

**Aqua-vIn Pipes Ltd. Vs. Cce**

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**Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu**

**Decided On : Aug-13-2002**

**Reported in : (2002)(84)ECC288**

**Judge : S Peeran, R K Jeet**

**Appellant : Aqua-vIn Pipes Ltd.**

**Respondent : Cce**

**Advocate for Pet/Ap. : Shri. R. Raghavan**

**Judgement :**

1. This appeal filed by the appellants viz. M/s Aqua-Vin Pipes (P) Ltd. (hereinafter referred to as appellants) is directed against the order in original No. 4/97 dated 11.9.97 by which the Commissioner has confirmed a duty demand of Rs 21,743, another demand of Rs. 5,20,089 under Rule 9(2) read with proviso to Section 11A(1) of the CE Act, besides another demand of Rs. 14,85,721 on Modvat Inputs cleared clandestinely under the provisions of Rule 57I(ii) of the CE Rules, 1944. He has also confiscated PVC pipes valued at Rs. 3,89,620 under Rule 173Q with an option to redeem the same on payment of fine of Rs.1,50,000 besides imposing penalty of Rs. 20,00,000 on the appellants under Rule 173Q of the CE Rules.

2. Brief facts of the case are that the appellants are engaged in the manufacture of PVC pipes facing under Chapter 3917.00 and are registered with Central Excise. On 9.3.95 the officers of the department visited the Unit and found that some PVC

pipes have been removed under their factory "JOB GATE PASS" without payment of duty. It was also found that no entries had been posted in the statutory register after 5.3.1995. Physical verification of the stock of finished goods was carried out by the officers on 10.3.1995 and 17.3.1995 in the presence of Shri R. Venugopal, Dy. Manager of the appellants and a statement showing physical stock of PVC pipes, the difference in the stock when compared with the RG-1 register was prepared. It was found that there were 2122 numbers of PVC pipes in excess and 592 PVC pipes of various descriptions were found to be short in RG-1 stock. The value of the goods found in excess in RG1 stock was arrived at Rs. 3,89,620 on the basis of the pricelist of the assessee and the duty thereon worked out to Rs. 77,925. The value of shortages noticed was Rs. 1,08,717 and the duty worked out on that was Rs. 21,743. The records also revealed that the appellants have also cleared the following goods without indicating in any of the statutory documents: (c) PVC scraps valued at Rs. 8,47,092 without payment of duty of Rs. 20,05,810 during the period from 20.4.94 to 9.3.95.

3. Statement was recorded from the said Deputy Manager on 21.3.95 who stated that the records viz. RG1, RG23A Part I and Part II etc. are maintained by the Excise clerk Shri Ganesh and that entries in the RG1 after 5.3.95 were not posted as the Excise clerk was deputed for some work outside. In his further statement dated 21.4.95 he has stated inter alia that they were availing Modvat on the raw materials in question but at the time of despatch of raw materials to M/s Flexoflex (FPL for short) they were not expunging debiting the duty involved on such removals and that shortage of raw materials will be made good by local purchase of raw materials without availing Modvat on such purchases. As a follow up action proceedings were initiated by issue of show cause notice No. 35/95 dated 14.4.95 which culminated in the impugned order which is under challenge in this appeal on the following grounds: (a) The statement given by R. Venugopal, Dy. Manager has not been correctly appreciated by the Commissioner.

(b) Confiscation of the alleged excess found and confirmation of duty on alleged shortages found without giving finding is against the law.

(c) Modvat inputs transferred to Flenoflex have been returned to the appellants and their claim in this regard has been ignored without any basis and the evidence available in the seized records have not been properly looked into. Further, the input output ratio (100 : 95) has not been looked into by the Commissioner and no specific finding has been given by the Commissioner for rejection of the input-output ratio.

(d) Scrap removed for conversion has not been taken into consideration by the Commissioner.

(e) Pipes received from job worker viz. Saravana Industries has not been considered by the Commissioner.

(f) Abatements as admissible under the rules have not been given while quantifying the demand.

