

Orient Paper Mills Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-03-1983

Reported in : (1983)LC1512DTri(Delhi)

Appellant : Orient Paper Mills

Respondent : Collector of Central Excise

Judgement :

1. This appeal has been filed by Orient Paper Mills, Brajrajnagar, Orissa against the Order No. 5/OR of 1980 dated 31-3-80 of the Appellate Collector of Central Excise, Calcutta. The dispute is regarding a demand for 3,93,852.82 made by the Superintendent of Customs and Central Excise, O.P. Mills, Brajrajnagar by letter C. No.PR-4/OPM/78/ 1421 dated 9-9-78 in respect of wrapper paper said to have been cleared between 16-3-76 so 30-11-76 by O.P. Mills. This demand was endorsed by the Assistant Collector of Central Excise, Sambalpur who, by his order (original) No. 17/3/ 79/1 dated 4-5-79, ordered O.P. Mills to pay forthwith the demanded amount of Rs. 3,93,852.82. The dispute arose because from 16-3-76, duty on wrapper paper became leviable ad valorem. The Central Excise contend that the Mills should pay duty on its wrapper paper as wrapper paper before it is taken for use to wrap other papers in. The Mills reject this contention saying that they pay duty on the wrapper paper when it is finally removed from the factory after other papers are wrapped in it. The duty on the contents which are wrapped in the wrapper paper is calculated on the total value which includes the value of the wrapper paper. To pay duty on the wrapper paper before it is used as wrapper

for other paper as demanded by Central Excise would result in paying duty twice on the wrapper and this is contrary to the law. The wrapper does not become marketable till it is removed with its contents, at which time, it pays duty as part of the contents.

2. The learned counsel for the appellant urged all the above before the Tribunal at the hearing on 3-5-83. She also urged that the same question was decided by a Bench of this Tribunal in Rayalaseema Paper Mills Ltd. v. The Collector of Central Excise, Hyderabad-1983 ELT 517, when the Bench decided that duty on wrapper paper cannot be levied twice. The counsel urged that even proforma credit under Rule 56A was denied them under the untenable plea that the wrapper paper had not been brought from outside but had been manufactured within the same factory. The Central Excise authorities held that the rule would not permit credit in this case as the wrapper could not be said to be a component or material used in the manufacture of the paper which are wrapped in the wrapper paper. The learned counsel ended by saying that the demand dated 9-9-78 was for the period 8-3-76 to 31-11-76 and so was time-barred.

3. The learned counsel for the appellant also quoted the judgment of the Bombay High Court in Acme Mill Industries (P) Ltd. v. Inspector of Central Excise, 1980 ELT 156 (Bom.), in which the High Court ruled that if goods were cleared openly and with the knowledge and consent of the department, the provisions of Sub-rule (2) of Rule 9 will not be attracted.

4. The learned counsel for the department argued that there was nothing wrong with double taxation and that it all depended on the exigencies of public interest. Where the taxing authorities wish to assess and collect duty twice on a commodity, it cannot be said that there was anything inherently wrong in such a procedure. In support he quoted a judgment in AIR 1979 SC 321. In respect of Rule 56A, the counsel for the department argued that the explanation provided in this rule is effective only from 1-7-80. The wrapper paper which is the subject of dispute in this case was not brought from outside but was manufactured by Orient Paper Mills in the same factory in which the contents were also manufactured. Nor can it be said that the wrapping paper was used in the manufacture of -the

contents, as for example, when the paper is coated, impregnated or otherwise treated in which case it can be claimed that the wrapper paper has been used in the manufacture of other finished products. The time bar was not applicable since the wrapper paper was being assessed provisionally and the demand was only the result of the final assessment.

5. The principal argument by the appellant is that the collection of duty on the wrapper paper once when the wrapper paper is finished and the second time when it is assessed to duty as part of the contents when it suffers duty again applicable to the containers is double taxation or collecting duty twice on the same goods. There seems to be misunderstanding of the scheme of Central Excise duty assessment. There is no double taxation here and there is no collection of duty twice on the wrapper as wrapper paper is a natural consequence of the manufacture of that paper. The criterion of marketability canvassed by the appellant is inept because they have not shown that the paper is unmarketable. They claim unmarketability only because they have not sold the paper. But that the paper is marketable is evident from the fact that the factory put it to the use to which such paper is capable of being put.

