

Premier Packaging Private Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-22-1986

Reported in : (1986)LC323Tri(Delhi)

Appellant : Premier Packaging Private

Respondent : Collector of Central Excise

Judgement :

1. It is alleged in the present matter that appellants used 23,45,352 Kgs. of kraft paper for manufacture of kraft board during the period from April, 1972 to November, 1974 but accounted for only 15,14,438 Kgs. of kraft board. The Department, therefore,, charged appellants with manufacture, non-accountal and removal without payment of duty and without observing due procedure 5,01,544 Kgs. of kraft board.

2. Shri K. Narasimhan, Advocate appears, on behalf of the appellant. He submits that the period for which duty has been demanded is April,, 1972 to November, 1974. The show cause notice was issued on 12th May, 1975. Thereafter what is described by the learned Advocate as a corrigendum, was issued by the Department on 10th February, 1977 which explained the basis of duty demanded in the show cause notice dated 12th May, 1975. According to the learned Advocate the first show cause notice issued on 12th May, 1975 was in fact incomplete and it is only with the issue of the subsequent notice of 10th February, 1977 that the show cause notice can be considered to have been finalised.

Accordingly, limitation should count from the date of the corrigendum and demand for the entire period would be barred. In this connection Shri Narasimhan has cited the decision in the case of Radhika Vitamolt v. Collector of Central Excises, Meerut 85 (21) ELT 920. It is the contention of the learned Advocate that the notice dated 10th February, 1977, in fact, changes the show cause notice substantially and it should therefore be considered a fresh notice. Even if this argument is not accepted says Shri Narasimhan, then the first show cause notice is also largely barred by limitation.

3. Shri K. Narasimhan has also questioned the applicability of Rule 9, the contravention which has been alleged by the Department. It is pointed out that Rule 9 of the Central Excise Rules provides that "no excisable goods shall be removed from the place where they are produced until the excise duty leviable thereon has been paid and on presentation of the application of a proper form and on obtaining the permission of the proper officer on the form. Shri Narasimhan submits that this Rule does not apply to manufacturers working under the self-removal procedure to whom rules under Chapter VIIA of the Central Excise Rules, 1944 applied. Since under Chapter VII A there is no requirement of prior assessment, therefore, it is stated, Rule 9 of the Central Excise Rules cannot apply to them.

4. It is further stated on behalf of the appellants that Rule 9(2) under which duty has been demanded is also not applicable as there is no evidence of clandestine removal. In this connection reference is made to the decision of the Supreme Court of India in the case of N.B.Sanjana, Assistant Collector of Central Excise, Bombay and Ors. v. The Elphin-stone Spinning and Weaving Mills Co. Ltd. 5. The entire case, the appellants state, in fact, rests on surmises and conjectures and there is no evidence of surreptitious manufacture and removal. It is argued that the Department has rested its case as if the concept of normal production, as visualised under Rule 173E of Central Excise Rules, 1944 were applicable to them which is not so.

Appellants have cited the case of Oudh Sugar Mills v. Union of India 1978 ELT 3172, in which the Supreme Court held that average production cannot be made

basis for issue of a show cause notice.

6. The learned Advocate stated that the hollowness of the show cause notice is exposed by the Assistant Collector's own Order in which various deductions have been allowed from the total quantum of goods held to have not been properly accounted for. However, Shri Narasimhan states that the quantities allowed by the Assistant Collector and not disputed even at the appellate stage, should not be called into question at this stage.

7. It is further stated on behalf of the appellants that in computing the quantum of production duly accounted for, due allowance has not been given for moisture, which according to ISI standard 1397-1967 (Reaffirmed 1977) should have been of the order of a minimum of 10%.

Another point which has been stressed by the learned Advocate is that it is extraordinary that the Department should be wanting appellants to account for the raw material together with the adhesives. Adhesives, it is pointed out, has a water content of 62% and no reasonable computation can take place in terms of adhesives used.

