Prithvi Plastic Packaging and Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-12-1986

Reported in : (1986)(10)ECC168

Appellant : Prithvi Plastic Packaging and

Respondent : Collector of Central Excise

Judgement :

1. These are two appeals transferred to the Tribunal in terms of Section 35P of the Central Excises & Salt Act, 1944.

2. One appeal has been filed by the assessee M/s Prithvi Plastic Packaging and the other appeal has been filed by the department. The impugned order is that of Central Board of Excise & Customs passed by it on appeal by the assessee against Collector of Central Excise, Baroda's order-in-original. Brief facts, in so far material, are as follows : 3. The assessee is manufacturing H.D.P.E. Granules either on its own or on the basis of granules supplied by another proprietory concern Prithvi Polymers on job basis. Thereafter the fabric is cut into shape and size and then stitched into HDPE sacks. In the financial year 1979-80 till around August 1979, the assessee had been manufacturing HDPE fabrics and sacks in the same premises at 42, Industrial Estate, Vatva. Later on, it transferred the stitching operation of the cut to shapes and size fabrics to another premises at C-l/19, Vatva where stitching was done by the two persons employed by the assessee as contractors. The contractors were doing the stitching of the sacks on job basis after payment of a specific amount per unit of sack stitched.

Collector's order-in-original clubbed the production of all the 3 units namely that of the assessee, Prithvi Polymers and of the contractor on the ground that all these units are one and the same, working for and on behalf of the assessee, in so far as the manufacturer of HDPE sacks is concerned.

On appeal, Central Board of Excise & Customs modified the order of the Collector only to an extent that the production of HDPE sacks by or on behalf of Prithvi Polymers cannot be clubbed with the production of sacks by the assessee. Since the former unit was held to be a separate entity from that of the assessee. In so far as the unit at C-l/19, Vatva was concerned, it was held by the Board that stitching of sacks at that unit is nothing but a dispersal of its manufacturing activity by the assessee and therefore, clubbing of the production of the two units i.e. of the assessee and of the unit at C-l/19, Vatva was confirmed. Effect of this order-in-appeal was reduction of duty liability of the assessee during the financial year 1979-80 from Rs. 101279/- to Rs. 66907.32p. Order-in-appeal passed by the Board was received by the Collector on 25.8.81. A review show cause notice dated 14.7.82 under Section 36 as it existed before 11.10.82 was issued by the Central Government to the assessee asking it to show cause as to why the order-in-original of the Collector be not restored; the said show cause notice was received by the assessee on 18.7.82.

4. The assessee has urged that so far as the show cause notice issued by the Central Government is concerned, it is clearly time barred in terms of third proviso to Section 36(2) inasmuch as it has been issued after six months of the date of communication of the impugned order to the Collector of Central Excise, Baroda. This position is now well settled in view of the judgment of larger Bench reported in 1986(7) ECR 461. This judgment clearly holds that the subject period prescribed in Section 11A regarding recovery of non-levy of short-levy must apply to review show cause notices issued under the third proviso to Section 36(2) even if Section 11A had not been brought into force. In this case when the impugned order was issued, Section 11A had already been brought into force. Therefore, we hold that the review show cause notice issued by the Government is time barred since it sought to enhance the shortlevy allowed by the impugned order. Effect of this finding, therefore, would be that Prithvi Polymers and the assessee are two

separate units. Department's appeal, therefore, is rejected as time barred.

5. On its appeal, learned Consultant for the assessee submitted that the impugned order has not taken into account its specific plea that the unit is--undertaking only stitching operation at C-l/19, Vatva is not a factory in terms of Section 2(m) of the Factories Act, 1948 and accordingly, the goods produced by this unit were fully exempt in terms of notification 85/79 dated 1.3.79. This concession has specifically invited the attention of the Bench, is given to the goods manufactured in any premises other than a factory defined in Section 2(m) of the Factories Act. The concession is not relatable to a manufacturer but to a premises. He contended, therefore, that if it is held that the factory at C-l/19, Vatva is that of the assessee, the goods produced therein would still be exempt under the said notification. Similarly, in notification 89/79 dated 1.3.79 the exemption is given to goods upto limit of Rs. 15 lakhs cleared in a financial year for home consumption produced in a factory which is covered by Section 2(rn) of the Factories Act, 1948. He submitted that there is no bar for a manufacturer to avail of two notifications separately if he is otherwise eligible for the same. In the instant case the assessee is eligible to benefit of notification 85/79 in respect of goods manufactured at C-l/19, Vatva. He is also eligible to the benefit of notification 89/79 because by virtue of Explanation III to the said notification the goods must be produced in a factory covered by Section 2(m) of the Factories Act, 1948. Therefore, for the purpose of computing the value limit of clearances by or on behalf of the assessee in terms of notification 89/79, the clearance of HDPE sacks from C-l/19, Vatva would not be taken into account. In support of his preposition, the learned consultant cited 1985 ECR 121 wherein Tribunal has held that the assessee is entitled to the two notification 105/78 and 53/78 separately in respect of the same product. He also cited the Tribunal's judgment in the case of Calico Mills v. Collector of Central Excise, Ahmedabad 1985 (22) ELT 574. It has been held by the Tribunal that one exemption notification cannot take away the benefit given by another separate notification.

