

Collector of Central Excise Vs. Pen Workers

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-19-1986

Reported in : (1987)(30)ELT807Tri(Mum.)bai

Appellant : Collector of Central Excise

Respondent : Pen Workers

Judgement :

1. The appeal ED (BOM) 64/83 arises out of and is directed against the order-in-appeal No. A-1360/ BI-268/82, dated 8-9-82 passed by the Collector of Central Excise (Appeals), Bombay. The appeal ED(BOM)65/83 arises out of and is directed against the order-in-appeal No.A-1360/BI-269/82, dated 8-9-82 passed by the Collector of Central Excise (Appeals), Bombay.
2. Both the appeals were filed by the Collector of Central Excise, Bombay-I. As these appeals involve common questions of facts and law, they are clubbed together; heard together and hence this common order.
3. The undisputed facts in appeal ED(BOM)64/83 are : The Respondents M/s. Pen Workers were the manufacturers of 'Cinema Chairs'. During the period from 9-12-78 to 18-3-80, the said Chairs were classified under T.I. No. 40 of Central Excise Tariff. On 21-12-79 the Respondents submitted classification list seeking classification of the Cinema Chairs as falling under T.I. 68 of C.E.T. This was provisionally approved by the Assistant Collector by his letter dated 7-3-80 and finally by his letter dated 9-5-80 The Respondents thereafter by their letter dated

17-6-80 claimed refund of Rs. 1,55,587.46, the excess duty paid during the period 9-12-78 to 18-3-80. The Respondents also addressed another letter dated 23-1-81 claiming refund of the excess duty. Since the duty had not been paid under protest, the Assistant Collector rejected the refund claim by his order dated 15-7-81. In the appeal filed by the Respondents herein the Collector (Appeals) recorded a finding that the duty had been paid under protest as could be seen from Respondents' letter dated 21-11-78 and as such the refund was not time barred.

4. The subject matter of the appeal ED(BOM)65/83 is the refund claim of Rs. 33,031.80 for the period from 20-7-77 to 14-1-78. The grounds urged in support of the claim were that the 'Cinema Chairs' were not liable for duty under T.I.40 of C.E.T. but were classifiable under T.I.68 of C.E.T. and therefore eligible for exemption under Notification No.176/77, dated 18-6-77. The Assistant Collector held that the refund claim for the period from 20-7-77 to 10-8-77 is barred as it was made beyond the period of six months from the date of payment of duty. He allowed refund to the extent of Rs. 28,167.80 as against the claim of Rs. 33,031.80. On appeal, the Collector (Appeals) modified the order of the Assistant Collector holding that the period of limitation applicable was one year upto the date of amendment of Rule 11. He, therefore, held that the Appellants are entitled for refund for the period between 27-7-77 and 5-8-77.

5. In these appeals the Collector has challenged the orders passed by the Collector (Appeals). On behalf of the Appellants only two contentions were urged. It was contended by Shri Pattekar that the whole claim of refund which is the subject matter of appeal ED(BOM)64/83 was barred and the finding of the Collector (Appeals) that the duty had been paid under protest was erroneous in as much as the letter on which the Collector (Appeals) relied was addressed for obtaining licence for manufacture of steel furniture and the said letter cannot be relied on to hold that duty had been paid under protest. Shri Pattekar submitted further that after the said letter Cinema Chairs were classified as falling under T.I.40 and no appeal had been filed against that classification and therefore the Collector (Appeals) committed an error in allowing the refund claim of Rs. 1,55,587.46.

6. The other submission of Shri Pattekar was that the Collector (Appeals) committed an error in holding that unamended Rule 11 was applicable to the claim which is the subject matter of appeal ED(BOM)65/83. Shri Pattekar contended that the claim itself was made after the said Rule 11 was amended. Therefore it is the amended Rule that would govern the claim and not the repealed rule. Shri S.N. Parikh for the Respondents, however, contended that all along the Respondents were urging that the Cinema Chairs were not excisable. But then when the Department did not accept that contention, they filed classification list reiterating that contention and also expressly stated that they would be paying duty under protest. In the said circumstances the Collector (Appeals) committed no error when he held that the duty had been paid under protest and therefore the Respondents became entitled to claim refund.

