & Co. v. Union of India-AIR 1962 S.C. 1006.Union of India v. Delhi Cloth and General Mills AIR 1963 S C 791- 1977 E.L.T. (J 199).Shinde Brothers v. Deputy Commissioner Raichur & Ors.-AIR 1967 S.C. 1512.

He has pleaded that in view of his arguments and the Calcutta High Court judgment the order passed by the learned Collector (Appeals) should be quashed and the order passed by the learned. Asstt. Collector should be restored. Shri Bhowmik has also referred to Rule 196 in Chapter X of the Central Excise Rules, 1944 which deals as to the duty leviable on excisable goods not duly accounted for.

3. In reply, Shri N. Mookherjee, Advocate, has pleaded that the respondent had duly filed form D-3. He has pleaded that the respondent's refund claim under Rule 173-L *ibid* is in order and the respondent duly satisfies the conditions laid down in Rule 173-L. He has further pleaded that Rule 173-L deals with the refund of duty on goods returned to the factory and Rule 174-M deals with the goods cleared for export may be allowed to be returned to the factory. He has also submitted that Rules 97, 173-L and 173-H are the relevant Rules which deal with the refund on account of excise duty paid. He has pleaded that in the instant case Rule 137-L is applicable and Rule 149 deals with the destruction of unusable material, waste and other refuse. Shri Mookherjee has also pleaded that the goods were received back within one year from the date of clearance. He has referred to a decision of the Government of India in the case of India Tobacco Ltd. reported in 1981 E.C.R.

499. The Hon'ble Board had held that the defective cigarettes which are unfit for human consumption are not considered goods and these are not excisable. He has pleaded that if the Revenue's argument that the order of the Collector (Appeals) is not correct, is accepted his appeal may be remanded. He has referred to a Government of India decision in the case of reported in 1982 E.L.T.540. The Government of India had held that if all the points raised in the appeal were not examined in the appellate order there was denial of natural justice and the case was fit for remand for passing order in accordance with law. He has also referred to another judgment in the case of National Products reported in 1982 E.L.T. 715 where the Government had held that if an appellate order was not a speaking order dealing with all the points urged by the petitioner it was liable to be set aside for de novo disposal after giving an opportunity of being heard to the appellant. Shri Mukherjee has pleaded that Rule 196-B relates to special industrial purposes and is in Chapter X of the Rules. He has pleaded that the refund application was filed on 9th August, 1980. He has also referred to a Bombay High Court judgment in the case of Bombay Wire Ropes v. Union of India reported in 1981 E.L.T.727. He has pleaded that the Hon'ble High Court had held that where the Appellate Collector has not applied his mind the case should be remanded to the lower authorities.

5. Shri Bhowmik has, in reply, referred to Rule 97 which deals with the refund of duty on goods returned to factory. He has pleaded that the judgment cited by the learned Advocate do not help him at all. He has pleaded that the learned Collector (Appeals) has not gone through Rule 173-L. He has pleaded that there is no question of non-application of mind by the Collector (Appeals) and pleaded that the appeal should not be remanded and should be decided on merits.

6. After hearing both the sides and going through the facts and circumstance of the case, I hold that the destruction of goods is not covered by Rule 173-L of the Central Excise Rules, 1944. Rule 173-L pertains to refund of duty on goods returned to factory for being re-made, refined, reconditioned or subjected to any other similar process in the factory. The destruction of goods is not covered by any of the circumstances mentioned above. Rule 173-L is reproduced as under :- "Rule 173L (1) The Collector may grant refund of the duty paid on manufactured

excisable goods issued for home consumption from a factory, which are returned to the same or any other factory for being re-made, refined, reconditioned or subjected to any other similar process in the factory : (i) such goods are returned to the factory within one year of the date of payment of duty or within such further period or periods not exceeding one year in the aggregate, as the Collector may, on sufficient cause being shown, permit in any particular case ; (ii) the assessee gives information of the re-entry of each consignment of such excisable goods into the factory to the proper officer in writing in the proper form within twenty-four hours of such re-entry to enable the proper officer to verify the particulars of such goods within forty-eight hours of receipt of the information ; (iii) the assessee stores the said goods separately pending, their being remade, refined, reconditioned or subjected to any other similar process in the factory unless otherwise permitted by the Collector by an order in writing and makes such goods available for inspection by the proper officer when so required : Provided further that in relation to the declared excisable goods, for Clause (ii) of the first proviso, the following Clause shall be substituted, namely :- "(ii) the assessee gives information of the re-entry of each consignment of such excisable goods into the factory to the proper officer in writing in proper form within twenty-four hours of such re-entry".

