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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-14-2000

Reported in : (2001)(127)ELT221TriDel

Appellant : Dcm Shriram Industries Ltd.

Respondent : Commissioner of C. Ex.

Judgement :

1. The appellants herein manufacture various chemicals including Benzyl Chloride and Benzyl Cyanide for use in the sugar industry. Benzyl Chloride is manufactured by reacting Toluene, Chlorine and Caustic Soda procured from outside. Benzyl Cyanide is manufactured by reacting Benzyl Chloride, Sodium Cyanide, Triethylamine Sodium Hypochloride and Caustic soda. Phenyl Acetic Acid is manufactured by reacting Benzyl Cyanide manufactured within the factory with Sulphuric acid procured from outside. Benzyl Chloride used in the manufacture of Benzyl Cyanide and Benzyl Cyanide used in the manufacture of Phenyl Acetic Acid were being cleared without payment of duty under Notification No. 176/86 and No. 217/86 dated 1-3-1986 and No. 246/86. Phenyl Acetic Acid was cleared at nil rate of duty under Notification No. 147/84-C.E., dated 18-6-1984. Exemption to interim products used captively is available under Notification 176/84 and No. 217/86 only if the final product is cleared on payment of duty. Therefore, it appeared to the Department that Central Excise duty was leviable on Benzyl Chloride and Benzyl Cyanide. Hence a show cause notice dated 5-7-1990 was issued to the appellants raising a duty demand on Benzyl Chloride and Benzyl

Cyanide captively consumed during the period from 1-1-1990 to 26-3-1990.

2. The assesseees pleaded that Benzyl Cyanide which was produced in their factory, was in crude form and was not marketable and therefore, not liable to duty; that if duty is to be demanded from them, it should be on the basis of manufacturing cost and not the selling price; that during the manufacture of Phenyl Acetic Acid, by-product, Aqueous layer of Phenyl Acetic Acid is obtained which is classified under CET sub-heading 3823.00 and cleared on payment of duty; that no duty is chargeable on Benzyl Chloride under Notification 217/86 since duty is charged on aqueous layer of Phenyl Acetic Acid and no duty is payable on Benzyl Chloride since it is eligible to the benefit of Notification 217/86. The Adjudicating authority held that there was no distinction between Benzyl Cyanide of marketable quality and Benzyl Cyanide used captively by the appellants. He agreed with the contention of the assesseees that no duty can be demanded on Benzyl Chloride used in the manufacture of Benzyl Cyanide in view of Notification No. 217/86 provided that Central excise duty was paid at the appropriate rate on Benzyl Cyanide produced by the appellants. He denied the benefit in terms of Notification No. 217/86 on proportionate quantity of Benzyl Cyanide in respect of aqueous layer as by-product and confirmed duty demand on entire quantity of Benzyl Cyanide used as reactant for manufacture of Phenyl Acetic Acid which is cleared at nil rate of duty.

He also held that duty demand has been correctly computed and also denied benefit of Modvat credit claimed by the assesseees. The Collector (Appeals) upheld the order of the Assistant Collector except in relation to the claim for Modvat credit which he remanded for fresh decision to the Assistant Collector by passing a speaking order. Hence this appeal.

3. The learned Consultant Shri R. Swaminathan states that identical issues in the case of the same assesseees arose in E/A No. 462/91 and against order-in-original dated 12-8-1991 of the Collector of Central Excise, Meerut in which the Tribunal passed final order No. 245/98-C dated 3rd April 1998, in which the Tribunal upheld the applicability of the extended period of limitation, rejected the assesseees contention that captively consumed Benzyl Cyanide was distinct from marketable

cyanide, held that adjustment in assessable value is to be made for packing cost, extended the benefit of Modvat credit on goods used in the manufacture of Benzyl Cyanide in view of the finding that Benzyl cyanide was dutiable, and also extended the benefit of Notification 217/86 to that part of the Benzyl Cyanide used in the manufacture of Phenyl Acetic Acid which went into by-products cleared on payment of duty. The learned Consultant therefore, fairly submits that it is no longer open him to contest the duty demand on Benzyl Cyanide and to argue that the extended period of limitation which has been invoked in the present case, is not applicable. He therefore, confines himself to the submission that they are eligible to the benefit of Notification 217/86 for Benzyl Cyanide used in the manufacture of Phenyl Acetic Acid and aqueous layer since the aqueous layer is a by-product which is regularly cleared on duty although phenyl acetic acid is cleared by availing exemption from payment of duty.

