

Collector of Central Excise Vs. Amber Paints

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-11-1985

Reported in : (1985)(22)ELT297TriDel

Appellant : Collector of Central Excise

Respondent : Amber Paints

Judgement :

1. The facts of the case, briefly stated, are that M/s. Amber Paints, Bombay, the Respondents in the present proceedings, were granted an L-6 Licence by the Central Excise authorities permitting them to obtain toluene/benzene on payment of duty at the concessional rate provided, in Notification No. 35/73, dated 1-3-1973. This notification exempted the two aforesaid products from a portion of the duty leviable thereon subject to the Collector of Central Excise being satisfied, inter alia, that the products were intended for use as solvent or diluent or thinner for the manufacture of paints, varnishes, lacquers and allied materials or for use in painting. Where such use was elsewhere than in the factory of manufacture of the products, the exemption was subject to the compliance with the procedure laid down in Chapter X of the Central Excise Rules, 1944. Amber Paints accordingly obtained 19.480 Kilo Litres of toluene at the concessional rate of duty and manufactured 37.419 Kilo Litres of solvent/thinner out of the toluene.

They used 15.819 K.Ls of solvent/thinner out of the aforesaid quantity in the manufacture of paints and varnishes in their own premises. The remaining quantity of 21.600 K.Ls, which was in excess of their requirements, was sold to 4 other

parties. Since this latter quantity of solvent/thinner was not used by the Respondents themselves, the Department issued a show cause notice to Amber Paints demanding the differential duty of Rs. 18,554.25. The Deputy Collector of Central Excise, Baroda, who adjudicated the case, held that there was a contravention of the conditions in the L-6 licence and the provisions of Notification No. 35/73 and, on that basis, he confirmed the demand.

On appeal, the Appellate Collector of Central Excise, Bombay held that but for a quantity of 400 litres, the remaining quantity of solvent/thinner sold to other parties was used in the manufacture of paints and varnishes. The said 490 litres, however, were not used in the manufacture of paints and varnishes. The Appellate Collector did not agree with the adjudicating authority's view that the solvent/thinner had to be used by Amber Paints themselves in their own factory. The only condition was that the solvent/thinner manufactured should be used for paints, varnishes, etc. regardless of the fact whether such use was within the same factory or in another. On this reasoning, he held that the toluene contained in the aforesaid 400 litres of solvent/thinner was chargeable to differential duty. He set aside the demand except to this extent.

2. In exercise of the powers vested in the Central Government under Section 36(2) of the Central Excises and Salt Act, 1944, the Government examined the records relating to the Order-in-Appeal passed by the Appellate Collector of Central Excise, Bombay to decide for itself whether the order was proper, legal and correct. The Central Government formed the tentative view that the order was not proper, legal and correct inasmuch as the concession under Notification No. 35/73 was prima facie available only to those licensees who used the goods so obtained in manufacturing thinner which was used by them in the manufacture of paints and varnishes in their own factory and not by their customers. Government, therefore, issued a show cause notice bearing No. F. 198/4/212/81-CX.V, dated 5-1-1982 to Amber Paints calling upon them to show cause why the Order-in-Appeal should not be set aside and the order of the original adjudicating authority not restored or such orders as deemed fit, after consideration of the submissions of the party, should not be passed. Amber Paints, by their reply dated 14-1-1982, contended that the order passed by the Appellate Collector was correct, legal and proper and

called for no interference.

3. On the setting up of this Tribunal, the aforesaid proceedings, which had not been disposed of by then, were transferred to it under Section 35-P of the Central Excises and Salt Act, 1944 to be disposed of by the Tribunal as if it were an appeal filed before it.

4. At the outset, Shri K.V. Kunhikrishnan, Consultant for the Respondents, Amber Paints, raised a preliminary objection to the effect that the show cause notice dated 5-1-1982 was barred by limitation. The appellate order sought to be reviewed was dated 27-6-1981 and the last date for initiating review proceedings was 27-12-1981. Since the notice was issued beyond the prescribed period of six months, it was hit by limitation. In support of this contention he relied upon the judgments of the Delhi High Court in *Associated Cement Co. Ltd. v. Union of India* -1981 ELT 421, and of the Bombay High Court in *Corn Products Co. of India Ltd. and Anr. v. Union of India and Anr.*-1984 (16) ELT 177. He also relied upon the Tribunal's decision in *Steel Rolling Mills of Hindustan Pvt. Ltd. v. Collector of Central Excise, Calcutta*-1984 ECR 1527.

5. Replying to the preliminary objection, Shri S.N. Khanna, Departmental Representative, stated that the original show cause notice culminating in the present proceedings was the one issued by the Superintendent of Central Excise, Broach on 26-5-1979. The said notice was issued in terms of Rule 1% of the Central Excise Rules, 1944, Shri Khanna contended that the limitation of 6 months with reference to Section 11A of the Central Excises and Salt Act, 1944 would not apply to the present review notice dated 5-1-1982. Under Rule 196, there was no time-limit imposed for issue of a notice seeking to recover differential duty. In support of this contention he relied upon the decision of Special Bench 'B' of this Tribunal in *Bajaj Tempo Ltd., Pune v. Collector of Central Excise, Pune*-1984 (16) ELT 294. Referring to the effect of the 3rd proviso to Section 36(2) of the Central Excises and Salt Act, 1944, Shri Khanna said that it did not whittle down the review period from 12 months to 6 months. He cited in this context the decision of Special Bench 'A' of this Tribunal in *Collector of Central Excise, Chandigarh v. British India Corporation Ltd., Gurdaspur*-1984 ECR 6. We have carefully

