

Commissioner of C. Ex. Vs. Electronics and Engineering Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-05-2000

Reported in : (2000)(122)ELT712TriDel

Appellant : Commissioner of C. Ex.

Respondent : Electronics and Engineering Ltd.

Judgement :

1. In this appeal the Revenue has challenged the validity of the impugned order of the Collector (Appeals) to a limited extent to which duty demand for the period 1-3-1994 to 1-4-1994 in respect of "Battery Pack" manufactured by the respondents, had been held to be time barred.

2. The facts giving rise to this appeal may briefly be stated as under : 3. The respondents filed classification lists Nos. 2/92-93, dated 1-3-1993, 1/93-94, dated 1-4-1994, 4/93-94, dated 1-3-1994 and 1/94-95 dated 1-4-1994, wherein they classified their product viz. Connecting cable, battery pack and battery charger cum power pack under sub-heading 9031.00 of the CETA but these were all approved provisionally and show cause notice was issued to them by the Assistant Collector on 27-6-1994 as to why the product, battery pack and battery charger cum power pack be not classified under sub-heading 8507 of CETA and he changed the classification of the product battery pack from sub-heading 9031.00, as claimed by the respondents to sub-heading 8507 of the CETA, through the order in original dated 10-11-1994. In consequence of that order demand for payment of the duty on the goods cleared by the respondents during the period 1-

3-1993 to 1-4-1994 was issued by the Superintendent of Central Excise. The Collector (Appeals), however, confirmed the order in original of the Assistant Collector regarding classification of the goods battery pack but also held that the differential duty on the clearances made for the period 1-3-1993 to 1-4-1994 was not recoverable as the goods were removed under approved classification list.

4. The Revenue has challenged this part of the order of the Collector (Appeals) holding the demand for the differential duty on the clearances made during the period 1-3-1993 to 1-4-1994 by the respondents, to be time barred, in the present appeal.

5. The learned JDR, Dr. Ravinder Babu has assailed this part of the order of the Collector (Appeals) by contending that the classification lists were modified and approved finally by the Assistant Collector only through order in original dated 10-11-1994 and earlier to that there was only provisional approval. Therefore, the clearances made by the respondents during the period in question could not be held to be under the approved classification lists by the Collector (Appeals) and as such his order to this extent deserves to be set aside.

6. On the other hand, the learned Counsel for the respondents has attempted to justify this order of the Collector (Appeals) on the grounds, namely (1) no order regarding the provisional approval of the classification lists was conveyed to the respondents, (2) Even no order regarding provisional assessment under Rule 9-B of the Central Excise Rules was passed by any competent authority and as such the removal of the goods during the disputed period by the respondents must be taken to be under the approved classification lists, (3) Even if there was provisional approval of the classification lists, the provisional assessment order could only operate in respect of the goods which were cleared by the respondents subsequent to passing of that order and not earlier to that, (4) No show cause notice for recovery of the differential duty demand under Section 11A of the Central Excise Act was issued and served on the respondents.

8. The respondents admittedly claimed classification of their product, battery pack alongwith other products under sub-heading 9031.00 of the CETA when they filed their classification lists in respect thereof, but the same was not accepted by the

Revenue. Rather the approval accorded was only provisional, as is clear from the Assistant Collector's order dated 27-4-1994 and show cause notice on that very date was issued to them as to why their product in question be not classified under sub-heading 8507.00. The respondents submitted their reply to that show cause notice wherein they reiterated classification of the product under sub-heading 9031 of the CETA but before the final approval of their classification lists, they made the clearances of the product in question during the period 1-3-1993 to 1-4-1994 and paid the duty only on the price as declared by them in the classification lists.

9. The arguments of the learned Counsel that the order regarding the provisional assessment was never conveyed to the respondents, cannot be accepted at all, as copy of that order is on the record and finds mention in the impugned order of the Collector (Appeals) also.

Moreover, it is not their case that any approval of the classification lists was ever conveyed to them. Rather admittedly the show cause notice was given to them for change of classification of the product in question from sub-heading 9031 to sub-heading 8507 of the CETA. Therefore, removal of the goods by them cannot be said to be under an approved classification list, rather it can be safely concluded that the same was under the provisional approval. This conclusion also finds corroboration from the provisions of Rule 173-CC of the Central Excise Rules which empowers the assessee to remove the goods in certain cases pending approval by the proper officer of the classification or price lists. This Rule clearly enacts that where an assessee pending approval of the classification or price list removed such goods on payment of duty on the basis declared in the list and thereupon the duty paid on such goods shall be deemed to be the duty assessed provisionally under Rule 9B.10. The perusal of the file also shows that even order regarding provisional assessment was passed by the Assistant Collector on 27-4-1994. It is hard to accept as it does not appeal to the reasons that this order was never conveyed to the respondents. Moreover, when the respondents' price lists were not approved as these were submitted and show cause notice for changing the classification of the product in question from one sub-heading, as mentioned by them therein, to another sub-heading i.e. from sub-heading 9031.00 to 8507.00 of the CETA, was issued, they themselves were under legal obligation to follow the

