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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-19-2000

Reported in : (2001)(73)ECC771

Appellant : Usha Rectifier Corpn. (i) Ltd.

Respondent : Collector of C. Ex.

Judgement :

1. This appeal has been filed by M/s. Usha Rectifier Corporation Ltd. against the Order-in-Appeal No. 549/92, dated 29-10-1992.

2. Briefly stated the facts are that a show cause notice dated 29-9-1992 was issued to the Appellants for demanding duty on the plant and machinery including testing equipments manufactured by them and as reflected in Note 6 of Schedule 'Q' of the balance sheet for the year ending 1987 and Director's report appearing at page No. 2 of the Annual Report for the year ending December, 1987 (para 2 Technology Absorption). The Additional Collector, Central Excise, under Order-in-Original No. 6/92-93, dated 27-5-1992 confirmed the demand of duty amounting to Rs. 4,92,566.28 and imposed a penalty of Rs. 50,000/- holding that in view of the documentary evidence in the balance sheet it had been proved beyond doubt that they had manufactured plant and machinery/testing equipments worth Rs. 31.26 lacs; that the facts disclosed in the balance sheet had to be accepted as true unless otherwise proved; that Note 6 of Schedule 'Q' confirm the position that equipments were manufactured and used captively within the factory premises. On appeal, Collector (Appeals) under the impugned order rejected their appeal.

3. Shri R. Santhanam, learned Advocate, submitted that the Appellants manufacture Electric Transformer, Semiconductor devices and other Electrical and Electronic equipments; that they have their own research and development wing in which trial and experiments are undertaken for the developmental jobs based on latest technology; that during the course of such trial and experiments bought out parts and components are assembled and after the research the same are disassembled; that such research and development process undertaken by them cannot be called manufacturing process by any stretch of imagination; that they had attempted to manufacture testing equipment in which they did not succeed and the testing equipment did not reach the stage of finished goods; that accordingly there was never a removal of excisable goods, and therefore, the question of clandestine removal does not arise. The learned Advocate further submitted that the adjudication by the Additional Collector is without jurisdiction since the term Collector does not include an Additional Collector on and from 14th May, 1992 and as such adjudication of a matter containing allegation of clandestine removal could only be done by the Collector; that as per instructions dated 14-5-1992 issued by the CBEC only Collectors were empowered to issue and decide demands in cases where allegation of fraud, suppression, etc. were involved. He, further, submitted that the extended period for issuing the demand is not available to the department inasmuch as the goods were part of the continuous research process and experiment cannot be said to have been manufactured for sale; that accordingly there was no requirement of filing of classification list or amendment of the licence. He also contended that the concept of deemed removal under Rules 9 & 49 of the Central Excise Rules would apply to only those cases where the commodity manufactured gets transformed into something and comes out as a different product by losing its identity in the course of manufacture. Reliance was placed by him on the decision in the case of J.K. Cotton Spg. & Wvg. Mills v.U.O.I., 1987 (32) E.L.T. 234 (S.C.). He, further, mentioned that in the present case the equipments and instruments made by them had not been subjected to any further processing in the factory whereby they had lost their existence and as such the concept of deemed removal is not applicable. The learned Advocate also mentioned that balance sheet is a public document and a case of clandestine removal cannot be made on the basis of anything

mentioned in the balance sheet; that Note 6 of Schedule 'Q' was given only with a view to impress share holders of the company to justify the use of raw material, stores and spares, salary and other benefit to Research and Development staff to project rosy picture of the company. He finally mentioned that a copy of the balance sheet was given to the department; that department had also conducted audit of their accounts and the Supdt. under letter dated 5-6-1990 has directed to pay the duty on the impugned goods; that under their letter dated 16-6-1990 they had submitted a reply to the Supdt. and the statement of Shri E. George, Commercial Manager was recorded on 23-12-1991; that nowhere Shri George had deposed that the impugned goods were finished goods; that they were under the bona fide belief that on such research and development work, no Central Excise duty is payable; that there was no mala fide intention on their part which is evident from the fact that they had mentioned about these impugned goods in the balance sheet. Learned Advocate also relied upon the decision in the case of Rishabh Refractories Pvt. Ltd. v. C.C.E., Chandigarh, 1996 (87) E.L.T. 93 (T), wherein it was held that declaration of inflated figures of sales before the Department of Industry with supporting affidavit in order to obtain higher quota of coal is not sufficient to establish clandestine removal of excisable goods for demanding duty.

