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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-20-1983

Reported in : (1983)LC899DTri(Delhi)

Appellant : Carew and Co. Ltd.

Respondent : Collector of Central Excise

Judgement :

1. The controversy in this case emanates from rejection of the refund application filed by the appellant, namely Carew & Co. Ltd., Rosa (U P.) under the provisions of section 36 of the Central Excises and Salt Act, 1944, and has arisen as a result of demand raised by the Central Excise Authorities in respect of "bagasse" consumed by the appellant in their sugar manufacturing factory during the period 1-3-1975 to 29-4-1975.

2. The facts as set out in the grounds of revision indicate that the Company, during the course of manufacture of sugar in their factory, used sugarcane as raw material and while extracting juice, the fibrous material comes out in a moist condition, known as "bagasse". The contention of the appellant is that this material is more or less a waste product and has no or very little value and as such is stored in the open in the factory premises so that after it dries up, it can be used as fuel in the boilers, which user is pleaded to be as a convenient mode of destruction of the waste material.

3. It was pleaded that after Itme 68 was introduced in Central Excise Tariff with effect from 1-3-1975, the company filed a classification list showing molasses against the entry in column 5 of the format of the classification list under the heading : "All other goods". Excise duty was paid accordingly on molasses only. However, on 20-4-1977 the Superintendent, Central Excise, Saharanpur, within whose jurisdiction the factory fell, served a show cause notice on the company, requiring cause to be shown as to why duty amounting to Rs. 16,276.92, be not recovered on account of bagasse valued at Rs. 16,27,692.30, cleared from the factory. Its price was computed at the rate of Rs. 10 per quintal and has been allegedly used in the factory during the period 1-3-1975 to 29-4-1975. The notice was issued on the view that it was not an intermediate product or a component product used in the factory of production, within the contemplation of Notification No. 58/75-C.E., dated 1-3-1975, 4. The dispute is confined only to the period ending with 29-4-1975 because on 30-4-1975, the Central Government issued another Notification No. 118/75-C.E., dated 30-4-1975, enlarging the scope of the exempted goods with respect to Tariff Item 68 by providing that all goods falling under Item 68 manufactured in a factory and "intended for use in the factory in which they are manufactured..." were also exempt from excise duty. This material, known as bagasse, has, admittedly, been used during the process of manufacture of sugar after extraction of the juice from the sugarcane. As the manufacturers get benefit of the second notification dated 30-4-1975 the dispute is confinded only to the period when Tariff Item 68 was introduced, namely, with effect from 1-4-1975 to 29-4-1975 when the second Notification was issued, 5. Appellant resisted the demand made by means of the show cause notice by raising, inter alia, the plea of time bar inasmuch as demand, according to them, was received by them on 7-9-1977 whereas the period of demand was 1-3-1975 to 29-4-1975, and pleading that it was a case of non-levy due to error and misconstruction on the part of the authorities and the only rule applicable was rule 10 of the Central Excise Rules and that rule 10A has been wrongly invoked. However, the main thrust of their contest to the notice was that in the production of bagasse, no process of manufacture was involved and no new product came into being and it was only a case physical extraction of juice from the cane and was parallel to the process of physical extraction of ground nut and just as the ground nut husk which was also

used as fuel in the concerned factory, was not subjected to any excise duty, the fibrous material which was left out of the sugarcane as a result of extraction of juice, could also not be liable to any excise duty.

6. They pleaded in the alternative, that without prejudice to their main arguments as to time-barred as well as non-excisability of the goods, the lower authorities had, in any case, erred in computation of duty at the rate of Rs. 10/- per quintal on the basis of some clearance of about 39 quintals of bagasse by some other factory of Rosa and that this quantity was not even 0.01% of the total quantity produced by them and presumably this high price was paid by a khandsari factory who purchased that short quantity of bagasse from M/s. Rosa Sugar Works of M/s. Oudh Sugar Mills because of some urgency. It was thus pleaded that this stray transaction could not be made a basis for determining the manufacturing cost of this item, known as bagasse. Although they had placed on record another decision of the Appellate Collector where Rs. 5/- per quintal has been accepted in respect of large number of factories in a collective order-in-appeal Nos. 618 to 522-C.E /77, dated 25-4-1977, the same has been ignored.