procedure prescribed under Rule 9-B for provisional assessment of the goods. They could remove the goods pending approval of the price lists only on executing a bond in the proper form, as is envisaged by Rule 173-C of the Central Excise Rules. But they admittedly did not comply with the requirement of this Rule and removed the goods of their own and paid duty on that much price, as declared by them in the classification or price lists. Therefore, the duty paid on such goods has to be deemed to be assessed provisionally under Rule 9B of the Rules. In this context reference may also be made to *Samart International (P) Ltd. v. CCE*, 1992 (58) E.L.T. 561. In that case also the classification or price list was submitted by the assessee but it was approved by the Assistant Collector after some time and regarding the clearances made in the meantime by the assessee, it was ruled that such clearances shall be deemed to be provisional even if B-13 Bond was not executed by the assessee. Therefore, the view taken by the Collector (Appeals) that the clearances made by the respondents during the period in question were under the approved classification lists, must be held to be erroneous and unsustainable in law.

11. The contention of the learned Counsel that the provisional assessment order dated 27-4-1994 can be made applicable only in respect of the goods cleared after that date and not earlier to that, cannot be accepted being wholly misconceived. As observed above, the classification or price lists, as submitted by the respondents, were never approved by the Assistant Collector, rather the show cause notice was issued to them for the change of the classification in respect of the product in question from sub-heading 9301, as mentioned by them in those lists, to sub-heading 8507 of the CETA. The approval accorded was only provisional and order for the provisional assessment was also accordingly passed by the Assistant Collector. Therefore, any removal of the goods made by them meanwhile on the basis of the classification lists was only under the provisional approval and assessment of the duty, under Rules 173-CC and 9-B of the Rules. The ratio of the law laid down in *CCE. v. Pharmasia Pvt. Ltd.*, 1989 (41) E.L.T. 77 (Tribunal) and *Associated Cement Cos. Ltd., Refractory Works v. CCE*, 1992 (57) E.L.T. 178 (T) referred by the Counsel is not attracted to the facts of the present cases. In both these cases, it has been only ruled that "the provisional assessment would be effective only in respect of the goods under clearance and not those

already cleared. The past clearances could be treated as provisionally assessed only when goods were assessed provisionally under Rule 9-B".

12. But in the case in hand, as observed above, clearances of the goods during pending enquiry regarding the correct classification and final approval of the classification lists, by the respondents have to be deemed to be under provisional assessment in terms of Rule 173-CC, referred to above. The respondents very well knew that their classification/price lists were not approved finally. They were rather served with a show cause notice for the change of the classification of the product in question and before the adjudication of that notice and the final approval of their classification lists, they managed to clear the goods paying duty only on the price, as declared by them in the lists. The duty so paid on such goods, has to be deemed to be assessed provisionally under Rule 9-B, as is clear from the bare reading of Rule 173-CC of the Rules. Therefore, the respondents cannot escape from the payment of the differential duty on the goods cleared by them before the final approval of their classification lists. The demand of differential duty raised from them after the approval of the classification lists for the period in question cannot be said to be time barred.

12. No separate show cause notice was required to be served on the respondents before calling upon them to pay the differential duty. They were already served with a show cause notice vide which they were required to explain as to why the classification of the product in question, as claimed by them in the classification list under sub-heading 9031, be not changed to subheading 8507 of the CETA. During the pendency of the final approval of their classification lists they cleverly cleared the goods without having recourse to the procedure prescribed under Rule 9-B of the Central Excise Rules for provisional assessment of the goods which they were required to follow as per the provisions of Rule 173C of the Rules under which they filed the price lists of the goods assessable ad valorem. On classification of the goods under proper and appropriate sub-heading of the CETA, the differential duty could be legally demanded from them by the Revenue as the duty earlier paid by them on the price, as declared by them in the classification lists was only under the provisional assessment. Again no fresh show cause notice was required to be served on them for payment of this duty amount. The ratio of the law laid down in

CCE, Patna v. ITC Ltd., 1994 (71) E.L.T. 324 (S.C.) relied upon by the learned Counsel, is not attracted to the facts of the present case. In that case provisional assessment was finalised after adjudication and the amount was quantified and demand was issued. But soon thereafter another demand in terms of the same adjudication order was issued and on that account it was ruled by the Apex Court that "the show cause notice and personal hearing before saddling with additional demand was essential". But such is not the situation in the case in hand. The demand for payment of differential duty had been raised in consequence of the finalisation of the provisional assessment after adjudication and after giving hearing to the respondents. No additional demand had been raised from them in consequence of the final assessment order.

12. The view taken by the Collector (Appeals) in the impugned order that the demand for payment of differential duty for the period 1-3-1993 to 1-4-1994 was time barred, cannot be subscribed and endorsed, rather the same must be held to be erroneous and unsustainable under the law. Therefore, his order under appeal to that extent is set aside. The appeal of the Revenue accordingly stands allowed.

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