4. Shri R. Raghavan, learned Counsel for the appellants submitted that the entire proceedings from the show cause notice to the impugned order is based on the statement of Shri R. Venugopal, Dy. Manager of the appellants which was recorded on 21.3.95 and 21.4.95 and the whole evidence based is on this statement. He further submitted that pipes have been removed to FPL for lack of space in their factory and those pipes have been removed from there on payment of duty. As regards scrap, he submitted that the appellants had applied for permission and their request was rejected. He further submitted that PVC pipes are of various sizes and if one is set off against the other there would be no shortage or excess. Affidavits were also filed in this case but they have not been considered by the adjudicating authority. Allegation of the department that they have purchased raw materials without documents and manufactured and cleared goods clandestinely without payment of duty is not based on any evidence. He also submitted that the ratio of raw materials and finished product is 100:95. He further submitted in the statement given by V. Lakshmikanthan, production Manager, there is no averment about receipt of raw materials. The learned Counsel also invited our attention to the Affidavits filed by various persons such as S/Shri A. Paramasivam, PR Paramasivam to the effect that they had taken on loan certain quantity of goods and the said quantity was returned to the appellants. He

also invited our attention to the Affidavit filed by A. Sundaram. In the above background he submitted that the entire demand is based on private records from the appellants company and no enquiry has been caused by the department. He also submitted that the department can impose penalty for not following the procedure but the appellants cannot be saddled with burden of duty as there is no clandestine removal of the goods. As regards scraps, he submitted that scraps were removed to the job worker for conversion into pipes and the job worker has returned the same. On a query from the Bench the learned Counsel submitted that they did not have any permission for sending the raw material to the job worker for conversion and return under Rule 57F(3) and such permission was refused. However, he submitted that they have not gone in appeal against such refusal. He submitted that the raw materials which were removed to the job worker have been received back after conversion and there was no clandestine removal and no duty liability can be fastened on them and the question of confiscation of the goods also does not arise. As regards shortage, he submitted that the appellants have number of sizes of the pipes and shortage was because of the wrong accountal by the officers. He also submitted that there is no finding in regard the excess stock and no enquiry has been conducted with FPL and so also regarding receipt of excess raw material. Shri R.Venugopal, Dy. Manager had disclosed every thing at the time of recording his statement. As regards invocation of larger period, he submitted that the show cause notice has been issued after a lapse of six months, and longer period of limitation cannot be invoked in this case.

5. Shri A. Jayachandran, learned DR defended the order impugned and submitted that the deposition in the Affidavit is to the effect that the appellants did not have storage facilities in their factory and hence the goods were removed to FPL. But the fact remains that they have removed the goods from their factory without payment of duty and this fact has been admitted by them. He further submitted no permission was either sought for or given for storage of the goods in the factory of FPL. Therefore, their plea in this regard cannot be accepted. As regards removal of scrap, the department had rejected permission, but in spite of that they had indulged in clandestine removal of the scrap.

There is no evidence that for storage of excess stock they had taken the premises of FPL on rental basis. Both companies are separate legal entities though they are of the same group i.e. MAC group. He submitted that the learned Commissioner has considered all the points and has given a considered finding on each aspect of the matter submitted by the appellants. The learned Commissioner has relied upon not only the statement of the Dy. Manager, but also the deficiency noticed by the investigation officers from the statutory records and statements was taken to get the statutory documents clarified and the statement was never retracted by the appellants. He further submitted that once they availed the Modvat Credit on the inputs, inputs cannot be removed as such and they have to be removed only on payment or duty at the appropriate rate of such removal as if the goods have been manufactured by them. As regards removal of scrap, despite permission being refused, they have removed the scrap without payment of duty.

6. In the rejoinder the learned Counsel submitted that for the Modvat Credit taken, they have only to reverse the same.

7. On this submission, the learned DR submitted that when the inputs are removed as such, they have to suffer duty at the appropriate rate on the date of clearance of such inputs. It is only in case where the inputs are used for manufacture of final product then only the question of reversal of Modvat credit would arise. The learned DR also submitted that the sworn Affidavits are dated 27.5.92 and they have been considered by the learned Commissioner and finding also has been given.

The learned DR in the above background sought for dismissal of the appeal.

8. We have carefully considered the submissions made by both the sides and gone through the case records and we proceed to decide the various questions involved in this case.