6. The mere fact that a commodity is not placed on the market and offered for sale, does not mean it is not marketable; all that it may mean is that the manufacturer has chosen not to market it then. But the saleability remains intact. The goods created here became marketable when they were manufactured and then put to the use for which they were meant. There are no signs that any further finishing processes were to be undergone or that the paper, were semi-manufactured. The mill merely for reasons of its own convenience, did not place the paper for sale.

Such paper is sold and is still being sold. Marketability cannot mean the manufacturer's choice not to market. When he creates a marketable commodity, excisability follows, whether or not he sells it.

7. When we speak of double taxation it implies that the same article is subjected to tax twice as such article. This is not what is done to this wrapper paper. There can be no serious dispute about the excisability of the wrapper paper and since this

has been created in the factory of Orient Paper Mills, its subjection to taxation cannot be wrong. After this event, that paper is used to wrap other paper, reams and rolls, whereupon, the duty on such reams and rolls of paper is assessed by determining the total value of the package to wholesale purchasers which will necessarily include all the material in which the contents are wrapped. To say that at this stage the wrapper should not be subjected to duty would be equal to saying that a tin can which had paid duty as a tin can should not be subjected to duty when it contains ointment or powder and which are assessed on the total value of the package, namely, the value of the contents plus the value of the tin can. What in fact happens is that no duty is charged on the tin can at this time but only on the package of the goods which a tin can contains. But that value includes the value of the tin can. But this is only an incident.

8. On the other hand to say that the wrapper paper should not be subjected to duty at the earlier stage when it is first made in the factory is to say that the creation of an excisable commodity should not be subjected to Central Excise levy, a proposition that we are not prepared to accept. The plea of double taxation or payment of duty twice on wrapper paper is therefore unacceptable. There is a judgment of this Tribunal at 1983 (I) ETR April 1983 at page 245=1983 ELT 517-Shree Rayalaseema Paper Mills v. Collector of Central Excise, Hyderabad. In this judgement the Tribunal ordered that the duty should be charged on wrapping paper only once and not twice i.e. once on its manufacture and for the second time when it is used as a wrapper for other varieties of paper. In that case the Assistant Collector is said to have asked the appellants to pay the Central Excise duty on wrapping paper at two stages, namely, (ii) when it is used as a wrapper paper for other varieties of paper which are cleared from the appellants' factory.

9. The appellants referred to a judgment of the Andhra Pradesh High Court writ petition No. 2055 of 1980. The High Court had ordered the authorities to "allow the mills to clear the excisable goods manufactured by them without insisting on payment of duty on wrapping paper used internally for packing reams and rolls, provided the Mill has paid excise duty on the value of wrapping paper in accordance with the tariff rate applicable thereto." From this we see that the Court had ruled that the wrapper paper should be cleared without payment of duty

provided that it has paid duty as wrapper paper at the appropriate rate in accordance with the tariff. This supports the view that duty on the wrapper paper is assessable as wrapper since evidently the Court was satisfied that the wrapper paper being an excisable commodity that has been manufactured, it should undergo excise duty payment like all excisable goods. As we have observed earlier the wrapper paper is not being charged to duty twice. The excise authorities at O.P. Mills assessed the contents wrapped in the wrapper paper when they (contents) are cleared from the factory. The value of the package must necessarily include every thing that went into the complete package, which would be the contents, the wrapper paper in which they are wrapped, the outer packing, and baling hoops and strips, if any. The excise authorities do not assess duty on the wrapper paper when they assess the contents of the wrapper paper. They assess duty on the complete package. The judgment of the Allahabad High Court in the Geep Industrial Syndicate Ltd. v. Union of India, 1982 ELT 857, held that all the expenses which a manufacturer incurs for putting an article in a marketable condition for sale at the factory gate to wholesale purchasers are to be included in a manufacturing cost. In Ahmedabad Manufacturing and Calico Printing Ltd. v. Union of India, 1982 ELT 821, the Gujarat High Court held that an excisable article could not be considered to be fully manufactured unless it was duly packed because packing is an integral and an inseparable part of process of manufacture of excisable article. In such a situation the cost element of packing is as relevant in determining the assessable value of an article as the cost of material.