8. Finally, it is urged on behalf of the appellants that there is no justification whatsoever for the penalty imposed on the appellants as no mens rea is established. What is more, the show cause notice itself did not envisage or give notice as regards imposition of penalty.

9. Responding Shri Shishir Kumar states that the first show cause notice was complete and self-contained. He concedes that there is some change in the quantum of goods alleged to have been non-accounted for as well as the duty demanded. But this change, he says, is minor.

Besides, it is claimed that there is no change in the substance of the charge. It is urged, therefore, that the ratio of the decision in the case of Radhika Vitamolt v. Collector of Central Excise, Meerut (supra) is not applicable to the present matter.

10. The learned SDR refutes the argument that Rule 9(2) is not invocable in such cases because of the applicability of Chapter VII A of the Rules. It is pointed out

that Rule 9(1) of the Central Excise Rules refers to "these Rules" which includes rules under Chapter VII A of the Central Excise Rules.

11. It is further stated on behalf of the Department that ratio of the decision in the case of Oudh Sugar Mills (supra) also would not apply because that was given in the context of the physical control system that was prevalent in Central Excise. Since the present offence is related to unit functioning under self-removal procedure, it cannot be said, as was assumed in the decision in the case of Oudh Sugar Mills, that the factory operated under complete physical control, which made it necessary for the Department, before it alleged clandestine removal, to produce evidence as to how such surreptitious clearances were possible and what evidence there was to that effect.

12. The learned SDR has denied that the show cause notice is based on assumptions and presumptions. Shri Shishir Kumar points out that it is not for the Department to prove with mathematical precision the extent to which the clandestine manufacture and removal has taken place. Once the Department is able to show that there is evidence in terms of non-accountal of raw material and other related factors that there is surreptitious manufacture and removal of excisable goods. The onus, then, shifts on the manufacturer to contradict this evidence and to show that there has been no surreptitious manufacture and removal of excisable goods. It is emphasised on behalf of the Department that it is for the appellants to show that there has been proper accountal of goods on the basis of facts which can be within their knowledge only.

In this connection SDR has cited the decisions in the following cases. Collector of Customs, Madras and Ors. v. D. Bhoormull - AIR 1974 SC 859. Balumal Jamnadas Batra v. State of Maharashtra - AIR 1975 SC 2083.

13. It is further urged by the learned SDR that as per ratio of decision of the Supreme Court - in the case of Kanugo & Company v. Collector of Customs, Calcutta and Ors. 1983 ELT 1486, when the Department apprised the appellants of the results of an investigation, as also the evidence on record, which is against the appellants version, then the burden of proof shifts on the appellants from the Department and is not discharged if the appellants are not able to meet the

inferences arising from the evidence adduced by the Department.

14. The learned SDR further states that there is no evidence of the paper famine claimed by the appellants to have existed, as a result of which, it is stated, that they were compelled to accept the sub-standard paper having moisture content of 15 to 20%. It is further stated that it is not shown that any such consignments of paper were returned on account of poor quality.

15. We have carefully considered the facts of the case and the submissions made before us. We find that as per the first show cause notice issued on 12th May, 1975, all that was alleged was that the appellants had not maintained a correct account of the raw materials, i.e., the kraft paper. It was alleged that taking into account the quantity of kraft paper used for manufacturing, the quantity shown to have been wasted, and the quantity of excisable goods manufactured therefrom, there was still some quantity of kraft paper totalling 4,98,544 Kgs., which was not properly accounted for. This, it was alleged, resulted in short accountal of goods and loss of duty which was computed at Rs. 59,439.10. Accordingly, appellants were required to pay this duty under Rule 9(2) of the Central Excise Rules, 1944.

16. We notice that there is in the show cause notice a discrepancy in the figures of goods shown as short-accounted for and the goods on which duty has been demanded which remains unexplained. This discrepancy is as follows: Quantity short-accounted for as per table provided in the show cause notice.

