

Commissioner of C. Ex. Vs. Creative Engineers Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-03-2002

Reported in : (2003)(152)ELT77TriDel

Judge : S Kang, a T V.K.

Appellant : Commissioner of C. Ex.

Respondent : Creative Engineers Pvt. Ltd.

Judgement :

1. In this appeal, filed by Revenue, the issue involved is whether the extended period of time-limit as provided under proviso to Section 11A of the Central Excise Act is available to demand duty of excise from M/s. Creative Engineers Pvt. Ltd. 2. Shri Rajeev Tondon, learned SDR, submitted that on the visit of the factory of the Respondents on 21-1-98, the Central Excise Officers found that they were manufacturing Glued Insulated Rail Joints and Rail Trolley/Diplorry/Complete Bush Trolley for Indian Railways; that the Additional Commissioner, under Adjudication Order No. 116/2001, dated 17-9-2001 demanded Central Excise duty amounting to Rs. 17,82,866 for the period from 1994-95 to 1997-98 besides imposing penalty of Rs. 13,17,589 under Section 11AC of the Central Excise Act and a penalty of Rs. 7 lakh under Rules 9(2), 173Q and 226 of the Central Excise Rules; that the Commissioner (Appeals) under the impugned Order, however, has held that the extended period could not be invoked and the Demand was hit by limitation as the respondents had ample grounds to hold bona fidely that the goods were not excisable based upon the purchase Order given by the Indian Railways. The

learned SDR, further, submitted that the Railways has no authority to claim that the excise duty is not chargeable on the goods manufactured by the respondents; that the orders have been placed by Railways on the basis of rates offered by the respondents and as they did not show the Excise duty separately, the Railways were compelled to mention that excise duty is not applicable in the purchase orders; that moreover the purchase Order is not meant to serve as an authentic document in respect of the question of excisability of a specific product; that in order to reach a bona fide belief as to the excisability, the manufacturer is required to approach the jurisdictional Central Excise authorities who are the proper authority to decide/advise about the excisability of any product; that the purchase Orders cannot logically be utilized by them for reaching a bona fide belief as to the excisability of their product because the decision regarding excisability has to be taken first for arriving at the rates being offered by the respondents; that further the Railways had specifically offered to reimburse the excise duty (Point No. 36 of the Document of Additional Special Condition) that was to be paid by the party. The learned SDR also mentioned that in a similar case of *Dynamic Engineers v. Commissioner* [2001 (128) E.L.T.101 (Tribunal)], the Tribunal vide Final Order Nos. 21-24/2001-B, dated 12-1-2001 has held that extended period of limitation is invocable.

Reliance has also been placed on the decision in the case of *Fortune Impex v. Commissioner of Customs, Calcutta*, 2001 (138) E.L.T. 556 (T) = 2001 (77) ECC 410 (T) wherein it has been held that mistake cannot be committed consecutively on five occasions and the long time lag and despatch of goods part by part consecutively on five occasions belie their claim of bona fide mistake. The learned SDR, therefore, contended that similarly in the present matter excisable goods were manufactured and removed over a period of 3 financial years without payment of Central Excise duty and without informing the Department about manufacture and removal of goods.

3. On the other hand, Shri Bipin Garg, learned Advocate, submitted that the Purchase Order was placed by the Indian Railways on behalf of the President of India wherein it is clearly mentioned that excise duty is not applicable; that the respondents were, therefore, under a bona fide belief that the goods being

fabricated by them were not liable to any duty of excise; that Condition No. 10 of the "Additional Special Conditions for glued joints" received with Tender Paper clearly mentioned that "since this is a fabrication contract, no sales tax, excise duty and price variation clause is applicable, except on fitting only"; that the Respondents, on the basis of the said condition, mentioned the wording "Not Applicable" against the Columns of Excise duty in the tender/quotation. The learned Advocate also referred to the letter dated 3-3-98 of the General Manager, N.E. Railway wherein it is mentioned that no excise duty is leviable and that they have placed Orders for manufacture and supply of SEJ's to many firms in which rails are supplied in similar way but no excise duty is being paid. The learned Advocate, alternatively submitted that the penalty under Rule 173Q has been enhanced by the Additional Commissioner in remand proceedings which is not permissible under the law; that penalty under Section 11AC of the Central Excise Act cannot be imposed for the clearances of the goods effected prior to 28-9-1996; that if the respondents are held liable to pay duty, they should be allowed to take Modvat credit of the duty paid on the inputs. Finally he mentioned that while computing the demand of duty, the price should be treated as cumduty price in terms of the decision of the Larger Bench in the case of Sri Chakra Tyres Ltd. v. CCE, 1999 (108) E.L.T. 361 (T-LB) = (32) RLT 1 (CEGAT).

4. We have considered the submissions of both the sides. It has not been disputed by the respondents that during the relevant period they had neither informed the Central Excise Department about manufacture of the goods nor even consulted them about the excisability of their product. It is the duty of every person manufacturing excisable goods to seek registration under Excise Law and observe the Central Excise formalities and remove the goods on payment of duty. They have claimed that they held the bona fide belief that no excise duty is payable as the purchase orders placed by Railways claimed so. We agree with the submissions of the learned SDR that the purchase Order placed by a customer irrespective of the fact that the Customer is a Government Department - cannot be made the basis for holding a reasonable belief that the goods manufactured by them are not leviable to excise duty.

The contract entered into by a Government Department is required to be in the name of the President of India. But that does not mean that the said contract will decide the question of excisability of the product also. As rightly contended by the learned SDR, the appellants should have sought the advice from the Central Excise Department which is only in a position to say as to whether a particular product is exigible to excise duty or not. We do not, therefore, find any reason for the respondents to have a bona fide belief that the goods manufactured by them were not excisable. Recently in the case of BPL India Ltd. v. CCE, Cochin, 2002 (143) E.L.T. 3 (S.C.) = 2002 (50) RLT 249 (S.C.), the appellants were manufacturing VTRs and colour monitors out of imported material without intimating the Central Excise Department. The Supreme Court did not accept their contention on the question of limitation and upheld the decision of the Tribunal which has held as under : "13. The next point of the appellant is that longer period of limitation is not invocable in this case. It is seen that the appellant having manufactured the product in question and removed the same without any intimation to the Department which clearly goes to show that their action was with intent to evade payment of duty.

There cannot be any bona fide belief on the part of the appellant in this regard. In these circumstances the contention of the appellant that the removal of the goods without payment of duty was not with intent to evade payment of duty cannot be accepted. Therefore, the duty demanded by invoking the longer period of limitation is in accordance with law." 5. In the present matter also the respondents had manufactured and removed the goods without any intimation to the Department and thus suppressed the fact with intent to evade payment of duty. The extended period of limitation is thus invocable in the facts and circumstances of the present matter. We, however, agree with the learned Advocate that the quantum of duty has to be recomputed treating the price as cum-duty for which purpose the matter is remanded to the adjudicating authority. Further, the respondents are also eligible for Modvat credit of the duty paid on inputs which were used in or in relation to the manufacture of the goods in question subject to the production of duty paying documents to the satisfaction of the adjudicating authority. We also agree with the learned Advocate that the penalty under Rule 173Q cannot be enhanced by the adjudicating authority in remand proceedings and penalty under

Section 11AC has to be restricted to the clearance of the excisable goods effected on or after 28-9-1996. The matter is, thus, remanded to the adjudicating authority for carrying out these directions.

6. Both, the appeal filed by the Revenue and cross-objection filed by the respondent stand disposed of in the above manner.

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