TIn Manufacturing Co. of India and Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-14-2000

Reported in : (2000)(69)ECC704

Judge : S T G.R., S Kang

Appellant : TIn Manufacturing Co. of India and

Respondent : C.C.E.

Judgement :

1. In the impugned order Ld. Collector held that 17076 nos. of Metal Containers which were provisionally released were liable to confiscation. He, therefore, ordered appropriation of Rs. 10,000 towards fine in lieu of confiscation of the goods. Ld. Collector confirmed demand of Central Excise Duty of Rs. 2180.62 on 2363 Metal Containers found short. Ld. Collector also appropriated Rs. 50,000 towards fine in lieu of confiscation on 88.644 M.T. of tin scrap which was liable to confiscation. Ld. Collector also appropriated Rs. 10 lakhs towards fine in lieu of confiscation on 389.540 M.T. of tin sheets which were liable to confiscation. Ld. Collector also demanded Central Excise duty of Rs. 4,44,609 on 436.534 m.t. of tin sheets found short. Ld. Collector also imposed a penalty of Rs. 5 lakhs on M/s. Tin Manufacturing Co. of India Ltd. He also imposed a personal penalty of Rs. 20,000 each on S/Shri S.P. Goel and Ravi Goel and a personal penalty of Rs. 5,000 on Shri S.U. Warsi. Ld. Collector also confirmed a demand of duty amounting to Rs. 43,700 in respect of supplies of the tin containers made by M/s. Tin Manufacturing Co. of India to M/s.

Goyal Tin Works Ltd. Being aggrieved by the above order, the appellants have filed these appeals. Only two appeals as indicated above have been filed and since both the appeals arise out of the same order, they were heard together and are being disposed of by this common order.

2. The appellants have filed a Misc. application on the ground that the Commissioner of Central Excise, Meerut under the impugned order held as indicated above that against this impugned order, three appeals were filed. The appeals were Nos. are E/2586, 2587 and 2588/91-NB; that another demand was confirmed by Corrigendum dated 16.7.92 to the Order-in-Original dated 24.4.91 and a penalty of Rs. one crore was also imposed; that this Corrigendum Order was also challenged before the Hon'ble CEGAT; that this was Appeal No. E/4472/92-NB; that CEGAT by its common order Nos. A/323-326/97-NB dated 18.2.92 passed the following order: (a) In Appeal No. E/2586/91-NB pertaining to Tin Manufacturing Co.

demanding duty confiscating goods and imposing penalty, the Order-in-Original was confirmed.

(b) Order imposing penalties on S/Shri S.P. Goyal and Ravi Goyal in Appeal No. E/2587/91-NB and E/2588/91-NB was set aside.

(c) In Appeal No. 4472/92-NB the Corrigendum to the Order-in-Original was set aside and the matter remanded.

3. Ld. Counsel submitted that in remand proceedings, the same Order-in-Original dated 4.11.97 was again passed which in Appeal No.E/2307/97-NB came up for hearing on 1.7.99 when CEGAT after granting the stay again remanded the matter under its Final Order No.A/545/99-NB dated 1.7.99. He submits that thus only Appeal No.E/2586/91-NB remained for the appellants M/s. Tin Manufacturing Co. of India. Ld. Counsel submitted that the appellant at one stage contended that in Final Order Nos. A/323-26/97-NB dated 18.2.97, this Tribunal did not consider their submissions and filed the ROM but the ROM was dismissed by Misc. order No. ROM/4/98-NB dated 13.1.98. Ld. Counsel submitted that being aggrieved by the Misc. Order dated 13.1.98 in respect of Appeal No. E/2586/91-NB disposed of

by Final Order No.A/323-26/97-NB dated 18.2.97. A Misc. Writ Petition No. 107/98 was filed in Allahabad High Court who vide order dated 15.2.98 had set aside, the Misc. Order dated 13.1.98 and the earlier order dated 18.2.97 in Appeal No. E/ 2586/91-NB. Ld. Counsel submitted that in view of the above only Appeal No. E/ 2586/91-NB survives and the same may be taken up for decision.

4. On careful consideration of the submissions, we agreed with the submissions of the Ld. Counsel in this Misc. application and find that only Appeal No. E/2586/ 91-NB filed by M/s. Tin Manufacturing Co. of India survives.