17. After a period of one year and 9 months, a further communication was addressed to the appellants giving the basis of the figures contained in the first show cause notice. However, in the process it was for the first time alleged that duty was being demanded on corrugated board manufactured, out of kraft paper and there was also a change both in the quantum of goods alleged to have been short-accounted which was changed to 5,01,544 Kgs. and the duty demanded which was changed to 59,669.86.

18. The Assistant Collector adjudicated the matter after 11 months, after making various inquiries following the reply to the show cause notice made by the appellants. We find that the Assistant Collector came to the following conclusions

in his order.

(a) There was correspondence of the appellants with the suppliers of paper in which complaints were made regarding bad quality of paper and higher moisture content. It followed from this finding that necessary deductions were required to be made from the computed figure of corrugated boards non-accounted for on the basis of the high moisture content of the raw material. Assistant Collector has allowed deduction of 1,82,825 Kgs.

(b) The quantity of paper held by the Department to be unaccounted for was computed on the basis of weight which included the weight of the reel core and the hessian packing. This came to about 2.56% of the gross weight and, therefore, merited deduction. This weight came to 60,041 Kgs.

(c) Some of the paper was shown to have been diverted for packing the finally manufactured goods. Party claimed that this amounted to 1,24,609.02 Kgs.

(d) Substantial quantity of paper was lying on the floor at various stages of process of production and were not taken account for while issuing the show cause notice.

(e) Paper was stored in open space and was exposed to vagaries of nature and losses due to rains, etc. The Assistant Collector has given an allowance of 99,490 Kgs. on this account. Apart from this quantity, the Assistant Collector has allowed an equal quantity i.e.

99,490 Kgs. to be deducted as tolerance on the ground that "apart from the total waste due to vagaries of nature in open yard, storage of paper has also to be a relevant factor. It is difficult to counter-act their claim in its entirety. If this total waste is put at par with the disposable one, a further quantity of 99,490 Kgs., say one lakh kilograms may have to be given as tolerance." (f) There were losses sustained during the process of manufacture due to poor quality of paper received, etc.

(g) The Assistant Collector has computed that a total quantity of 23,45,352 Kgs. kraft paper was utilised in the manufacture of corrugated board and for this purpose, a total quantity of 5,18,449 Kgs. of adhesives was used. After this the

Assistant Collector observes "in a normal process of manufacture 5,18,449 Kgs. of paper could be rightly held as having been wasted in this process". After giving a deduction on this account, the Assistant Collector came to a conclusion that 23,45,352 Kgs. of corrugated board "must have been produced".

19. After making computation and deductions on the above basis, the Assistant Collector came to the conclusion that "a quantity of 2,40,899 Kgs. of paper was certainly used by the manufacturer in the manufacture of corrugated board". Accordingly, he demanded duty on this weight and imposed a penalty of Rs. 500 on the appellants.

20. When the party went up in appeal before the Appellate Collector, he appears to have confined himself to the issue of moisture content and observed that appellants were asked to produce material from standard technical literature to prove their point regarding the extent of moisture, but they submitted testimonials from private individuals and an association. The Appellate Collector felt that he could not go on the basis of such documents. He added as follows :- "On the other hand, I find that the Assistant Collector has himself been quite liberal and allowed sufficient allowance for moisture content and manufacturing losses, Still very large quantity remains unaccounted for. I, therefore, do not see any reason to interfere with his Order." 21. We observe that in the show cause notice dated 12th May, 1975, all that is alleged is that certain quantities of kraft paper shown to have been used for manufacturing, have been short-accounted. The duty has been demanded on proportionate quantity of corrugated board assumed to be manufactured therefrom, under Rule 9(2) of Central Excise Rules, 1944. There is nothing in this show cause notice to actually allege clandestine manufacture or removal of such corrugated board. Nor have the appellants been asked to explain why a personal penalty should not be imposed on them for any offence under the rules. In the subsequent notice dated 10th February, 1977 also, there is no specific allegation made of clandestine manufacture and removal of excisable goods, nor is any mention made of their liability to penalty. What is more, there is no evidence whatsoever of such surreptitious manufacture or removal.