7. It was further pleaded in that the quantity has also been wrongly worked out and computed because it was apparent that quantity of bagasse as entered in the stocks and other records, was of fresh material which contained high degree of moisture whereas to be termed as bagasse and used as fuel in the boiler, all the water stands evaporated and as such the natural evaporation has to be allowed and that in spite of the fact that all material was placed before the Appellate Collector to show as to what was the water content of bagasse as entered in RT 7(c) of the return, the Appellate Collector erred in observing that said form did not indicate the exact moisture content of the bagasse and so no allowance could be possibly made for the moisture content although he accepted that allowance had to be male for the moisture content and that the request for taking into, account the evaporation oss was quite fair.

8. They pleaded, therefore, that in case their main plea as to time bar as well as non-excisability of this item did not find favour, it was a case where fresh computation on the basis of rate of duty as well as weight had to be given.

9. This revision petition has been received by transfer to the Tribunal under section 35P(2) of the Central Excises and Salt Act, 1944, and is being disposed of as such.

10. Shri D.N. Kohli, Consultant appeared for the appellant at the time of hearing whereas department was represented by Shri Hem Prakash, Departmental Representative. Shri D.N. Kohli, reiterated all the contentions as canvassed in the grounds of appeal. He urged, in the first instance, that this item known as 'bagasse' was not a manufactured product but only waste material, and as such not exigible to excise duty. He proceeded to fortify his arguments by drawing analogy from the process of separation of 'binola' during ginning of cotton or that of ground-nut husk in the process of extraction of ground-nut and contended that the present was an analogical case and that resultant waste product could not be deemed to be an excisable product. He also made reference to the case of Indian Aluminium Company and Anr. v. A.K. Bandhyopadhyay and Ors. (1980 E.L.T. 146 Bom.) decided by Bombay High Court. He dwelt at length on the plea of time bar contending that the demand had been confirmed with reference to Rule 10A by the Assistant Collector by means of order passed on 5-9-1977 whereas this rule 10A stood deleted from the Rules with effect from 6-8-1977 and that consequently rule 10A ceased to be applicable. He further contended that otherwise also, it was a case of non-levy as a result of error or mis-construction and no fraud or suppression was alleged to have been proved and that the normal period of six months under rule 10 as then prevailing, was available and that this demand having been made by means of show cause notice after the expiry of two years, the period under reference was not sustainable. In the alternative, he pin-pointed the error committed be the lower authorities in considering the wet weight content as well as the computation of price.

11. Shri Hem Prakash, Departmental Representative refuted all these arguments in reply, by emphatically contending that bagasse was not a mere waste but a definite product having a distinct trade name and that the case of cotton seed cited on behalf of the appellant was distinguishable inasmuch as there only separation was involved whereas in the case of bagasse it was extraction and it was a product having utility inasmuch as it was not only being used as a fuel but also for

the purpose of manufacture of paper products as a raw material. As regards the plea of time-bar he contended that deletion was effective with effect from 6-8-1977 whereas action had been initiated prior to that and as such rule 10A was fully applicable so far as these two proceedings were concerned. He also contended that rate could not be uniform and as such the dispute raised in regard to value was also not sustainable, nor the dispute as to the moisture factor: 12. We have given our very careful thought to these questions raised in this appeal. The foremost question to he determined is the excisability of the goods because (hot goes to the roots of the matter. We find on a reading of the appeal that this mateiral has been throughout described in the appeal itself as a produce of the factory or as a "product".

13. We also observe that this has a distinct name as bagasse in common trade usage and parlance. The produce is a result of extraction of juice from the sugarcane which is a manufacturing activity with the help of power. The case of "scrap and Dross" as considered in the case of Indian Aluminium Company, is certainly distinguishable because what resulted during the process of manufacture of aluminium tubes from aluminium sheets was a thrown up waste not having any distinct trade usages or identifiable name whereas in the present case, this product has an established and recognised trade name as well as use.