10. To repeat, the levy of duty on the wrapper paper as wrapper paper is a lawful process which cannot be circumvented by the plea that the wrapper paper pays duty when it is cleared as a wrapping for other paper. The charge of double levy is unfounded and cannot be sustained.

As we have pointed out, it is not merely in this case that a wrapping or packing undergoes so called double taxation but in most cases goods are offered for sale in containers or ready packed units. The packing or container will have suffered excise duty on its own at some earlier stage. But it is not a case of charging duty twice on such packing whether it is a tin can or on a plastic container or a plain wrapping paper, or a glass bottle. A simple illustration here would be if O.P.Mills

had bought wrapping paper from another factory, the wrapping paper would have come as duty paid paper. Surely O.P. Mills will not, in that case, claim that it should not pay duty on the wrapper paper value when it is used to wrap its papers, simply because the wrapper paper had paid duty at the first factory.

11. In respect of credit under Rule 56A of Central Excise Rules, we were informed during the hearing by the learned counsel for the appellant that the matter is still engaging the attention of the Central Excise authorities and we will therefore not deal with it at this stage. We would only observe that explanation to Rule 56A provide that for the purposes of this rule, material or component parts include component parts which are produced or manufactured in the manufacturer's factory. Although this explanation was inserted only in July, 1980 it should apply to past matters also because it is not an amendment but an explanation. An explanation merely makes something clear which was not clear, that something remaining the same even after the explanation. It cannot be said that the words "material or component parts" changed with the insertion of the explanation. They are the same words and their meaning cannot be changed by their explanation. Since the explanation elucidates the law and provides clarity where perhaps there was uncertainty or misunderstanding, we must hold that the position from the beginning of the rule was as explained. In this view we hold that Rule 56A should be extended in respect of the wrapper paper by the Central Excise authorities, if all other requirements of the law are met and fulfilled by the factory. An objection has been raised by the department that the wrapper paper cannot be said to have been used in the manufacture of the finished product i.e. the paper wrapped in the wrapper paper. But since, as we have seen, the question of 56A credit is under examination, we need not pass any order on this.

12. It has been urged by the counsel for the appellants that the demand was time-barred. The learned counsel for the department, however, contested this saying that the goods had been provisionally assessed and so the time bar would not apply to the demand and the demand was fully enforceable. We are unable to agree with the departmental counsel because there is nothing in the record to show that the demand was a result of finalisation of the provisional assessment of wrapper paper.

The letter of demand No PR-4/OPM/ 78/1421 dated 9-9-78 issued by the Superintendent, Customs and Central Excise, O.P. Mills, Brajrajnagar does not say a word about the demand being the result of provisional assessment. As a matter of fact the letter shows that no duty had been collected on wrapper paper from 16-3-76 to 30-11-76. To assess goods provisionally is provided under Rule 9B only for certain contingencies such as when : (i) the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of the goods, or (ii) when the proper officer deems it necessary to subject the goods to chemical or other tests for purposes of assesment, or (iii) where the assessee has produced all the documents and furnished all information but the officer deems it necessary to make further enquiry including an enquiry to satisfy himself about the observance of the conditions of the removal of the goods and when the proper officer directs the duty on the goods pending the test and production of documents, etc., be assessed provisionally at a rate to be indicated by him, if the assessee executes a bond with a proper surety or security, etc., etc., to pay the difference of duty that may arise at a subsequent stage. None of the 3 circumstances were available in the assessment of the wrapper paper. Nor was a bond submitted by the assessee by the fulfilment of conditions nor was any duty recovered provisionally. It is to be noted that in provisional assessment duty is always assessed and collected but at a rate that is not the final rate and that is subject to final assessment on completion of all enquiries, tests, production of documents, etc. In other words, provisional assessment involves collection of difference of duty or in some cases refund of duty where the duty collected provisionally proves to have been more than the duty finally determined as leviable. Here we find that no duty was collected at all for the period although various correspondence are said to have been carried on between the Mill and the Central Excise. And it appears from the records that the Mills have been paying duty under protest after 30th November, 1976. So the claim, if provisional assessment for the period March 76 to November 76 must be held to be incorrect and unsustainable.