7. Shri Parikh further submitted that the refund claim which is the subject matter of appeal ED(BOM)65/83 related to the period 20-7-77 to 14-1-78. During the relevant period Rule 11 read with Rule 1733 was applicable. Rule 11 came to be amended on 6-8-77. Since the refund was claimed in respect of duty paid prior to the date of amendment the claim was governed by the unamended rule and not amended rule. In support of his above contentions Shri Parikh placed reliance on the following decisions :- 8. Having regard to the rival contentions, the points that fall for determination in these appeals are : (i) whether the Collector (Appeals) was unjustified or committed an error in holding that the payment of duty for the period from 9-12-79 to 18-3-80 was made under protest and therefore not barred by limitation; and (ii) whether it is the amended Rule 11 or the unamended Rule 11 that is applicable to the refund claim made for the period between 27-7-77 and 5-8-77.

9. From the Paper Book produced in the appeals it is seen that the Respondents M/s. Pen Workers were manufacturing Cinema Chairs right from the year 1978. The chairs manufactured by them have been classified as steel furniture under T.I.40 and they were paying Central Excise duty at 20%. They also held Central Excise Licence No. 8/SF/68.

In their letter dated 21-1-78 addressed to the Superintendent of Central Excise M/s. Pen Workers stated among other things that the chairs manufactured by , them cannot be treated as steel furniture and it had been so held by the Government of India in its order dated 18-7-76 and the Appellate Collector of Central Excise and Customs, New Delhi in appeal 1943-C.Ex/77, dated 19-7-77 and therefore they are submitting revised classification list of Cinema Chairs. In their letter dated 7-2-78 addressed to the Asstt. Collector of Central Excise, M/s. Pen Workers requested for cancellation of their L.4 licence No. 8/SF/68 since the Asstt. Collector, has accepted their classification list and had held the chairs as non-excisable.

10. The Superintendent of Central Excise vide his letter dated 2-9-78 is well as by his letter dated 21-9-78 informed M/s. Pen Workers that n view of the clarification given by the Board of Central Excise and customs the Cinema Chairs would be classifiable as steel furniture and therefore they are required to obtain licence and observe all formalities. He also called upon them to furnish the details of clearances effected from 1-2-78. M/s. Pen Workers by their letter dated 21-11-78 addressed to the Superintendent stated among other things that they are now informed that the Cinema Chairs have been treated by higher authorities as steel furniture falling under T.I.40 and therefore they are applying for the Central Excise Licence without prejudice to their contention that Cinema Chairs are not excisable as steel furniture under T.I.40 and they will be paying Central Excise duty thereon under protest.

11. The Collector (Appeals) relying on this letter recorded a finding that the payment of duty made subsequent to 21-4-78 was under protest and therefore the period of limitation of six months provided under Rule 11 was inapplicable. This finding of the Collector (Appeals) was questioned in these appeals by Shri Pattekar for the Department on the ground that the said letter was written for the purpose of obtaining L.4 licence and it cannot be considered as having perpetual operation.

Shri Pattekar urged that the classification list filed by the Appellant were approved by classifying the Cinema Chairs as falling under T.I.40 of C.E.T. and that the

Respondents herein did not prefer any appeal against the classification. The protest, if any, made would come to an end when once the classification is approved and accepted. There is no force in this contention. As has been seen earlier, initially the Respondents were paying duty in respect of the chairs manufactured by them under T.I.40. Relying on the Government of India decision that the steel chairs of the type manufactured by them are not classifiable under T.I.40, they submitted revised classification list contending that their chairs are not excisable. The said classification list was approved by the Asstt. Collector by his letter dated 30-1-78.