There is no trace or evidence of existence of such goods. The Department has chosen to demand duty on the entire quantity of corrugated board thus presumed to have been manufactured and also imposed a penalty on the appellants.

22. The next question that arises is under what rule have the appellants sought to raise these assumptions and demand duty. The only rule that is cited is Rule 9(2). Rule 9 reads as under- "(1)No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export, or manufacture or any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form; Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under rule 27 or rule 47 or in a warehouse appointed or licensed under rule 140 or may be exported under bond as provided in rule 13: Provided further that such goods may be removed without payment or on part-payment of duty leviable thereon if the Central Government, by notification in the official Gazette, allow the goods to be so removed under rule 49: Provided also that the Collector may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or from a store-room or warehouse duly approved, appointed or licensed by him keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at interval, not exceeding one month and the account-holder shall periodically make deposit therein sufficient in the opinion of the Collector to cover the duty due on the goods intended to be removed from the place of production, curing, manufacture or storage.

(1-A) Where a person keeping an account current under the third proviso to Sub-rule (1) makes an application to the Collector for withdrawing an amount from such account current, the Collector may, for reasons to be recorded in writing, permit such person to withdraw the amount in accordance with such procedure as the

Collector may specify in this behalf 4(2) If any excisable goods are, in contravention of Sub-rule (1), deposited in, or removed from, any place specified therein, the producer or manufacturer thereof shall pay the duty leviable on such goods upon written demand, 5 (within the period 'specified in rule 10) by the proper officer, whether such demand is delivered personally to him or is left at -his dwelling-house, and shall also be liable to penalty which may extend to two thousand rupees, and 6 (such goods) shall be liable to confiscation.)" 23. It would be seen that Rule 9 provides that no excisable goods shall be removed from any place where they are produced, cured or manufactured, etc., until the excise duty leviable thereon has been paid. Rule 9(2) provides that if any excisable goods are, in contravention of Sub-rule (1) are deposited in or removed from the place authorised, the manufacturer shall pay the duty leviable on such goods upon the written demand and be liable to a penalty extended to Rs.2,000/-.

24. Now it will be observed that Rule 9 applies where it is shown that excisable goods have been removed without excise duty leviable thereon having been paid. In the present matter, in the first instance, no evidence has been produced before us to show that such goods have been produced and removed without payment of duty.

25. The show cause notice itself essentially alleges only the short accountal' of raw material i.e., kraft paper. There is nothing at all in the show cause notice to show as to what is the basis for the conclusion that kraft paper, if short-accounted for, was necessarily manufactured into corrugated board, and thereafter removed without payment of duty.

26. As the appellants have rightly pleaded, there is a rule under the Central Excise Rules, 1944 viz., Rule 173E which provides that any officer duly empowered by the Collector in this behalf may fix the quantum and period of time when the production in the assessee's factory was considered normal by such officer, having regard to the installed capacity of the factory, raw material utilisation, labour employed, power consumed and such other relevant factors as he may deem appropriate. The normal quantum of production during a given time determined by such officer as per this Rule shall form the norm and the assessee

if so required by the said officer may be called upon to explain any shortfall in production during any time as compared to the norm. If the shortfall is not accounted for to the satisfaction of the said officer, then as per Rule 173E, he may assess the duty to the best of his judgment after giving assessee a reasonable opportunity of being heard. In the present matter Rule 173E of Central Excise Rules, 1944- has not been invoked. No norm of production has been fixed. There is no other rule which authorises the Department to proceed to make a judgment assessment in terms of this concept of normal production. The Assistant Collector in fact resorted to best judgment assessment without any authority to do so in the circumstances of the case. In fact, we find that not only is there a change in the computation of goods short accounted for as between the first show cause notice and the second show cause notice, but almost a complete change in basis of such computation and demand for duty in the order of the Assistant Collector. Even if there were some legal authority for the norm and computation adopted by the Assistant Collector, he should have given the appellants an opportunity to examine this new basis and to offer their comments. But he did not do so.