14. We also do not find it possible to draw any parallel from the instances referred to by the learned Consultant with reference to ground-nut husk or cotton seeds because, apart from their reference to trade notice, no further details were furnished and it is a settled proposition by now that while adjudicating on matters, quasi-judicial authorities have to apply their own mind and determine the issue and not go by trade notices or advices issued by the Executive.

15. We, therefore, find it to be a case where these goods known as bagasse, can certainly be termed as a by-product turned up in the course of a manufacturing activity and recognised as a separate entity in trade and commercial parlance and as such rightly held excisable for duty for the period, till the second notification came into being.

16. We also find the objection as to time-bar devoid of all force because it is clearly mentioned in the order of the Appellate Collector that in the Classification List filed by the appellant for the period in dispute, this bagasse was nowhere shown as an item produced by them.

It is pertinent to note that although the appellant has placed on record a copy of a Classification List for subsequent period showing bagasse also as one of the items, they have not supplied any copy of the Classification List covering the period in dispute and as such the observations of the Appellate Collector that bagasse was not shown as a product produced in the factory, are fully justified. There is a definite column in the Classification List for indicating particulars of other goods cleared and although molasses and press-mud are shown therein, there is no indication or mention of bagasse. It is thus not a case where goods had been indicated and averred to be non-excisable to which the Excise Authorities might have acquiesed at the time, by applying 'nil' rate of duty, and thus the ratio of judgment of the Hon'ble Supreme Court in Elphinston Spinning and Weaving Mills case would not be attracted and Rule 10 would not apply in the circumstances.

17. We also find the plea as to the non-applicability of rule 10A to be not tenable because as per grounds of appeal, notice to show cause was admittedly received by the appellant on 20-4-1977. The proceedings definitely are to be taken to have been initiated as soon as the show cause notice is served and subsequent repeal or deletion of rule 10A which took place with effect from 6-8-1977 would not affect these proceedings. We, therefore, do not find it possible to concede to the contention that rule 10A had ceased to be applicable by the time the impugned order of the Assistant Collector came to be passed because for this purpose, the relevant time would be the time of issue of show cause notice. The contention of the appellant would have been understandable and tenable, had even the proceedings not been initiated by means of the show cause notice.

18. We, therefore, are of our carefully considered view that rule 10A has been rightly applied in this case.

19. As a result, the appellant fails on both issues on merits, namely, the excisability of the goods as well as the point of non-enforceability of the demand because of time-bar. We, however, find abundant justification for the grievance made in the alternative, namely, as to the assessment of the duty both with reference to weight as well as the rate. We find it emphatically pleaded that the rate of Rs. 10 per quintal as taken by the authorities was based only on a sale of 39 quintals of bagasse by another factory, to a khandsari factory, and that too long after the period in dispute because the said transaction is pleaded to be as on 14-1-1977 whereas the present demand related to the period 1-3-1975 to 29-4-1975. The pleas that for the purpose of computation of value with reference to section 4 of the Act, the time of clearance from the factory alone was material which, in this case, is the deemed consumption in the factory itself but the period of production remained nevertheless 1-3-1975 to 29-4-1975.

20. We also find it positively asserted that water content has been very clearly mentioned in RT 7(c) returns and against each month/period, water percentage in bagasse was indicated and that they further offered to produce the relevant record pertaining to the period in question. They have also appended copy of a consolidated Order-in-Appeal passed by the Appellate Collector, Delhi taking Rs. 5/- per quintal to be the rate consumed during the same period, pertaining to the Mills of the same area.

21. We, therefore, think it to be a fit case where, in the absence of any evidence to the contrary, the same rate of Rs. 5/- per quintal ought to be taken and we further direct that since this product known as bagasse, whether consumed as a fuel or as raw-material for paper and paper board, etc., assumed identity only when dried up, the water percentage has to be excluded and for that record of the company prepared at the relevant time can be the only basis. We, therefore while dismissing the appeal on merits, direct that there shall be re-assessment of the excise duty on the value of Rs. 5/- per quintal and on fresh calculation of weight, after excluding the water content as revealed by the record of the appellant-company indicated in para (d) at page 7 of the grounds of appeal. Consequential relief be given accordingly within two months of the date of communication of this order.

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