On this finding the demand of duty was clearly time-barred.

13. However, the fact of the matter is that the party has paid this amount although it says it did so under protest. This is at page 5 of its appeal (which does not bear any date). The demand may be time-barred but that does not mean that the payment of duty is not acceptable. For reasons we have recorded above, duty was leviable on the wrapper paper and that duty has been paid by the Mills. Therefore, there is nothing more to be said on the subject and we cannot order a refund of a duty legitimately payable. A time-barred demand for a sum legitimately payable may not be enforceable, but if the assessee pays the duty, that duty is acceptable not being a wrong duty and hence not refundable. Nor is there evidence that the duty was recovered by resort to coercive measures, as for example, under Rule 230 of Central Excise Rules. Though the appellants say the Central Excise pressurised them, there is no evidence that the payment was enforced by resort to measures such as detention of goods of the factory, etc. As we have observed, the demand was not enforceable. Had enforcement or coercive measures been adopted, this Tribunal would have no hesitation in declaring the recovery illegal and directing refund of the sum recovered. That was not the case. The duty was paid by the factory simply on the demand being made.

14. Since the assessment was correct, we confirm this action of the lower authorities and reject the appeal.

15. I fully agree with the conclusion reached by my learned brother in this case on the main issue involved, which is whether or not the full cost of the wrapping paper (including any excise duty paid on it) should be included in the value of the "wrapped" paper for the purpose of assessment to excise duty. I agree with him that the full cost of the wrapping paper, including excise duty already paid, should be included in the assessable value of the "wrapped" paper. It is true that another Bench of the Tribunal, in the case of Shree Rayalaseema Paper Mills Ltd., Kurnool [reported in the Excise Tribunal Reporter for April 1983 with the reference 1983(1) E.T.R. 245 had come to a different conclusion. I observe, however, that in doing so that Bench had relied on a judgment of the Andhra Pradesh High Court in the case of Andhra Pradesh Paper Mills Ltd., reported in 1982 ECR 941D (A.P.).

That Bench also stressed the fact that the factory of the appellants in the case before them and that of Andhra Pradesh Paper Mills Ltd., fell within the jurisdiction of the same High Court, and observed that it was appropriate that the procedure being followed by the Andhra Pradesh Paper Mills Ltd., in pursuance of the decision of the Andhra Pradesh High Court, should also be allowed to be followed by the appellants before them. In the operative part of their order allowing the appeal, that Bench again stressed the ruling given by the Andhra Pradesh High Court.

16. The present appellants have their factory in Brajrajnagar, in the State of Orissa. I am only stating this fact for the record and do not mean by this to imply that the principle enunciated by the Andhra Pradesh High Court should not be respected in dealing with their case.

17. However, a much more important factor is the order made very recently (on the 9th May, 1983) by a Full Bench* of the Supreme Court on the principles of valuation of excisable articles under the Central Excises and Salt Act. I feel that this introduces a new dimension to the case because: (a) The Andhra Pradesh High Court was influenced by the general view of the Courts on the question of valuation which, till the recent order of the Supreme Court, were taken to be well-established, but which have now been substantially modified; (b) The other Bench in turn relied heavily on-if it did not actually feel itself bound by-the decision of the Andhra Pradesh High Court.

18. The Andhra Pradesh High Court quoted with approval another decision of the same High Court, in the case of Indo-National Limited, Nellore v. Union of India 1979 ELT 334, wherein it was stated as follows :- "As stated already, excise duty payable under the charging Section 3, being a tax on manufacture, it can only be on manufacturing cost and manufacturing profit and the assessable value cannot be loaded to any extent by any other cost or profit which is unrelated to manufacture. In other words, to arrive at the real value of the goods for the purpose of levy of duty, the price of the goods must be free from being loaded with post-manufacturing costs and expenses...".