27. In coming to his findings, the Assistant Collector has observed that "in a normal process of manufacture 5,18,449 Kgs. of paper could rightly be held as having been wasted in the process. Deducting this quantity from the total quantity of paper and adhesives used, the net quantity of 20,45,352 Kgs. of corrugated board must have been produced". There is no indication as to from where the Assistant Collector has derived his concept of normal process of manufacture.

Besides, even while raising demand of duty, it is observed that the Assistant Collector only talks of quantities of paper that "must have been produced" and not the quantities produced.

28. We also find that the Assistant Collector has given a tolerance of 7-8% for moisture content. It seems that 10% moisture content was permissible even in the normal circumstances as per ISI standard. In this case what the appellants have shown is that the paper that was being received was of very poor quality and of high moisture content.

The Assistant Collector himself concedes in his order that his inquiries have shown that there were letters addressed at the relevant time by the appellants to their suppliers making a complaint of the poor quality and the high moisture content. It is, therefore, not understood how the Assistant Collector has rested content by allowing only 7-8% moisture content.

29. What is more, deductions of large quantities have been allowed on grounds such as vagaries of nature, disposable waste and what is called "further quantity to be given tolerance" to make the total waste at par with the disposable one." 31. The Appellate Collector has hardly gone into all the grounds of appeal. He has referred to only the deductions claim as regards moisture content and so far as the rest of the arguments of the appellants are concerned, he has virtually dismissed them on the ground that the Assistant Collector had already been very liberal.

31. We are not satisfied that there is any evidence of clandestine manufacture of corrugated board and there is no evidence at all of surreptitious removal of such goods. Therefore, it is not established that there was any liability to duty in respect of such goods.

32. In view of our foregoing finding, no case at all is made for imposition of penalty.

33. The show cause notice itself virtually rests on concept of normal production for which no support is derived from the Central Excise Rules. Appellants have rightly cited in their favour the decision of the Supreme Court in the case of Oudh Sugar Mills Ltd. v. Union of India 1978 ELT 3172. It was held by the Supreme Court in this matter that the demand for duty and the imposition of penalty could not be sustained as there was no tangible evidence against the appellants and there was only inferences involving unwarranted assumptions. The findings, therefore, being vitiated by an error of law, it was held that allegations based upon unwarranted assumptions cannot form legal basis, for demand of duty. We are inclined to the view that this is a typical case of such unwarranted assumptions.

34. We are particularly impressed with the argument of the learned Advocate for the appellants that if we take into account the deductions separately allowed by

the Assistant Collector on account of various factors in the quantities in respect of which duty has been demanded, then the total, virtually meets the total quantity of goods alleged to have been short-accounted for. The learned SDR has sought to make the point that the ratio of the Supreme Court decision in the Oudh Sugar Mills case would not apply here for the reason that that decision related to the period before the self-removal procedure period. He has instead cited a number of decisions relating to Bhoormull, Natwarlal Damodardas Soni and Balumal 3amnadas (supra) all of which are in fact relating to customs cases and interpretation of the Customs law, and, therefore, not applicable to excise matters. We may add that there is no warrant for the belief that in the post self-removal procedure period, simply because physical control has been lifted, therefore, the Department can raise demand for duty and impose penalty even where no conclusive evidence is available of surreptitious manufacture and removal of excisable goods.

35. Accordingly the orders of the lower authorities, including the demand of duty and the imposition of penalty are set aside and appeal allowed.

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