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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-24-2002

Reported in : (2003)(85)ECC112

Judge : K Usha, B T K.K.

Appellant : Flex Chemicals Ltd.

Respondent : Cce

Judgement :

1. The appellants M/s Flex Chemicals Ltd. manufacturer PET chips falling under Chapter Heading No. 3907.60 of Central Excise Tariff Act, 1985. The appellants apart from manufacturing these chips for their own use are also manufacturing the same on job work basis for their sister concern - M/s Flex Industries Ltd. (hereinafter referred to as FIL) for which the raw material is supplied to them by this party. The duty on such PET chips is paid by the appellants by computing the assessable value on the basis of the cost of inputs + job charges. The manufacture of the chips on job work for FIL involves two separate processes/methods which are as under: (i) In the first process, the raw materials viz, DMT, MEG and catalyst are supplied to the job worker by FIL. In this process of manufacture, a product Methanol is obtained as a by-product which is retained by the job worker. For this process, the job worker is paid job charges @ Rs. 6000.00 per M.T. of PET chips by FIL.

(ii) In the second process, PTA and MEG + catalyst are supplied by FIL as raw material. No byproduct is recovered and the job worker is paid job charges @ Rs. 10,000.00 PMT of PET chips by FIL The Central Excise authorities on the scrutiny of their manufacturing processes came to learn that in the first process of manufacture, a by-product Methanol is obtained which is retained by the party free of cost. This was viewed to be an additional consideration. Therefore, the value of the PET chips for the purpose of assessment was required to be loaded by an element of Rs. 4,000.00 PMT for this additional consideration as per Section 4(2) of the Central Excise Act, 1944, in terms of which where the duty is payable with reference to value, such value shall be deemed to be the normal price thereof at which such goods are sold by the assessee to a buyer in the course of whole sale trade and that where price charged is not the sole consideration, the assessable value of goods shall be based on the aggregate of such prices and the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee as provided under Rule 5 of Central Excise (Valuation) Rules 1957. Accordingly, the appellants were issued a show-cause notice dated 19.2.2001 by the Commissioner of Central Excise, Indore in which it is alleged that the retention of by-product - Methanol without any payment was an additional consideration besides the processing charges/job charges as the job charges for subject process is lowered to the tune of Rs. 4000.00 PMT i.e. Rs. 4 per kg. and that is to be formed as part of the assessable value under Section 4 of the Central Excise Act, 1944; that while arriving at assessable value this additional consideration was required to be added to the value arrived at on the basis of raw material cost plus job charges which the noticee had failed to do. This had resulted in short payment of duty of Rs. 24,24,648 on the clearances effected during the period from February 1997 to September 1997. This amount had already been paid by the party, They were, therefore, called upon to show cause why the aforesaid amount should not be recovered from them under Section 11A of the Central Excise Act, 1944 and why the amount already paid should not be appropriated against this demand. They have further been called upon why the penalty should not been imposed on them under Section 11AC read with Rule 173Q of Central Excise Rules, 1944. They were also called upon to show cause why the interest should not be recovered from them under Section 11AB of the Act ibid.

2. In their written reply dated 20.11.2001 to the show-cause notice, the appellants submitted before the Commissioner that they were charging two different rates for the job work of manufacturing PET chips; that this was in the knowledge of the department since 12.12.97 the date on which a certificate from the Chartered Accountant showing two different job work charges i.e. @ Rs. 6.00 and @ Rs. 10.00 per kg.