(a) As regards removal of PVC pipes from the factory without keeping proper account of the removals, we observe that the appellants have stated that they have removed the PVC pipes to M/s Flexoflex (FPL for short) as per an agreement with them as they did not have adequate space for storage of the goods in their

premises. We observe that the appellants as well as FPL are engaged in manufacture of PVC pipes and both are limited Companies and are separate legal entities though of the same group. No documentary evidence have been produced by the appellants that there was such arrangements between the two companies for removal of the goods to FPL. Further there is also no evidence to indicate that the goods so removed by the appellants and received by FPL have been cleared on payment of duty. In fact the appellants have admitted in the reply to the show cause notice that no duty was paid on the goods at the time of removal from their factory to FPL. Their intention of removing the goods without payment of duty is therefore clearly established. The affidavit produced is not supported by any acceptable supporting evidence. If the pipes were removed to FPL for the purpose of storage only, that fact could have been and should have been in the knowledge of the Deputy Manager and nothing prevented the appellants from bringing the said fact to the notice of the department in time, therefore, the lower authority has correctly come to the conclusion that there was contravention of Rule 9(1) and Rule 49 of the CE Rules, 1944 and the goods so removed are liable to duty.

(b) As regards the scraps removed for conversion into pipes and return of the same to the appellants, we observe that the appellants themselves have admitted that they had sought for permission for such removal of scraps under Rule 57F(3) and inasmuch as the permission was not granted, they removed the goods on their own.

Contravention of the Rules is therefore writ large on the face of the records. Further the appellants have not come forward with acceptable evidence regarding removal of such converted goods on payment of duty. Therefore, the finding arrived at by the Commissioner in this regard cannot be found fault with.

(c) As regards the other point that raw materials received and the finished goods cleared which was in the ratio of 100:95, during the year 1994-95, we observe that in the face of the records showing removal of raw material and finished goods viz. PVC pipes, shortfall, and excess stock of PVC pipes valued at Rs. 3,89,620 without properly accounting, as held by the lower authority, correlation between raw material and finished goods is not possible and we find no fault in the

conclusion arrived at by the lower authority in this regard.

(d) As regards the other question whether any inquiry was with regard to Modvat inputs removed to FPL, it was the contention of the appellants that those inputs were removed on loan basis and that it was replaced to the appellants later on. We observe that the Deputy Manager either at the time of recording the statement or at any time during investigation of the case came forward to establish that the Modvat inputs loaned to FPL had been returned to the appellant;; The burden was undoubtedly on the appellants to do so and which burden has not been discharged and we are, therefore, inclined to agree with the conclusion arrived at by the adjudicating authority in this regard.

(e) Coming to the next question regarding invocation of the extended period of limitation, we observe that the evidence on record shows the mala fide intention of the appellants in removal of the goods to FPL. Therefore, we are of the considered opinion that the longer period of limitation has been correctly invoked.

9. We also observe that the appellants are in the field for over decade and it cannot be said that they are not aware of the Central Excise procedure with regard to manufacture, removal of goods and payment of duty etc. We observe that in the statement given by Shri R. Venugopal Deputy Manager and authorised signatory of the appellants, he has stated before the officer on 21.3.95 that entries in the statutory records viz. RG1 register could not be posted after 5.3.95 because the Excise Clerk was deputed for outside work. He has not stated as to the reason for not filling up the vacuum created by the absence of the Excise clerk as if no entries were required to be made. If that statement is taken at the face value, it shows the casual attitude of the appellants in regard to observance of the Central Excise procedure.

Not posting entries in the Statutory register cannot be explained away like this as has been sought to be done by the officers responsible in the Company. We also observe that a ground has been taken vide para 20 of the grounds of appeal that the Commissioner has imposed penalty under Section 11AC. This is totally a baseless ground as no penalty under Section 11 AC has been imposed on the appellants under the order impugned.

10. We observe that the appellants have been levied a redemption fine of Rs. 1,50,000 on the goods valued at Rs. 3,89,620 which is excessive and calls for reduction in the facts and circumstances of the case. We also observe that the appellants have been imposed a penalty of Rs. 20,00,000 which is also harsh and excessive and calls for considerable reduction. In the facts and circumstances, we are inclined to think that ends of justice would be served if the redemption fine is reduced from Rs. 1,50,000 to Rs. 75,000 (Rupees Seventy five thousand) and the penalty from Rs. 20,00,000 to Rs. 5,00,000 (Rupees Five lakhs) and we order accordingly. Except for the above modifications in regard to redemption fine and penalty, the impugned order is otherwise upheld and the appeal is dismissed.

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