4. He relies upon the decision of the Apex Court in the case of Commissioner of Sales-tax v. Bharat Petroleum Corporation 1995 (77) E.L.T. 790 in support of his contention.

5. The prayer is opposed by the learned DR who submits that clearance of aqueous layer on payment of Excise duty is not material for considering the benefit of exemption under Notification No. 217/86, that the Bharat Petroleum judgment is not applicable in the context of exemption from Central Excise duty and that in any event, the benefit of Notification 217/86 cannot be extended to the entire quantity of Benzyl Cyanide used in the manufacture of both Phenyl Acetic Acid and Aqueous layer since admittedly Phenyl Acetic Acid is cleared by availing exemption from duty.

6. We have carefully considered the rival submissions. In the case of the same assessee, the Tribunal has extended the benefit of Notification No. 217/86 to that quantity of Benzyl Cyanide used in the manufacture of Phenyl Acetic Acid which went into the by-product, aqueous layer, which was cleared on payment of duty. Therefore, what remains to be considered is whether the entire Benzyl Cyanide which was used in the manufacture of Phenyl Acetic Acid is eligible to the benefit of Notification No. 217/86. The exemption under the Notification is applicable to

the inputs used in or in relation to the manufacture of final products which are not exempt from whole of the duty of excise leviable thereon or is chargeable to nil rate of duty.

Phenyl Acetic Acid is wholly exempt from excise duty and hence Benzyl Cyanide used as input in the manufacture of Phenyl Acetic Acid will not enjoy exemption in terms of Notification 217/86. In view of the clear language of Notification 217/86, we hold that exemption is not available to that quantity of Benzyl Cyanide which was used in or in relation to the manufacture of Phenyl Acetic Acid. The decision of the Apex Court in the case of Bharat Petroleum related to set-off of sales Tax paid on purchase of sulphuric acid and cotton purchased by the respondents. The only condition for set-off under Rules 41 and 42 of the Bombay Sales Tax Rules (framed under the Bombay Sales Tax Act, 1959) was that the goods purchased on payment of tax should have been used in the manufacture of taxable goods for sale and their use for manufacture of another item of goods which may or may not be taxable was held to be immaterial, although in the case of Bharat Petroleum, refined kerosene was also taxable for nine months and in the case of Pulgaon Cotton Mills, yarn was also manufactured and it was subject to tax. In this background, the Supreme Court held that the type of use with which it was concerned in that case, is a composite one in which it is not possible to co-relate any part of the purchased goods as having gone in for the purpose of manufacture of taxable goods and that the entire sulphuric acid purchased by Bharat Petroleum Corporation has gone into the composition of acid sludge which was an independent commercial commodity with market value and was taxable and therefore, Bharat Petroleum Corp. was entitled to set-off of the entire tax paid by it on purchase of sulphuric acid although the acid refined (which was not taxable) in addition to acid sludge (taxable byproduct), the Court held that similarly Pulgaon Cotton was eligible to set-off to the entire tax paid by it on purchase for producing taxable cotton waste as well as non-taxable cloth. The Court held that the set-off Rules do not require that the purchased goods must have been used only for the manufacture of taxable goods for sale and therefore, they found it difficult to read into the provisions a quantitative co-relation of goods resulting in a taxable turnover and the purchase of raw materials on which tax has been paid.

7. In the present case however, we are concerned with Notification 217/86 which places a clear embargo on exemption to inputs used in or in relation to the manufacture of exempted final product. Therefore, the ratio of the Supreme Court judgment (supra) cannot be made applicable to the present case under Notification 217/86. Further, we find that in the earlier case of the same assessee (decided by final order No. 245/98-C dated 15-4-1998) read with Misc. Order No. 107/99 dated 18-11-1999 wherein the demand covered the period 1-3-1986 to 1-3-1987 and 1-4-1987 to 31-12-1989) the appellants claimed the benefit of Notification 217/86 for that quantity of Benzyl Cyanide which was used in the manufacture of by-product cleared on payment of duty which would clearly show that they were in a position to segregate the quantity of Benzyl Cyanide used in the manufacture of exempt commodity viz. Phenyl Acetic Acid from that quantity used in the manufacture of Aqueous layer which was cleared on payment of duty and therefore, co-relation between the input and the dutiable commodity is possible.

8. In the light of the above discussion, we hold that the assessees are not eligible to exemption on the entire quantity of Benzyl Cyanide in terms of Notification 217/86 but that exemption is available to that quantity of Benzyl Cyanide which was used in the manufacture of aqueous layer, which was cleared on payment of duty. The appeal is disposed of in the above terms.

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