19. Earlier in the judgment (para 12) the High Court examined the implications of using the wrapping paper for packing other varieties of paper and observed as follows :- "Thus the process of packing other kinds of paper with the wrapping paper really constitutes a post manufacturing process of other kinds of paper. It cannot be said that the use of the wrapping paper for packing other kinds of paper forms part of the process of manufacturing other varieties of paper".

20. It will thus be clear that the Andhra Pradesh High Court, in coming to its decision in the case of Andhra Pradesh Paper Mills Ltd., relied on the propositions that (a) it was well established that in determining the value of goods, the post-manufacturing costs or expenses which are unrelated to the manufacture or production cannot be included, and (b) the process of packing other kinds of paper with wrapping paper constitutes a post-manufacturing process.

21. Now, these two propositions stand substantially modified by the latest order of the Supreme Court on the principles of valuation. In the first place, it has been laid down that a number of expenses and costs which used to be claimed as post-manufacturing expenses, cannot be deducted from the assessable value : among the expenses and costs specifically mentioned are the advertisement or publicity expenses, expenses of the sales organisation, and any other expenses incurred by the assessee upto the date of delivery.

22. Even more important and directly to the point, the Supreme Court has laid down that "So far as the cost of packing is concerned, no deduction is permissible in respect of such cost from the wholesale cash price of the excisable article at the factory gate, whether the packing be primary packing or secondary packing and whether its cost is shown separately or as included in the wholesale cash price. Whatever packing is necessary for the purpose of putting the excisable article in a condition in which it is generally sold in the wholesale market at the factory gate, the cost of such packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate".

This amounts to a specific and direct authority for including in the cost of a consignment of paper the full cost, including any duties, of the paper in which it is wrapped or packed.

23. I feel, therefore, that the order of the Supreme Court, and the law as laid down by it, should supervene over the view taken by the Andhra Pradesh High Court in the case of Andhra Pradesh Paper Mills Ltd., and the view taken by the other Bench of the Tribunal, following the view of the Andhra Pradesh High Court: and that we would not be wanting in respect to either the High Court or the other Bench if we adopted our own view as set out above, which finds strong support in the latest order of the Supreme Court. I accordingly concur with my learned brother's view in rejecting this appeal.

24. In view of the recent decision of the Supreme Court (dated 9-5-83) in the Valuation Case, relevant portions of which have been extracted by the learned Sr. Vice-President in para 8 of his order, ir-resistible conclusion is that full cost of the wrapping paper (including any Excise duty on it) should be included in the value of the wrapping paper for the purposes of assessment to Excise duty. I agree with the conclusion of brother H.R. Syiem, Member (Technical) and learned Sr.

Vice-President on this main issue. I have, however, reservation about the findings about refund not being granted though the demand by the Department was time barred. In the instant case, the appellants paid duty "under protest". In T.P. Mukherjee's Law Lexicon Vol. 2 1982 Edn.

Page 807, the term 'Under Protest' is described to mean as under : "The value of the phrase "under protest" is to safeguard the position of the person who makes the payment and to ensure that it may not be said that the payment he made was a voluntary one." 25. When the appellants paid duty 'under protest' they reserved their right to challenge the demand on all grounds which law permits them to raise including the one that the demand was time barred. I see no distinction in duty paid under protest and duty realised through coercive process. It is also to be remembered that while it is a well recognised principle that lapse of time bars only the remedy, but does not extinguish the right, the principle is not recognised by Section 27 of the Limitation Act, 1963, which lays down : "Extinguishment of right to property : At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." 26. The General Law of Limitation is applicable in the country. Even

if it might not be applicable to demands and payment under the Central.

Excises and Salt Act, 1944, I see no reason why we should prefer the abstract principle of lapse of time barring only the remedy and not extinguishing the right to specific statutory provisions contained in Section 27 about right also being extinguished, which as already pointed is the General Law of the country more so when the appellants had paid duty under protest. With these observations, I agree in the main conclusion.

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