5. The facts of the case in brief are that the appellants are engaged in the manufacture of Metal Containers. The appellants were availing credit of duty on inputs under the Modvat scheme. On a visit to the factory premises, the officers physically verified the stock of the finished product the raw material and the waste. They found an excess of 17076 containers involving Central Excise Duty of Rs. 13,230.45 Basic + Rs. 661.52 special and a shortage of 2363 containers of different varieties involving CED of Rs. 2,876.60 Basic + Rs. 103.83 Special was found. Since the authorised signatory could not properly explain the excess and shortage the goods were seized. On physical verification of the stock of raw material 54.834 m.ts. of tin sheets were found in stock against recorded balance of 461.368 m.ts. in R.G.23A Part I. When asked explain, while explaining the shortage Shri Ravi Goyal in his statement dated 1.3.88 stated that 440 tonnes of tin plates/sheets had been transferred from factory to their Delhi Godown, he, however, could not explain the dates on which the sheets were removed nor could he produce any Central Excise Gate Pass evidencing payment of duty on such removal. The officers also found 88.644 m.ts.

of tin scrap scattered. As the Department considered that tin scrap was dutiable and should have been accounted for inasmuch as Modvat credit was taken on the imported tin sheets. Since this requirement was not complied with, therefore, this quantity of tin scrap was also seized the duty involved on this quantity was Rs. 33,972,75. Accordingly, a SCN was issued to the appellants asking them to explain as to why duty should not be demanded on the goods found short and the goods removed to another godown and the goods not accounted for and why the goods found in excess should not be confiscated and why penalty should not be imposed The appellants in reply to the SCN submitted as under: (1) About excess of 17076 of Metal Containers it was submitted that 3180 nos and 5956 nos. of containers were produced on 23.6.88 and were to be enterec in R.G. I Register only on 24.6.88 after checking; that the Central Excise Officers came to the unit in the morning at 10 hours and these goods were not allowed oq be entered in the R.G. I Register. It was contended that 794C nos. of 2 kgs! were manufactured a couple of days before and were undei leak test and inspection of quality and had not reached the R.G. I Stage.

(2) In regard to the shortage of 2363 containers, it was submitted that intention cannot be attributed to evade duty to the appellants when the appellants were paying more than Rs. one crore as duty; that the shortage was less than 0.2% which was very meagre.

(3) Regarding 88.644 m.t. of tin scrap it was submitted that Rule 57D(1) of Central Excise Rules, 44 provides Credit of duty allowed in respect of any inputs shall not be denied or varied on the ground that part of inputs are contained in any waste, refuse, or by-product arising during the manufacture of final product, whether or not such waste, refuse or bye product is exempt from Excise Duty.

It was submitted that Modvat credit contained in the said waste is not demandable; that the waste was very minimal. It was contended that it was in process waste and as per settled law, duty cannot be levied on processing waste. They relied on the judgments reported in 1989 (20) ECR103 (Madras) and 1987 (29) ELT 502 (Delhi). It was also contended by the appellants that duty liability arises only at the time of removal and not when the goods are within the factory premises.

6. On the allegation of removal of 389.540 m.t. of imported tin sheets outside the factory premises, it was submitted that facts and circumstances have not been properly understood. It was explained that due to reasons beyond their control and to avoid suspected damage to the inputs by the agitating labour about 440 m.t. was transferred to their own godown at Delhi. It was also contended that the inputs had neither been removed for home consumption or for export, no permission'was required to be taken as the said stock of inputs remained a part of the factory and

had to be stored outside the factory premises in view of the special circumstances. It was contended that the remaining 27.860 m.ts. had been sent back to the factory from the godown under intimation to the Asstt. Collector, Ghaziabad on 5.7.88 and 6.7.88. It was submitted that only 19 m.t. approximately remained unexplained.

7. Arguing the case for the appellants Shri J.S. Agarwal, Ld. Counsel submits that insofar as excess of metal containers is concerned, proper explanation was given inasmuch as one day's production was yet to be recorded and some of the containers were to be tested for peak and inspected for quality. He submitted that insofar as shortage is concerned, the shortage is negligible. The appellants are manufacturing a large number of metal containers and the shortage of 2,000 app. is just very insignificant figure and may be on account of arithmetic calculations.

In regard to shortage of tin sheets on which Modvat credit was taken it was submitted that 389.549 m.ts. had to be shifted to their Delhi Godown due to labour trouble. It was submitted that some quantity was issued to the factory on different dates and therefore, if at all there was a shortage, it was only of the order of 19 m.ts.

8. Ld. Counsel submits that insofar as process waste of 88.644 m.ts. is concerned, the same was lying at various places in the factory and since the goods were neither being removed, therefore, the question of payment of duty on the process waste did not arise until the same are cleared and removed from the factory.

Ld. Counsel submits that it has been contended that tin sheets found short were used for manufacture of metal containers clandestinely and that the metal containers have been clandestinely removed. It has been submitted that the Department has not produced any evidence to this effect of clandestine removal.