was submitted to the Supdt. of Central Excise vide their letter dated 28.11.97. It was contended that payment of duty at different job work charges for the manufacture of PET chips depending upon the method of manufacture was in the knowledge of the department since 12.12.97; the present show-cause notice had been issued on 24,3.2001 and received by them on 29.3.2001 i.e. after a delay of approximately 39 months from the date of their knowledge whereas the normal limitation period available to the department is only six months from the date of knowledge, therefore, the demand is time-barred. As regards the merits of their case, the noticee party submitted that the allegation of lowering the job charges by Rs. 4000.00 per MT on account of additional consideration through retention of Methanol in the show-cause notice is not correct and the provisions of Section 4(2) of the Central Excise Act, 1944 are not applicable. It is submitted that nothing more was paid by the supplier of the raw material to them over and above the billed amount, that the job charges were fixed in advance after considering all the factors in totality before taking up the manufacturing activity on job work; that job charges were determined as per job work undertaken; that job charges @ Rs. 6 per kg was fixed for the job work to be undertaken through DMT route and another job charges @ Rs. 10.00 per kg was fixed for the manufacture through PTA route; that comparison of two different types of job works is unwarranted because each job work is independent of each other and the demand of duty on the basis of difference in two job charge rates does not have any sanction of law. They further contended that the provisions of Rule 173C of Central Excise Rules, 1944 are not applicable for valuation of the goods since the same has to be done as per the method laid down by the Supreme Court in the case of Ujagar Prints Etc. v. Union of India 1988 (18) ECC 435 (SC): 1988 (38) ELT 535 (SC). They further submitted that they had already paid an amount of Rs. 24,24,648 the subject matter of demand. It is however, contended that this amount is not liable to be recovered

from them and they are not liable to any penalty under the provision of Section 11AC read with Rule173Q.3. On considering the above submissions of the party, the Commissioner of Central Excise, Indore vide his order dated 24.1.2002 confirmed the demand of Rs. 24,24,648 on them under the proviso to Section 11A(1) of the Central Excise Act, 1944. Since the party had paid this amount, he ordered for appropriation of the same against the amount confirmed on them. The adjudicating authority further imposed a penalty of equal amount under Section 11AC read with Rule 173Q. He also held that the appellants were liable to pay interest under Section 11AB of the Act.

4. This appeal is against the impugned order of the Commissioner. We have heard Shri A.P. Mathur, Advocate and Shri Arvind Arora, Joint Excise Manager of the party for the appellants and Shri P.K. Jain, SDR for the respondents. The Ld. Counsel for the appellants very fairly submitted that he is not contesting the appeal so far as it relates to the demand of Rs. 24,24,648 and the same has already been paid by them in three instalments on 1.12.98, 25.1.99 and 20.3.99, even before the issue of the show-cause notice. He, however, stated that the appeal is contested on the grounds of time bar only for the purpose of imposition of penalty of equal amount under Section 11 AC. The Ld. Counsel submitted that the present proceedings relate to the demand of duty for the period from February 1997 to July 1997 for which the show-cause notice is issued to them on 24.3.2001. It is stated that on the same ground the party was issued another show cause notice dated 3.3.98 by the Supdt. Central Excise Range-ll, Malanpur demanding duty of Rs. 25,44,192 for the period from August 1997 to October 1997 which is subsequent to the period of demand in the present proceedings. It is contended that in the earlier show-cause notice, there was no allegation of any suppression, mis-statement or fraud etc. and those proceedings culminated in the Assistant Commissioner of Central Excise, Gwalior Division passing an order dated 25.9.98 in which he confirmed the duty of Rs. 25,44,192 under Section 11-A and further imposed on them a penalty of Rs. 2,60,000 under Rule 173Q. The appellants have filed copies of this show-cause notice and the order of the Assistant Commissioner. The Ld. Counsel for the appellant is contending that the findings of the Commissioner in his impugned order that since the goods were being manufactured on job work basis and no sale was involved; that they were required

to file declaration in form Annexure-2C as provided under Rule 173C; that they had removed the goods without filing such declaration and that there is a suppression of facts, is not tenable. The appellants are also challenging the findings of the Commissioner that at no point of time they had declared about retention of Methanol which was a gain to them over and above the job charges; that they had consciously suppressed this fact and continued to suppress the same willfully even when they were specifically asked about the price declaration, that it was only through their contract dated 1.1.97 - a copy of which was submitted by them on 1.6.2000 that the department came to know about retention of by-product "Methanol".