On the issue that dispersal of manufacturing, namely carrying out stitching operation in a separate premises has been deliberately done by the assessee, the learned consultant submitted that there is nothing illegal in it. The manufacturer is

at liberty to so arrange his affairs that his tax liability is minimised. Simply because the arrangement has been done deliberately, the learned consultant submits that the benefit legally due to the assessee cannot be denied. In his support he relied upon Supreme Court's judgment reported in AIR 1973 SC 2526.

6. Learned JDR draw the attention of the Bench that the entire operation has been deliberately carried out by the assessee to evade central excise duty as is clear from the order-in-original passed by the Collector. From a reading of the order-in-original he submitted that no doubt is left that the appellant/assessee is the manufacturer of all HDPE sacks cleared from all the 3 units.

7. Replying the learned consultant submitted that there are decisions of this Tribunal where mere supply of raw material does not make a person a manufacturer or where common premises, occasionally use machinery etc. do not lead to a conclusion that the factory is one and the same or that the two persons having separate portions of the same premises are one and the same manufacturer. In this connection, he relied upon 1986(25) ELT 423 in the case of Shakti Udyog, Jullundhur v.Collector of Central Excise, Chandigarh and 1985 (19) ELT 441 in the case of 3agjivan Dass and Company v. Collector of Central Excise, Bombay. In view of these two rulings, he submitted that the manufacture at C-l/19, Vatva cannot be taken as one undertaken by the assessee. He, however, submitted that his alternative plea as referred to earlier is that even if the clearance of goods at C-l/19, Vatva is considered by or on behalf of the assessee, those goods will enjoy separate exemption under notification 85/79 and they cannot be clubbed with the goods cleared from the assessee's factory at 42, Vatva in terms of Explanation III to notification 89/79.

8. We have carefully considered the pleas advanced on both sides. We have already held that the assessee and Prithvi Polymers are separate entities because the impugned order has become final in so far as it allowed reduction of duty liability of the assessee on account of holding Prithvi Polymers and the assessee has separate entities; the reason being that the review show cause notice issued by the Govt.

under Section 32(2) as it existed then is time barred.

9. We also observe on the basis of overall evidence on record particularly of the tailors who are stitching the HDPE sacks at C-l/19, Vatva that the contractors at that premises are merely hired labour engaged by the assessee for the manufacture of HDPE sacks. The goods, therefore, produced and cleared at C-l/19, Vatva have been manufactured by-or on behalf of the assessee but this finding by itself is not decisive of the issue of duty liability on the assessee as rightly urged by the learned consultant for the assessee. The goods produced and cleared at C-l/19, Vatva are fully exempt from duty in terms of notification 85/79 inasmuch as it is not denied by the department that the said premises is not a factory in terms of Section 2(m) of the Factories Act. Similarly, the goods produced at these premises cannot also be taken into account for computing the value limit of the clearances at 42, Vatva on behalf of the assessee in terms of Explanation III to notification 89/79. We observe that in dealing with this plea of applicability of notification 85/79 and 89/79 the Collector has held that the premises at C-l/19, Vatva is nothing but a precinct of the assessee's factory at 42, Vatva. His finding in para 20 is the following words :- "It is obvious that as a result of the dispersal of manufacturing activity, the premises on plot No. C-l/19, where the fabrics were subjected to the process of stitching, became a precinct of the main premises on plot No. 42. It is not difficult to see that the two premises, that is the premises located at plot No. 42 and the premises housed in plot No. C-l/19, together constituted a factory within the meaning of Section 2(m). In terms of location, the case here can be likened to cases where premises constituting a factory are separated or divided from one another by natural or other barriers such as river or rail track. In cases of the type, it cannot legitimately be said/that the premises separated by such barriers do not together, constitute a factory. In the case here, we do have a man-made separation, but that should not make any difference. As earlier held by me the premises at C-l/19 can be deemed to be a precinct of the premises of the manufacturer or an adjunct of his principal premises on plot No. 42." We observe here that the adjudicating authority is ever stretching the meaning of the word 'precinct'. The normal meaning of this term can include within its scope the space around a premises. By no stretch of imagination, therefore, the premises at C-l/19, Vatva can be termed as 'precinct' of, or adjunct to, 42, Vatva. The goods produced at 42, Vatva are HDPE fabrics even if cut to shape and size

whereas the goods produced at C-l/19, Vatva are HDPE sacks which indisputedly are different from HDPE fabrics. The example of a factory being separated by a natural barrier, is not correct. It is not denied that the premises at C-l/19, Vatva is not a factory in terms of Section 2(m) of the Act. That being so, the benefit of notifications 89/79 and 85/79 to the manufacturer i.e. the assessee cannot be denied in the instant case.

10. What the department contends to do in this case has been intended to some extent by a subsequent notification 178/85 dated. 1.8.85 by which goods produced in a premises other than a factory defined in Section 2(m) of the Factories Act, 1948 are exempted only when their clearances by or on behalf of a manufacturer from such premises dp not exceed Rs. 20 lakhs in a financial year. In other words, the contention of clubbing the clearance in respect of goods produced in a premises other than the factory as defined in the Factories Act cannot be accepted in the face of notification 85/79. Accordingly, we allow the appeal of M/s. Prithvi Plastic Packaging.