considered the submissions of both sides. The genesis of the dispute lies in the show cause notice No.'M.P./13-1/79/1123 dated 26-5-1979 issued by the Superintendent of Central Excise, Broach to Amber Paints. The show cause notice alleged that Amber Paints had contravened the provisions of Rule 196 of the Central Excise Rules inasmuch as they had received 19.480 KLS. of toluene at concessional rate of duty in terms of Notification No, 35/73 for use as solvent/thinner for the manufacture of paints and varnishes, that out of 37.419 KLS. of solvent/thinner manufactured, they sold 21.650 KLS to certain parties who were not L-6 licensees and that thereby they were guilty of disposing of the toluene obtained at the concessional rate of duty in a manner otherwise than as provided in the notification read with Chapter X of the Central Excise Rules. The notice went on to ask Amber Paints to show cause why the differential excise duty of Rs. 18,554.25 should not be demanded from them under Rule 196 of the Central Excise Rules. Turning to the adjudication order, dated 30-6-1980 passed by the Deputy Collector of Central Excise, Baroda, it is seen that the adjudicating authority held that Amber Paints had contravened the conditions of the L-6 licence and Notification No. 35/73 and, consequently, he confirmed the demand for duty as in the show cause notice. It is thus clear that the demand for duty was made in terms of Rule 196 and not Rule 10. The Tribunal in the Bajaj Tempo case-1984 (16) E.L.T. 294- has held that a demand can be made under Rule 196 without any period of limitation. The relevant portion of the Rule reads thus- If any excisable goods obtained under Rule 192 are not duly accounted as having been used for the purpose and in the manner stated in the Application or are not shown to the satisfaction of the proper officer to have been lost or destroyed by natural causes or by unavoidable accident during transport from the place of procurement to the applicant's premises or during handling or storage in the premises approved under Rule 192, the applicant shall, on demand by the proper officer, immediately pay the duty leviable on such goods." On the face of it, the Rule does not stipulate a time-limit within which the demand for duty should be raised. Only in the event of the goods procured under Rule 192 not being duly accounted for in the manner provided does Rule 196 come into play and evidently the cause for invoking this Rule cannot be limited by the limitation provided in Rule 10 which catered to an entirely different situation, namely, where duty had not been levied or paid or had

been short-levied or erroneously refunded or any duty assessed had not been paid in full.

7. The question, therefore, boils down to whether, in the circumstances of the case, the show cause notice, dated 5-1-1982 issued by the Central Government under Section 36(2) of the Central Excises and Salt Act, 1944, is hit by the 3rd proviso to the said Sub-section. Before going to this question, we may note that the demand confirmed by the Assistant Collector was set aside, except for the differential duty leviable on the toluene contained in 400 litres of solvent/thinner, by the Appellate Collector by his order dated 27-6-1981. The Section 36 (2) notice was issued on 5-1-1982, i.e. more than six months from the date of the order sought to be revised.

"Provided also that where the Central Government is of opinion that any duty of excise has not been levied, or has been short-levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this Section unless the person affected by the proposed order is given notice to show cause against it within the time-limit specified in Section 11 A." 9. Can it be said that the present case is one wherein duty of excise has not been levied or has been short-levied or erroneously refunded The question of erroneous refund evidently does not arise in this case.

A case of non-levy or short-levy would be one where the goods under consideration were either not assessed to duty at all or where the duty assessed was short of the duty actually assessable in terms of the Central Excise Tariff Schedule read with any relevant notification. In the present case, the duty leviable in terms of Notification No. 35/73 was admittedly assessed by the excise authorities and paid by the manufacturer of toluene. There is no dispute about this position. It is not as if the duty that ought to have been levied at that point of time was either not levied or was short-levied. Amber Paints held a licence in form L-6 whereby they were permitted to obtain toluene at the concessional rate of duty in terms of Notification No. 35/73 to be used by them in the manufacture of paints, thinners, solvents, etc., in their factory. In the form of application for licence, they were required to furnish the estimated quantity of the goods likely to be used

during the licensing year. In terms of Rule 192, they were required to state the estimated annual quantity of the excisable goods required. Chapter X governing the procedure for remission of duty on goods used for special industrial purposes (in which Rules 192 and 196 appear) does not lay down anywhere that the goods obtained under Rule 192 have to be used within a particular period. In this background, the question of demanding any sum representing the differential duty on the toluene received by Amber Paints could not have arisen till the goods were taken into use in a manner otherwise than as provided or in the event of unsatisfactory account of the goods. It will be clear, therefore, that a demand for differential duty on the occurrence of such eventualities would not be the same thing as a demand for duty on account of non-levy or short-levy. In this view of the matter, the 3rd proviso to Section 36(2) of the Central Excises and Salt Act, is not attracted in the instant case and the show cause notice is not consequently hit by the limitation contained in the said provision.

10. In the view we have taken, the judicial pronouncements as well as the Tribunal's decisions on the correct interpretation of the aforesaid 3rd proviso to Section 36(2) are not relevant for the present case.

11. The preliminary objection raised by the learned Consultant for the Respondents is rejected. The appeal shall be listed for hearing on 13-5-1985.

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