9. Ld. Counsel submitted that prohibitive redemption fine has been imposed. He submits that the redemption fine on metal containers found in excess is on the higher side and needs drastic reduction. So also he submits that the fine in lieu of confiscation on 88.644 m.ts. of scrap is Rs. 50,000 which is out of all proportions as the duty involved on the goods is only about Rs. 44,000. He submitted that the

fine in lieu of confiscation of 389.540 m.t. of tin sheets has been fixed at Rs. 10 lakhs which is not commensurate with the offence and out of all proportion. Ld. Counsel submits that the penalty of Rs. 5 lakhs is also out of the proportion and prays that the same may be waived. Ld.

Counsel prays that the appeal may be allowed.

10. Shri Mewa Singh, Ld. DR submits that there was an excess and shortage of metal containers. He submits that the contention that part of the excess metal containers were the production of the day on which the officers visited is not correct; that metal containers were completely manufactured and were lying in the BSR and therefore, the authorities below have rightly confiscated the metal containers and allowed them to be redeemed on payment of fine which is not excessive.

Regarding shortage of metal containers Ld. DR submits that metal containers are individual goods and can be counted well and therefore, submits that duty has been rightly demanded on these metal containers.

He submits that insofar as shortage of tin sheets is concerned, the authorities below have rightly held that the goods were removed without payment of duty and since part of the goods were recovered, therefore, confiscation of the goods is sustainable in law and the fine in lieu of confiscation is reasonable. Looking to the value of the goods in regard to process waste Ld. DR submits that Modvat credit was taken on the sheets, therefore, the process waste generated in the process of manufacture was dutiable and should have been accounted for, therefore, confiscation is perfectly legal. Regarding imposition of penalty, Ld.

DR submits that penalty is nominal and therefore, does not need any interference. He reiterates the findings of the Ld. Collector of Central Excise, Meerut.

11. We have heard the rival submissions. On a careful consideration of these submissions, we find that there was an excess of 17076 metal containers. These metal containers were in the factory premises. The contention of the appellant is that part of these metal containers were the production of the day and part were

still to be tested for leak and inspected for marketing. In the instant case we find that the contention of the appellant is not rebutted. We also find that there was no preparation for removal of these containers. It is a fact that these containers required leak test before becoming marketable or being recorded in RG. I Register. We, therefore, hold that the metal containers found in excess were not liable to confiscation and therefore, the fine in lieu of confiscation on release of these 17076 metal containers is set aside.

12. Insofar as the shortage of 2363 metal containers is concerned, we find that explanation furnished by the appellant is not sufficient.

Every shortage of the finished product recorded in R.G. I Register is to be explained by the assessee/appellant. Simply saying that it was an insignificant percentage is not sufficient. We, therefore, hold that duty has been correctly demanded on 2363 containers found short.

13. Regarding confiscation of 88.644 m.ts. of tin scrap, we find that Modvat credit was taken on tin sheets. Tin scrap is generated out of tin sheets, therefore, these 88.644 m.ts. of scrap was dutiable and since it was dutiable, therefore, it should have been properly accounted for. Since it was not accounted for in the statutory records of the appellants and no explanation was given, therefore, we uphold confiscation of 88.644 m.ts. of tin scrap. We, however, find that the fine in lieu of confiscation of 88.644 m.ts. of tin scrap is on the higher side, the same is reduced to Rs. 25,000.

14. On the question of whether 389.540 m.ts. of tin sheets seized in Delhi are liable to confiscation, we find that the plea of the appellant was that these tin sheets were removed from their godown at their factory to their godown at Delhi. However, the appellants have failed to produce any intimation given to the authorities or permission sought for removal of these goods. Since Modvat credit was taken on these items in the factory premises, therefore, removal of the goods without payment of duty or without taking necessary permission from the competent authority was illegal and therefore, 389.540 m.ts. of tin sheets were correctly held to be liable to confiscation. However, looking to the fine in lieu of confiscation, we find that the same is on the higher side and is reduced to Rs. 7

lakhs.

15. On the question of duty amounting to Rs. 4,44,609.88 on 389.540 m.ts. we find that the goods have been treated as part of the consignment shifted from the factory to Delhi godown and since they are inputs for manufacture of metal containers, therefore, demand of duty amounting to Rs. 4,44,609.88 is not sustainable in law and the same is, therefore, set aside. However, demand of duty on 46.994 m.ts. of tin sheets found short is confirmed. This demand shall be worked out by the Asstt. Collector and demanded from the assessee. This figure had been worked out on the basis that 436.534 MTs. were found short in the factory premises. Out of this 436.534 m.ts. 389.540 m.ts. was recovered from the Delhi godown of the appellant, therefore, the remaining quantity comes to 46.994 m.ts. on which duty shall have to be paid.

16. Insofar as imposition of penalty on the appellant is concerned, looking to all the facts and circumstances of the case, we find that the penalty is on the higher side, the same is reduced to Rs. 2.5 lakhs.

17. But for the above modification, the impugned order is upheld and the appeal with the Misc. application are disposed of in the above terms.