Thereafter the Respondents - did not pay any Central Excise duty on the chairs manufactured by them. The Superintendent by his letter dated 2-9-78 and the letter dated 21-9-78 required the Respondents to obtain Central Excise Licence. They sent the letter in question, namely, letter dated 21-11-78 agreeing to obtain licence without prejudice to their contention that the Cinema Chairs manufactured by them are not excisable. Further they categorically stated that they would be paying excise duty on the chairs under protest. The stand taken by the Respondents regarding their liability to pay duty was unambiguous and clear. It is true that along with their letter dated 21-11-78 they had submitted classification list. But there is nothing on record to show that classification list submitted by them have been either approved or were approved after giving an opportunity to the Respondents. In the said circumstances not filing the appeal against the classification list by itself would not be sufficient to hold that the payment of duty made subsequent to that date are not made under protest. The protest has been registered as early as on 21-11-78. The Department did not intimate the Respondents that they cannot be allowed to make the payment under protest. In the circumstances if the Collector (Appeals) had held that the protest incorporated in the letter dated 21-11-78 was valid no exception can be taken to such a finding.

12. A question similar to the above came up for consideration before the Special Bench in the case of Collector of Customs, Calcutta v. Stewards and Lloyds India Ltd., Calcutta, 1985 (22) E.L.T. 522 (Tribunal). The Special Bench rejected the contentions similar to the one urged in this appeal by the Department. After referring to Rule 173-J, Rule 11 the Special Bench observed "this provides that an

applicable for refund should be made within six months from the date of payment of duty and since 1977, also provided that this limitation shall not apply where any duty has been paid under protest. This latter provision only expressly made clear a principle that a protest lodged simultaneously with payment of duty was tantamount to claiming a refund. The department has not adduced any proof that the Superintendent or the A.C. or the Collector had rejected the protest made in 1975. Having informed the Collector's office that they may be allowed to pay duty under protest on 13-5-75, it is reasonable to hold that the dispute remained unsettled. The Superintendent's indirect communication of the A.C. having approved the classification list was hardly any order-in-original; a reply to the protest made to the Collector; or an appealable order, as the department would have us believe. In that view of the matter, the protest would be technically still alive and there would be no question of any time-bar. In these circumstances, it would be neither legal nor proper to hold that the protests were deemed to have been extinguished since no appeal was filed". We respectfully agree with the above observations.

13. In the above view of the matter, we reject Shri Pattekar's contention that the Collector (Appeals) was either unjustified or committed an error in holding that the duty was paid under protest and therefore not barred by Rule 11.

14. Coming to the second point Shri Pattekar's contention was that the payment of duty was not made under protest. The refund application was made after Rule 11 was amended and therefore the period of limitation that is applicable is as provided under the amended rule and not under the unamended rule as has been held by the Collector (Appeals). The question whether it is the unamended rule or amended rule that is applicable is no more res-integra. This very question came up for consideration before the Special Bench in Nagarjuna Steels Ltd. v. Collector of Central Excise, Hyderabad, 1985 (21) E.L.T. 854 (Tribunal). The facts in that appeal were the refund application was made on 24-4-78 claiming refund of duty paid during the period 8-6-77 to 31-5-78. As in this appeal it was contended before the Special Bench that the refund claim for the period between 8-6-77 to 6-8-77 was barred by time as rule that was applicable is the new Rule 11 and not the repealed Rule 11. The Bench, however, did not accept that contention and the

Bench observed "(i) when duty had been paid before 6-8-77, i.e. when the old Rule 11 was in force, the claim for refund of the whole or part thereof, though made subsequent to 6-8-77, would be governed by the provisions of Old Rule 11; (ii) since in respect of payments of duty made after 6-8-77, the right to claim refund thereof would become vested on the party on the dates of payment subsequent to 6-8-77 only, the said claim for refund would be governed by the New Rule 11 which had come into force on 6-8-77". In taking the above view the Special Bench had relied on the decision of the Bombay High Court in the *Universal Drinks Pvt. Ltd. v. Union of India* 1984 (18) E.L.T.207 (Bombay).

15. The Collector (Appeals) finding which has been challenged before us is in conformity with the decision of the Special Bench referred to above as well as the decision of the Division Bench of the Bombay High Court reported in 1984 (18) E.L.T. 207 (Bombay). We, therefore, see no reason to interfere with that part of his order. We reject Shri Pattekar's contention that because the refund claim was made after the coming into force of new Rule the period of limitation prescribed in the rule applies and not the period of limitation that was existing at the time of payment of duty.