4. Countering the arguments, Shri M.P. Singh, learned DR submitted that the demand of Central Excise duty in the present matter has been made on the basis of statement made by the Appellants in their balance sheet to the effect that addition to plant and machinery worth Rs. 31.26 lakhs had been made in the company by capitalisation of the expenditure on raw material, stores & spares and salary and wages; that by denying this statement the Appellants in fact are saying that balance sheet which is statutory documents is not to be believed. Audited accounts as reflected in the balance sheet is not only certified by the Chartered Accountant but also authenticated by the Managing Director and Company Secretary; that the ratio in the case of Rishabh Refractories Pvt. Ltd. is not applicable as in that case only a statement of inflated figure was given to a Government department with a view to get higher quota.

That statement was not audited figure and was not sacrosanct as in the present matter as the fact of manufacture has been mentioned in the balance sheet of the company which is prepared under the provisions of Companies Act. The learned DR contended that the Collector (Appeals) had rightly relied upon the balance sheet and the annual report which clearly says that the Appellants had manufactured certain equipments and saved foreign exchange. He also referred to the details of testing equipments which were given at page 67 of the paperbook and mentioned that the list gives complete description of the equipment manufactured by the Appellants and cost thereto; that if these items were not complete and finished, how their description and the cost could have been given. The learned DR further mentioned that their argument that equipments have not been utilised for manufacture of some new goods and as such deemed removal concept is not applicable is contrary to the provisions of law; that even removal for the purpose of captive consumption is deemed to be removal for the purpose of levying the duty as per explanation to Rules 9 & 49; that it is not necessary that the goods should be removed physically from the factory. Reliance was placed on the decision in the case of Wallace Flour Mills Co. Ltd. v.C.C.E., 1989 (44) E.L.T. 598 (S.C.) wherein it was held that the taxable event is manufacture of goods. Only the collection of duty is postponed to the date of removal. He also relied upon the decision in the case of Ballarpur Industries Ltd. v. U.O.I., 1994 (74) E.L.T. 795 (Del.) wherein it was held that levy is attracted at the initial stage on manufacture itself by application of concept of deemed removal.

Reliance was also placed on the decision in the case of Super Poly Fabriks Ltd. v. C.C.E., 1999 (114) E.L.T. 1019 wherein it was held that duty has to be paid on plastic strips manufactured at the intermediate stage of production of plastic fabric in terms of Rules 9 & 49. Learned DR also contended that the extended period of limitation is invokable as the Appellants had neither taken any licence for manufacture of the impugned goods, nor filed classification list or price-list as required under the law; that even for research and development purpose, if excisable goods are manufactured a licence has to be taken; that the fact of manufacture and removal of the goods was never intimated to the Department. The contention of the Appellants that they were undertaking trial and experiment and the goods were not manufactured is nothing but an after thought; that plea of reasonable belief is without any foundation as they had not even intimated about the manufacture of the excisable goods to the department. He also emphasised that as against their statement in, the balance sheet and the annual report no evidence has been brought on record in support of their submissions that the goods were not complete. Finally, the learned DR submitted that instructions dated 14-5-1992 is administrative instructions which will not affect the power or adjudication by the Additional Collector which is given by provisions of Central Excise Act. Reliance was placed on the decision in the case of Triton Valves Ltd. v. C.C.f., 1997 (89) E.L.T. 233, wherein it was held that Monetary limit for an amount for adjudication by Asstt. Collector was fixed by way of executive instructions and the Asstt. Collector in exceeding the ceiling commits only administrative irregularity which cannot be held to be a statutory irregularity; that similar views were held by the Tribunal in the case of C.C.E. v. J.K. Cement Works, 5. In reply learned Advocate submitted that the costing of the product shown in the list at page 67 was done only on the apportionment basis; that excise licence is only required for manufacture and sale of the excisable goods and not for work undertaken for trial and experiment; that it is settled law that show cause notice for demanding duty cannot be issued merely on the basis of audit objection as held by the Tribunal in the case of Swastik Tin Works v. C.C.E., Kanpur, 1986 (25) E.L.T. 798 (T), and, therefore, the notice issued only on the basis of audit objection in the present matter is not valid. Finally, he relied upon the decision in the case of Pushpam Pharmaceuticals Co. v. C.C.E., 1995 (78) E.L.T. 401 (S.C.), wherein it was held that expression "suppression of facts" has to be interpreted strictly; it does not mean any omission; the act must be deliberate and the correct information was not disclosed deliberately from payment of duty. He submitted that as there was no mala fide, extended period of limitation is not applicable.

