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Super Traders Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-21-1985

Reported in : (1986)(6)LC182Tri(Delhi)

Appellant : Super Traders

Respondent : Collector of Central Excise

Judgement :

1. The appellants manufacture stainless steel utensils out of imported stainless steel obtained from Minerals and Metals Trading Corporation of India. They also purchase stainless steel sheets/strips from M/s.

Ahmedabad Advance Mills. Further, they purchase stainless steel flats from M/s. V.I.S.L. Bhadravati and convert the same into cold rolled stainless steel strips mainly from M/s. T.K. Steel Industries (P) Ltd., on payment of labour charges. They were enjoying the concessional rate of duty under Notification No. 176/77-C.E., dated 18-6-1977 as amended.

2. A show cause notice was issued to the appellants alleging that they produced certain excisable goods without licence between 18-6-1977 and 31-3-1979 removed the goods evading Central Excise Duty payable thereon, fradulently availing the exemption from payment of Central Excise Duty under Notification No. 176/77. This allegation was based on the alleged fact that the excisable goods cleared by the appellants during the financial years 1976-77 and 1977-78 exceeded Rs. 30 lakhs.

They were threatened with duty liability of Rs. 1,43,383.55, confiscation of certain goods and imposition of penalty as well as other penal actions. After hearing the appellants and considering their reply to the show cause notice, the Collector held the charges against the appellants proved. Besides, including the value of goods exported in the value of clearances, the Collector took into consideration the value of cold rolled strips which the appellants got manufactured from flats and billets on payment of labour charges from other factories. He dismissed the plea of the appellants that conversion of flats and billets into strips cannot be called a process of manufacture with reference to the wording of Tariff Item 26AA. He further held that there was suppression (presumably of facts) inasmuch as the appellants did not disclose the value of stainless steel strips which were got manufactured and cleared by the appellants on their account. He, therefore, held that the appellants were not entitled to the concessional rate of duty under Notification No. 176/77-CE and as mentioned earlier demanded duty, confiscated certain goods and imposed a penalty. Hence the appeal before us.

3. In the Memorandum of Appeal before us the learned Counsel for the appellants submitted that the contention of the Department that goods are manufactured on the appellants' behalf is unsustainable. Job workers are independent parties and in the instant matter, there is no allegation and there can be no such allegation that the job workers were dummy companies. In support of this argument, he cited a Tribunal's decision in the matter of Lucas Indian Service Ltd., Madras v. Collector of Central Excise, Madras reported in 1984 (16) E.L.T. 415 (Tribunal) and Allahabad High Court's decision in the matter of Philips India Ltd. and Ors. v. Union of India and Ors. reported in 1980 E.L.T.263 (All.). The learned counsel argued that the appellants did not manufacture the goods and the goods never entered the factory of the appellants. Therefore, there was no question of the appellants company being manufacturers of the goods, and the value thereof being included in the value of clearances for purposes of Notification No. 176/77-C.E.4. The second argument of the appellants was that flats and billets are subjected to process of cold rolling for conversion into strips and no manufacture was involved, as both items fall under 26AA (iii). In support of his argument the learned counsel for the appellants cited a decision of Bombay High Court in the matter of Empire Dyeing v. V.P.Shade and Ors. (reported in 1977 E.L.T. J 34. He

further submitted that during the relevant time majority of the conversion was of flats and not of billets. Also, as far as the reduction of the thicker gauges to thinner gauges was concerned, this was done by M/s. Ahmedabad Advance Mills and there was no manufacture in such circumstances according to the learned Counsel who relied on the Government of India order reported in 1982 E.L.T. 581(A).

5. The learned counsel further argued that the show cause notice was time barred as relevant declaration was filed with the Department on 23rd March, 1979. They obtained a Central Excise Licence on 30th March, 1979. He argued that there was no guilty intention on the part of the appellants.

6. The learned Counsel also submitted that the value of goods exported should not be included in the value of clearances as only goods cleared for home consumption should be taken into consideration. Finally, the learned Counsel submitted that the Department wrongly took into consideration the average purchase value per kilogram of stainless steel flats and this led to erroneous working out of the duty demanded to the disadvantage of the appellants.

