

Sunrise Zinc Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-10-2003

Reported in : (2003)(159)ELT957Tri(Mum.)bai

Judge : S T Gowri, G Srinivasan

Appellant : Sunrise Zinc Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. Sunrise Zinc Ltd., Cuncolin, Goa, was, at the relevant time, engaged in the manufacture of electrolytic zinc and copper. It took Modvat credit under Rule 57T the additional duty of customs paid on quantities of di (2-ethylhexyl) phosphoric acid (hereinafter referred as "the chemical") which it imported. The use of this product, it is stated, is necessary in the manufacture of electrolytic zinc and copper. The appellant took credit of the additional duty of customs paid on these goods whenever it received in its factory.

2. In the course of their activities, the officers of the Commissioner intercepted a van carrying 20 drums of this chemicals from the appellant's factory, for which a commercial invoice had been issued to the buyer of the goods, which did not show payment of excise duty. The officers conducted further investigation after seizing the material.

The investigation showed that the appellant was engaged in the correspondence with Apsara Industries for sale of the goods and these letters showed the price charged by the appellant at Rs. 324/- per kilogram, mentioning that excise duty will be paid on the clearance made by it. R.K. Mishra, Assistant Manager of the appellant had said in his statement explains that the "goods which were seized were taken out of the process because of the low efficiency". A notice was thereupon issued to the appellant demanding duty on the quantity of chemicals cleared by it without payment of duty on the ground that it has been repacked and such repacking amounted to manufacture as provided in Note 2 to Chapter 29 in which the goods are classified. The notice also demanded reversal of the Modvat credit taken under Rule 57T of the duty paid on these goods and proposed penalty. In the order impugned in the appeal, the Commissioner has confirmed both proposals. He has demanded duty of Rs. 2,44,800/- and ordered reversal of credit of Rs. 72,599/- and imposed penalties equal to these amounts.

3. The contention of the Counsel for the appellant are as follows: It is not permissible to simultaneously demand duty on the chemical that has been manufactured, and at the same time ask for recovery of the credit taken of the input used in its manufacture. The notice alleged that the appellant had recovered the material from the manufacturing system and repacked it in order to market it, which act amounted to manufacture. If this is correct, it would mean that the product has been used by the appellant in the manufacture and spent it in the process and ceased to be usable in the process. The question of recovery of credit therefore would not arise.

4. The departmental representative emphasises the finding in the Commissioner's order.

5. It is relevant to mention at this stage that the act of taking of credit by the appellant under Rule 57Q on the duty paid on the goods is itself highly questionable. The goods appear to be some kind of catalyst or chemical used in the process which apparently is necessary in the process of manufacture. They do not conform to the definition of "capital goods" contained in Rule 57T. However, the department does not appear to have questioned this incorrect taking of credit

under this rule. Therefore, this is not an issue before us. If the chemical had in fact been used in the manufacture of the product by the appellant, and thereafter restored to its original condition, we find it difficult to see how the recovery of credit should be asked for. The use of the term "spent" indicates that the product has been so put to use in the manufacture that it is no longer in its original stage, hence the product would not be suitable in that stage for use in the process in which it is to be put to use. It has to be restored to its original stage, it is in effect being used to the extent that it is so used in the manufacture of the goods. There is therefore no basis for demanding recovery of credit.

6. It is however clear that the appellant has either restored the substance in its original stage or not utilised it in its manufacture at all. The price that it quoted to its buyer in Gujarat is Rs. 324/- per kilogram. The value that it declared in the bill of entry to the customs when it imported it was Rs. 1,21,13,988/- for a gross weight of 77320 kilograms. The goods were packed in 20 drums. Even assuming a reasonable weight for the drums, the value declared to the customs appears to be lower than the price at which the appellant offered the goods for sale. The spent chemical would hardly have the value that of the original. It is therefore clear that the appellant neither cleared the as it was, or restored to its original stage. In either case the duty is payable. It is also to be noted that although we had asked the Counsel for the appellant in December last year to clarify this position, no clarification has yet been given. The Counsel for the appellant states that he has not been furnished any instruction. The duty of Rs. 2.44 lakhs therefore has to be confirmed.

7. Having regard to the facts of the case, we do not find any justification for reducing the penalty imposed on the appellant.

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