It is contended that all these facts were known to the department in view of the earlier proceedings initiated against them. In view of this, therefore, it is contended that they cannot be subject to a penalty under Section 11 AC of the Central Excise Act, 1944. Shri P.K.Jain, Ld. SDR for the respondents on the contrary, reiterates the findings arrived at In the impugned order of the Commissioner. He submits that though the case is not contested by the appellants on its merits but even otherwise there is no merit in the case in view of the decision of the Tribunal in Jay Engineering Works Ltd. v. CCE, Hyderabad 1997 (93) ELT492 (T) in which it is held that the scrap generated during the process of manufacture and retained by the job worker as a result of the job work undertaken by him on the raw material supplied by the customer and sold later, is a consideration in kind for the job work done and that the amounts appropriated by sale of scrap were required to be reckoned towards the job charges for arriving at the assessable value. The Tribunal in the said decision also held that the appellants were duty bound under the law to furnish the facts in this regard to the excise authorities. In the present case also the appellants were retaining the by-product - Methanol resulting from the working on the DMT + MEG supplied to them by their principles and the value of this amount was not reckoned for the purpose of the computing the assessable value of PET for payment of duty. As regards the plea to time bar, the Ld. SDR is relying on the decision of the Larger Bench of the Tribunal in the case of Nizam Sugar Factory v. CCE, Hyderabad 1999 (114) ELT 429 (T) in which it is held as follows: "Relevant date has been defined in Sub-section (3) to Section 11A and nowhere this sub-section provides that the relevant date means the date of

acquiring the knowledge by the Department. As such acquiring the knowledge by the Department does not take away the period of five years provided by the Law Makers in the Act itself.

We must not lose sight of the fact that extended period of limitation has been provided by the Law Makers with the clear intention that if a person has not paid the duty, which is due to the Government under law, on account of fraud, suppression, wilful, mis-statement or contravention of Act or Rules with an intent to evade payment of duty, the Department can deprive him of his illegal benefit and/or demand the duty due to the Government within a period of five years from the relevant date. This period of five years is not curtailed merely because the Department has come to know about the fraud, suppression, etc. committed by the assessee, "Casus/Omisus" is well settled rule of interpretation." 5. We have considered the submissions made before us by both the sides.

As already stated, the facts of the case are not in dispute before us.

The appellants admittedly are manufacturing PET chips from the raw material viz., DMT, MEG and catalyst supplied to them by their sister concern M/s Flex industries Ltd. During the process of manufacture, the product Methanol is recovered as by-product which is retained by the appellants and sold in the market. For this manufacturing process, they are paid job charges @ Rs. 6000.00 PMT as against the other process of manufacture involving raw materials - PAT, MEG and catalyst in which no by-product is recovered and for which they are being paid the job charges Rs. 10,000.00 PMT by their principles. For the first manufacturing process, the department has worked out the differential amount of Rs. 4000.00 PMT as the elements to be added to the value of the PET for the purpose of assessment in lieu of the Methanol retained by the noticees free of cost as additional consideration. The addition of this amount is to arrive at the same level of the assessable value as in the other manufacturing process in which no by-product is obtained. Consequently, a demand of Rs. 24,24,648 is confirmed on the appellants in respect of the goods cleared by them during the period from February 1997 to July 1997. Neither these facts nor the different duty demand is contested before us. This amount has already been paid by the party even before

the issue of the show-cause notice dated 24.3.2001. The contention of the appellants Is that the facts were already known to the Department as they had been issued a show-cause notice dated 3.3.98 for the subsequent period viz; August 1997 to October 1997 on the same grounds without alleging any suppression, fraud or mis-statement etc. and therefore, the proceedings are time-barred. We find no force in this contention. The appellants having accepted their duty liability even before us, cannot revert back and contend that extended period of demand cannot be invoked against them for the purpose of opposing the imposition of penalty only. The earlier show-cause notice dated 3.3.98 is issued to the party demanding duty within a period of six months and for this purpose there appeared to be no need to allege any fraud, suppression or mis-statement etc. or to invoke the provisions of Section 11AC for the purpose of imposition of penalty. As in the present case-as also in the earlier one - the appellants did not contest their duty liability and had paid up the same without and demur. As rightly contended on behalf of the Revenue, the Larger Bench of the Tribunal in the case of Nizam Sugar Factory referred to supra has held that the period of five years is not curtailed merely because the Department has come to know about fraud, suppression etc. committed by the assessee. Therefore, we reject the contention of time bar whether for demand of duty or for penalty under Section 11 AC. However, in view of the fact that the appellants paid up the whole of the duty amount two to three years before the issue of the show-cause notice to them, a substantial relief in the quantum of penalty is called for. We, therefore, reduce the penalty to Rs. 2 lakhs (Rupees two lakhs only). The order relating to the confirmation of duty and the liability to pay interest under Section 11AB is upheld.