7. The learned representative for the Department opposing the arguments submitted that the show cause notice contained a charge of suppression and the Order-in-Original contained a finding that there was a suppression. Therefore, he submitted that the enlarged period of limitation was available to the Department. Besides, the appellants did not file the declaration under Notification No. 176/77. The learned representative argued that the manufacture and clearance of strips was done on behalf of the appellants and that the value of the same should, therefore be included in the value of the clearances of the appellants' factory. Referring to the orders passed by the Tribunal in the matter of M/s Britannia Biscuits Co. Ltd., Madras v. CCE, Madras (No. 204 to 270/84-D, dated 19-4-1984), he submitted that the ratio of the judgment is squarely applicable to the facts of the present case. Reinforcing this argument, he drew our attention to the statement of a partner of the appellant firm Shri S. Desai who, according to the representative, admitted that the work by the other mills was on labour charge basis amounting to admission of production by the other mills on behalf of the ' appellants. Opposing

the argument that the strips were not liable to duty and that producing thinner gauge out of thicker gauge does not amount to manufacture, the learned representative referred to the judgment of the Supreme Court reported in 1978 E.L.T. (J 389) in re : Union of India v. Hindu Undivided Family business known as Ramlal Mansukhrai, Rewari and another. He also cited the judgment of the Andhra Pradesh High Court in M/s Brooke Bond India Ltd. v. UOI and Ors.

(Reported in 1984 (15) E.L.T 32 (AP) and the case of Collector of Central Excise, Hyderabad v. Uma Laminated Products CP) Ltd. (Reported in 1984 (17) E.L.T 187 (Tribunal) in addition to (1980 E.L.T 735 (Del.) Hyderabad Asbestos Cement Products Ltd. and Anr. v. Union of India and Ors. (1983 E.L.T 1736) Mahalakshmi Dyeing and Printing Works and Ors.

v. Union of India and Anr..

8. He also submitted that the scrap which was in the appellants' factory was admittedly not manufactured in that factory. The learned representative emphasised that the presence of the scrap clearly showed that the same was out of the billets, etc., given to the other factories and was returned to the appellants' factory for the only reason that the production was on behalf of the appellants.

9. The learned Counsel for the appellants submitted that the presence of the scrap cannot lead to the conclusion as argued by the respondent as the appellants did not produce this scrap. He further emphasised that the duty on the strips, etc., was paid by the other mills who are real manufacturers and not the appellants. The learned Counsel submitted that even if an offence was committed, the fine and penalty imposed were harsh and the duty demanded was excessive as there were some mistakes in calculating the same.

10. We have considered the arguments of both sides. The questions that arise before us for decision is (i) whether the value of clearances of the appellants during the financial years 1976-77 and 1977-78 exceeded Rs. 30 lakhs or not and (ii) whether the show cause notice was time-barred.

11. We considered the question of time bar of show cause notice. Though the learned representative for the respondent argued that the seizure took place on 12-10-1979 and show cause notice was issued on 7-4-1980, and hence there was no question of limitation, the limitation has to be examined with reference to the demand for duty also. If the normal period of limitation is applied, the show cause notice is clearly time barred in respect of earlier financial years. However, we note the arguments of the learned respondent that the show cause notice made substantial allegations of suppression of facts and that therefore, the enlarged period of limitation, viz., five years is available to the Department. We perused the show cause notice and find that it contains allegations of suppression of facts. It also impliedly alleges mis-declaration of value in respect of the goods cleared by the appellants in the financial years 1976-77 and 1977-78. Besides, the appellants have not shown that they brought the fact of manufacture of cold rolled stainless steel strips etc. by other parties at the appellants' instance to the notice of the Department. Further, one of the rules contravened is shown as Rule 9(2). In the circumstances, we have to hold that the necessary ingredients to enlarge the normal limitation under Rule 10 are available in the show cause notice. We, therefore, hold that the show cause is not time barred.

12. That takes us to the next question as to whether the value that clearances of the appellants exceeded Rs. 30 lakhs limit in the two financial years. The appellants themselves manufacture utensils and it is not disputed that the value of these utensils is well within the limit. The real question therefore, is whether or not the value of cold rolled SS strips manufactured from stainless steel flats/billets by other factories on behalf of the appellants should or should not be included in the value of the clearances of the appellants. As mentioned earlier, the appellants own the position that the flats and billets are purchased by them and given to the other factories for rolling into strips. Their argument is that the rolling is done by others who are entirely independent and who paid duty on the same, and hence it is the other parties who are manufacturers and not the appellants themselves.

Consequently, the appellants argue that the value of cold rolled strips should not be added to the value of their own clearances.