(2) The assessee shall maintain a detailed account of the returned goods and the process to which they are subjected, after their return to the factory in the proper form.

(3) No refund under Sub-rule (1) shall be paid until the processes mentioned therein have been completed and an account under Sub-rule (2) having been returned to the satisfaction of the Collector within six months of the return of the goods to the factory. No refund shall be admissible in respect of the duty paid :- (i) in respect of opened packages containing goods with concessional rates of duty or partial exemption for the small or cottage sector, as set forth in the First Schedule to the Act, or by a notification issued under Rule 8; (ii) if the amount of refund payable on the goods is less than rupees fifty ; (iii) on goods which are disposed of in any manner other than for production of goods of the same class; (iv) on the unmanufactured tobacco from which cigars, cheroots and cigarettes so returned to

the factory, have been produced ; (v) if the value of the goods at the time of their return to the factory is, in the opinion of the Collector, not less than the amount of duty originally paid upon them at the time of their clearance from the factory.

Explanation.- In this clause 'value' means the market value of the excisable goods and not the ex-duty value thereof.

(4) The Central Government may, for reasons to be recorded in writing relax the provisions of this rule for the purpose of admitting a claim for refund." The learned Jr. D.R's argument that Central Excise duty is a tax on the production or manufacture of goods and it is not necessary to attract excise duty that the goods should be sold or are salable is fully covered by the Calcutta High Court judgment in the case of Union Carbide v. Asstt. Collector, Central Excise and Ors. reported in 1978 E.L.T. (J 180). The Hon'ble High Court had come to the conclusion after taking into consideration the judgment of the Federal Court and the Supreme Court which have been discussed above. Accordingly, I hold that the findings of the Collector (Appeals) that defective articles which cannot be sold in the market are not goods and the excise duty can be levied only on goods are not correct in law. Accordingly, the same are quashed. I hold that excise duty is a tax on manufacture of excisable goods. The taxable event is the manufacture or production of goods. It is not necessary to attract duty that the goods should be sold. If excisable goods are produced or manufactured that is sufficient to attract duty. Whether the goods are consumed, sold or not used thereafter is wholly irrelevant. I had the occasion to decide a similar issue in Appeal No. ED (CAD-54/83, Order No. 63/CAL/84-661 in the case of Collector of Central Excise, Calcutta v. Hind Tin Industries, Calcutta. In the said appeal I had held that the destruction of goods is not covered under Rule 173-L and there is no other corresponding provisions under the Central Excises and Salt Act, 1944 and the Central Excise Rules, 1944. The Hon'ble Calcutta High Court had held in the case of Inche Tyres Ltd. v. Asstt. Collector and Ors. reported in 1979 E.L.T. (J 236) that "if such a right of refund is conferred by the Statute and if there is any condition imposed to the exercise of that right, that would be binding on that person concerned and he cannot claim his right to refund without such condition. Any such provision in any statute is legal and valid." In my earlier decision, there

was a reference of another judgment of Government of India in the case of Prakash Cotton Mills reported in 1981 E.L.T. 216 wherein it was that there is no provision for granting any refund of duty when goods are destroyed at any post-clearance stage in such cases after clearance of the goods on payment of duty. The Government of India decision referred by the learned Advocate do not help him. These decisions are not binding on this court and they carry only persuasive value. The judgment of the Board or the Central Government before the creation of the Tribunal do have some force in view of the observations of Hon'ble Supreme Court in the case of Indo-China Steam Nvgn. v. Jasjit Singh, Addl. Collector- 1983 E.L.T. 1392 (S.C.) wherein it was held that where the Central Board are exercising appellate or revisional powers the same are Tribunal within the meaning of Article 136 of the Constitution. The learned Advocate's arguments that the appeal should be remanded to the lower authorities are not tenable.

Accordingly, I hold that destruction is not covered under Rule 173-L and there is no corresponding provisions under the Central Excises and salt Act, 1944 and the Central Excise Rules, 1944. In view of the foregoing discussions, the appeal filed by the Revenue is accepted.

Accordingly, the order passed by the Collector (Appeals), Central Excise, Calcutta is quashed and the order passed by the Asstt.

Collector, Central Excise is restored.

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