

Fram and Co. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-04-1987

Reported in : (1987)(11)LC635Tri(Delhi)

Appellant : Fram and Co.

Respondent : Collector of Central Excise

Judgement :

1. Show cause notice was issued to the appellants during April, 1978 alleging that they had cleared aerated waters falling under T.I. 1D without payment of duty from 29-10-1977 to 31-3-1978. There was a demand for payment of Central Excise Duty of Rs. 17,503.58. It was alleged that the appellants had exceeded more than one horsepower and 0.5 horsepower in the manufacture of aerated waters for the purpose of carbonation and washing of bottles. The appellants were disqualified from availing the concession under Notification 293/77, dated 15-9-1977. Under the notification the Government had exempted the aerated waters manufactured in the factory subject to the condition that no power was used and if power was used it was restricted to one H.P. for carbonation and half H.P. for washing of bottles. The appellants are using only one H.P. for carbonation and half H.P. for washing of bottles. The appellants explained to the Asstt. Collector that the classification list filed by them was approved by the concerned Superintendent and they had moved the government for waiving the payment of duty. The Asstt. Collector in his order dated 27-6-1979 confirmed the demand under Rule 10 of the Central Excise Rules. On appeal, the Appellate Collector under the impugned order held that the

appellants were using power in lifting of water to the tanks and for chilling water. He was of the view that the appellants were not entitled to the benefit of the notification.

2. Shri N.D. Khosla, Consultant submitted that the use of power for lifting of water would not amount to the process of manufacture and should not be taken into account. In respect of chilling of water, he stated that it was erroneous to conclude that the chilling of waters was a necessary process for the manufacture of aerated waters. He cited the decision of the Gujarat High Court reported in 1981 ECR 459D (S.K.Patel Family Trust v. C.C.E., Bombay). He contended that the department was estopped from demanding the payment. The duty cannot be retrospectively demanded on a re-classification of the goods.

3. Mrs. Dolly Saxena, SDR submitted that the chilling of water was a process incidental or ancillary to the manufacture of aerated waters as it reduced the temperature of water and made the absorption of Carbon Dioxide easy. The demand was within a period of six months.

4. The points for determination in this appeal are (i) whether the appellants are entitled to the benefit of notification 293/77; and (ii) whether the demand is justified. 4A. The relevant portion of the notification concerned is reproduced below for determining the controversy :- "In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue No. 217/77-Central Excises dated the 15th July, 1977, the Central Government hereby exempts aerated waters, falling under Item 1D of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), manufactured by or on behalf of a manufacturer in one or more factories, from the whole of the duty of excise leviable thereon. Provided that no power is used in any process of such manufacture or if power is used, its use is restricted to carbonation of water and washing of bottles and the power so used does not exceed one horsepower for carbonation of water and half horsepower for washing of bottles "....

It is not disputed that the appellants are using one H.P. for carbonation of water. They use half horse power in washing of bottles.

The notification permits the use of one H.P. for carbonation and half horsepower for washing of bottles. In the show cause notice there is a general statement that the unit was disqualified from availing the concession. Particulars as to how they were disqualified have not been set out. In the Order-in-Original it is vaguely stated that the total power used by them in the manufacture of aerated waters exceeded one and a half H.P. In the order of the Appellate Collector there is a reference of the appellants using power in lifting water to the tanks and for chilling water. But even the Appellate Collector has not placed much emphasis on the power being used for lifting water and the main ground of discussion is in respect of power used for chilling water.

The Government appears to have issued instructions in their letter F.No. 13/3/77-TRU, dated 24-8-1977 that the power used for lifting of water to over-head tanks cannot be considered as power used for aerated waters.

5. Hence we have to find out whether the use of power used for chilling of water upto a certain temperature would disqualify the appellants to the benefit of the exemption. It is significant to note that the notification specifies use of power in any process of such manufacture namely, manufacture of aerated waters. The chilling of water, it must be said, cannot be considered to be a process incidental or ancillary to the manufacture of aerated waters. The raw-material namely water continues to be water despite the chilling. In a place where power is not available, there is no process of chilling of water before the aerated water is manufactured. In other words, there is no evidence that aerated waters could not be manufactured without first chilling the water. If chilling of water is a primary pre-requisite, then it may amount to a process of manufacture or an incidental or ancillary activity. The process of manufacture in respect of aerated waters does not commence when the temperature of the water is reduced. It is more for the purpose of easy absorption of the carbonation. There is no transformation of water by virtue of the process of chilling the same.

It is not a different commodity known to the trade. The water continued to be in the same condition despite the activity of chilling of water.

When there is no transformation, it cannot be said that the chilling of water is a process of manufacture. The Appellate Collector has laid emphasis that chilling of water at a certain temperature is a must.

There is no technical support or other evidence to justify this finding. In our view mere chilling of water cannot be held as an intermediate stage before carbonation. The benefit of the exemption cannot be denied.

6. On the question whether the classification can be revised, we are of the view that it is not always necessary that resort should be had to review proceedings under Section 35 and recourse to Rule 10 (now Section 11 A) can be adopted for the purpose of short levy. In this case the demand is within the period of six months and hence the arguments of the appellants on this aspect cannot be accepted.

13. I have carefully perused the order proposed by Brother Shri Santhanam and I agree with the conclusion that the appeal is to be allowed and the impugned order to be set aside. However, I would like to say a few words in this connection.

14. The allegation of the department is that power was used by the appellants in lifting water to the overhead tank and in chilling water.

Apparently, the Appellate Collector has not considered the use of power in pumping water to the overhead tank as amounting to power used in the process of manufacture of aerated waters. Therefore, what remains for us to consider is as to whether chilling of water by use of power amounts to a process incidental or ancillary to the manufacture of aerated waters. Chilling is apparently resorted to in order that the process of absorption of carbon dioxide becomes relatively more efficient. This would, therefore, be nothing more than preparation of the raw material, namely, water before it is converted into aerated waters. The substance remains water before chilling and after chilling.

There is no change in the substance except that its temperature is reduced. I agree that the process of chilling cannot be considered to be a process incidental or ancillary to the manufacture of aerated waters.

15. Once the above position is reached, nothing else survives for consideration and it is not necessary to give a finding on the remaining points.

16. As stated by me at the outset, I agree that the appeal should be allowed setting aside the impugned order.

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