"In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Govt. hereby exempts goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), and cleared for home consumption on or after the first day of April in any financial year, by or on behalf of a manufacturer from one or more factories from the whole of the duty of excise leviable thereon, if an officer not below the rank of an Asstt. Collector of Central Excise is satisfied that the sum total of the value of the capital investment made from time to time on plant and machinery installed in the industrial unit in which the goods, under clearance, are manufactured, is not more than rupees ten lakhs : Provided that this exemption shall not be applicable to a manufacturer if the total value of all excisable goods cleared by him or on his behalf in the preceding financial year had exceeded rupees 30 lakhs : Provided further that the exemption contained in this notification shall apply only to the first clearances for home consumption by, or on behalf of, the manufacturer referred to in this notification, from one or more factories, upto a value not exceeding rupees 30 lakhs during a financial year subsequent to 1977-78, and upto a value not exceeding rupees 24 lakhs during the period commencing on the 18th day of June, 1977 and ending on 31st day of March, 1978.

Explanation.-For the purpose of determining the value of any capital investment, only the face value of such investment at the time when such investment was made shall be taken into account." 14. This Notification takes into consideration, for deciding the entitlement of exemption, the value of clearances for home consumption of goods by or on behalf of the manufacturer from one or more factories. In the instant case, the position is that the appellants buy flats/billets and get them rolled by the other factories ; the resultant products are then sold. It appears to be admitted that the resultant products do not enter the factory of the appellants. The appellants' arguments which have been mentioned earlier are mainly that the job-work is done by independent factories and, therefore, the value of the clearances cannot be added to the value of their own clearances effected directly from the factory. The appellants relied on a judgment of the Tribunal in the matter of M/s Lucas Indian Service Ltd., Madras v. Collector of Central Excise, Madras [Reported in 1984 (16) E.L.T.415 (Tribunal)] and Allahabad High Court's decision in the matter of Philips India Ltd. and Ors. v. Union of India, and Ors.

(reported in 1980 ELT 263 (All). These judgments were cited to support the appellants' argument that the other units rolling their products were independent.

We have examined both these judgments. The judgment of the Tribunal in the matter of Lucas Indian Service Ltd., Madras v. Collector of Central Excise, Madras dealt with the situation where it has to be decided as to who was the manufacturer. It was held therein that mere supply of materials to another firm for the manufacture of goods in accordance with one's drawings and specifications does not make the supplier a manufacturer of such goods unless it is proved that manufacture was done by the factory owner in the capacity of dummy company. In the present case, the question is not whether there was manufacture by the appellants' but whether the manufacture by the other companies was on behalf of the appellants' company. Therefore, this judgment does not help the arguments of the appellants. In respect of the Allahabad High Court in the matter of Philips India, the learned High Court held that if a person simply places order for getting certain goods manufactured according to its specifications, details and trade mark, without incurring any financial involvement needed for manufacturing or producing goods or without having any control or supervision over the manufacturing process, such a person cannot be treated as a manufacturer for those goods because in such cases the transaction is on principal to principal basis in the ordinary course of business. In such cases, the High Court observed, it can be said that actual manufacturer was engaged in the manufacturing activity "on his own" as he manufactures goods according to his own schedule, budget, capacity, availability of raw materials. The facts of this case are clearly distinguishable from the facts of the appeal before us. From the facts it is clear that the manufacture of the strips was done on behalf of the appellants and this fact is relevant for interpretation of the notification in question. In the circumstances we hold that neither of the judgments cited by the appellants cover the facts of the present matter.

15. We have also examined the argument that flats and billets when converted into strips do not involve any manufacture as both items fell under 26AA (3) of the CET. In support of this argument the appellants cited the Bombay High Court judgment in Empire Dyeing and Mfg. Co. Ltd. v. V.P. Bhide and Ors. (Reported in