6. We have considered the submissions of both the sides. The demand of Central Excise duty has been confirmed against the Appellants on the basis of particulars mentioned in Schedule 'Q' - Notes of balance sheet and profit and loss account for the year ending 1987. Srl. No. 6 of the said Schedule reads as under :- "Addition to plant and machinery includes testing equipments worth Rs. 31.26 lakhs fabricated in the company by capitalisation of following expenditure :- (iii) Salary/wages and other benefits...Rs. 4.93 lakhs (On the basis of estimated time spent)" It is thus apparent from para 6 of Schedule 'Q' of the balance sheet that the Appellants had fabricated plant and machinery including testing equipment

worth Rs. 31.26 lakhs and no record of such fabrication was kept by them nor any duty on their use was paid by them. There is no force in the submissions of the Appellants that such mention was made in the balance sheet to present a rosy picture of the company to the share holders or the equipment did not reach the finished stage and they were destroyed from the fact that Note on balance sheet, profit and loss account specifically mentions about the fabrication and capitalisation and belies the submissions made by the Appellants. The Collector (Appeals) in the impugned order has rightly given his findings that the balance sheet is a very important documents for a company and each of the figure and statements incorporated therein is open to criticism and analysis. A limited company has to lay a balance sheet and profit and loss account at every general meeting of the company as provided under Section 210 of the Company's Act which provides that every balance sheet of company shall give true and fair view of the state of affairs of the company. Section 215 of the Companies Act also provides that every balance sheet and every profit and Loss account of company shall be signed on behalf of Board of Directors by its Managing Agent, Secretary and Treasurer, Manager or Secretary, if any and not less than by two Directors of the company, one of whom shall be the Managing Director, where there is one.

Moreover balance sheet and the profit and loss account shall be annexed to the balance sheet and auditor's report shall be attached to. We, therefore, agree with the findings of the Collector (Appeals) that it is impossible to accept the plea that the appellants just cooked up some explanation in order to give a rosy picture to the share holders.

The Chartered Accountant had verified all the essential facts and figures and the recorded entries before satisfying themselves about the correctness of the statement, facts, figures and explanation given therefor.

7. We do not agree with the submissions of the learned Advocate that provisions of Rules 9 & 49 of the Central Excise Rules are not applicable as the equipments and instruments made by them have not been subjected to any further processes in the factory. Provision of Explanation to Rules 9 & 49 are very clear as it provides that for the purpose of these rules excisable goods manufactured and

consumed or utilised as such shall be deemed to have been removed from the premises immediately for such consumption or utilisation. For the application of these provisions it is not pre-requisite that the excisable goods should be subjected to any further processes. Reliance on the decision in the case of J.K. Cotton Spg. & Wvg. Mills is not correct. In fact the Supreme Court held in that case that "that the yarn which is obtained at intermediate stage of integrated process of manufacture of another commodity, is liable to payment of excise duty, Yarn that is produced by the Appellants is also liable to payment of excise duty." Paragraph 46 of the said judgment, referred to by the learned Advocate does not advance the case as the point discussed therein was whether the duty is payable on Yarn after it was seized for the purpose of weaving into fabrics.

8. It has not been rebutted by the Appellants that neither they had taken L-4 licence nor they had disclosed manufacture of goods in question to the Department nor they had filed any classification list or price list. In the absence of any disclosure to the Department it is apparent that the facts were suppressed from the Department and the extended period of limitation is rightly invokable. Whatever correspondence has been exchanged between the department and the Appellants is after the manufacture and use of the goods in question and in view of the decision of the Larger Bench in Nizam Sugar factory v, CCE, Hyderabad - 1999 (34) RLT 864, acquiring the knowledge by the Department subsequently does not take away the period of 5 years provided by the law maker itself. We also do not find any substance in the contention of the learned Advocate that a show cause notice for demanding duty cannot be issued on the basis of audit objection. The observation of the Appellate Tribunal in the case of Swastic Tin Works, supra, relied upon by ld. Advocate was with reference to the facts that the show cause notice was issued for demanding the duty in respect of the products without any investigation which were declared by the Assessee and cleared as such for years together and were approved as non-excisable in consecutive classification list. In view of these facts the Tribunal observed that there is no claim that there has been any further inquiry or investigation by the Department which is held to establish that the actual identity of the impugned goods is other than that claimed by the Assessee and earlier approved by the department itself." 9. Learned Advocate has also submitted that Additional Collector was not competent to adjudicate the

matter involved clandestine removal as the definition of Collector was changed and Collector did not include Additional Collector at the relevant time. We find that the Collector (Appeals) has given his specific finding on this aspect also. The statutory position after amendment of Section 11A(1) w.e.f. 14-5-1992 was that Central Excise Officer was competent to issue the show cause notice and adjudicate show cause notices even where proviso to Section 11A has been invoked. We, therefore, hold that the Additional Collector was competent to adjudicate the present matter. In view of this we reject the appeal filed by the Appellants.