1977 ELT J 34). We have gone through this judgment carefully. We see therein that the High Court held that manufacture of cotton fabrics was complete when the goods were released and sold in the market after duty was levied and collected from the manufacturers. It was with reference to this situation that the question of liability to duty after processing fabrics was decided. The High Court also took into consideration the fact that cotton fabrics mentioned in Sub-item 5 of Item 19 of the First Schedule to the Central Excises and Salt Act, 1944 hereinafter referred to as the Act) have not been Sub-classified into goods of different descriptions in the manner contained with reference to the fabrics mentioned in earlier Sub-items of Item 19. It was in these circumstances that the High Court considered it to be difficult to accept the position that "in respect of goods falling under Sub-item 5(5), duty could be charged on independent processors which duty could only be levied and collected and from the original manufacturers of goods." Similar circumstances do not exist in the present case as Item 26-AA has been sub-classified and it is not the case of the appellants that it is not so. In this context we recall the submission of the respondent that the Andhra Pradesh High Court Judgment 1984 (15) E.L.T.32 took a different view. Examining what was claimed to be a double taxation on coffee, the High Court held that it may be that an item may be taxed once as raw-material and after its manufacture and conversion into separately taxable goods, taxed again as another taxable item altogether. (The High Court was citing Alladi Venkateswarlu v. Govt. of A.P. (61 STC 394). The High Court further noted that in such cases the identity of the goods sold would be deemed to be different even though the raw materials may have been taxed already in a different form earlier. In our opinion, the AP High Court judgment is nearer to facts of the present case. Incidentally, this AP High Court judgment disposes of another argument of the appellants that there is no manufacture involved when the strips were rolled. Going by the ratio of the judgment, we hold that the strips were liable to duty and if the duty was collected, it was correctly collected. However, the liability to duty is not an issue before us except in so far as it relates to the value of the clearances of excisable goods. We also perused the order of the Govt. of India in Re : Universal Box Stropping & Engineering Works-1982 E.L.T. 581 A (G.O.I.), relied upon by the appellants. Apart from the fact that the AP High Court judgment disposes of the question effectively, the Govt. of

India's decision was with reference to strips of larger dimensions being reduced to those of smaller dimensions which according to the Govt., did not amount to manufacture. This is not relevant to the facts of the present case which is not one where strips of one dimension are reduced to strips of another ; when flats were rolled into strips it cannot be said that there is no manufacture.

16. In these circumstances, there is no doubt there was manufacture and the appellants themselves during the course of hearing stated that duty was being paid on the strips by the other mills. The only question is whether the value of clearances should be included in the value of the clearances on behalf of the appellants. There is no dispute that the flats/billets were purchased by the appellants got rolled on payment of job charges and later sold to various parties, the proceeds accruing to the appellants themselves.

17. In this context, the learned representative relied upon the judgment of this Tribunal in the matter of Britannia Biscuits Co. Ltd., Madras v. Collector of Central Excise, Madras (Order No. 204 to 207/84-D, dated 19-4-1984). We have considered the ratio of this judgment. Whether the production of strips was on behalf of the appellants is essentially a question of fact and has to be decided with reference to the facts of the present case but we keep in mind the ratio of judgment in Britannia Biscuits Company's case. In this context we take note of the submission of the respondent who made a reference to the statement of Shri Shantibhai Harilal Desai recorded on 15-10-1979. Shri Desai is a partner of the appellant firm and has described how they purchase the raw materials, pay job charges and sell the finished goods from their office-cum-godown. He has given other statements also, but the position is quite clear that the production and clearances of the stainless steel strips by the other factories though done as job work was on behalf of the appellants.

18. In the result, we hold that the appellants were not entitled to the benefit of Notification No. 176/77-CE inasmuch as the value of the cold rolled strips in both the financial years in question exceeded Rs. 30 lakhs with the addition of the appellants' own production of utensils in their factory. All the goods including their own production were correctly held liable to duty.

19. We, however, take note that the appellants made some other pleas while arguing their case. One is that the value of exported goods should not be taken into consideration for computation of duty payable by them. We have already reproduced Notification No. 176/77-CE earlier.

This notification refers only to the value of goods cleared for home consumption. Therefore, the value of goods cleared for export cannot be taken into consideration for computing the value of the clearances. The liability to duty of such goods has, if necessary, to be decided separately according to law, though prima facie it appears that no excise duty is leviable on export goods.

20. Another point made by the appellants was that there was an error in calculating the amount of duty inasmuch as the Department incorrectly took into consideration the value of stainless steel while working out the liability to duty. The appellants have not shown any details of such mis-calculation but in the interests of justice we order that they may be given an opportunity to make a representation to the appropriate authority in this regard. The representation may be examined and the appellants given an opportunity to be heard before the said representation is disposed of according to law, by issue of a formal appealable order.

21. The appellants also submitted that the penalty is not justified and is any way harsh. We note that duty of over Rs. 140, 000 was found to have been evaded. The circumstances have been dealt with extensively by the Collector. We too have gone into the circumstances in detail. We do not, as a consequence feel that the penalty imposed at Rs. 20,000 is excessive. The fine imposed is also reasonable. We, therefore, refuse to interfere with the impugned order and except for the direction issued supra about considering the appellants' representation about the quantum of duty, we dismiss the appeal.

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