Commissioner of Central Excise Vs. Boc (India) Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-09-2003

Reported in : (2004)(164)ELT359Tri(Mum.)bai

Judge : S T Gowri

Appellant : Commissioner of Central Excise

Respondent : Boc (India) Pvt. Ltd.

Judgement :

1. BOC (India) Ltd. was engaged in the compressing and filling in cylinders medical and industrial grade oxygen and argon. The process was being treated as one of manufacture. The assessee paid duty on the cylinders that it filled with liquefied gas and utilised as credit duty paid on the gases mat it received. Notice issued to it proposed to recover credit taken on quantities of these gases which escaped into the atmosphere during the process of filling in the cylinder on the ground that the goods were not used in the manufacture of the final product. The Asst. Commissioner confirmed the liability to reversal of the credit and imposed penalty on the assessee. The Commissioner (Appeals) allowed the appeal against this order on his view that the escaped gases were in the nature of waste and hence to be covered by the provisions of Rule 57D. Hence this appeal by the Commissioner.

2. The Commissioner(Appeals) has relied upon the unreported decision of the Tribunal, holding in the case of the same assessee that such escaped gases

would be waste within the meaning of Rule 57D. He says that his decision has taken into account the earlier decision of the Tribunal in Rajiv & Co. v. CCE 1995 (80) ELT 429 in which the single member has held that oxygen lost during filling of cylinder is not waste. The ground in the appeal, that this order of the Tribunal has not been accepted is itself totally unacceptable. The Commissioner does not have any option not to act upon the decision of the Tribunal merely because an appeal has been filed against it. It has not been shown that the order of the Tribunal has been set aside. That alone should be enough to dismiss the appeal. For the sake of completeness I will deal with the other two decisions that have been relied upon.In Adhesive and Chemicals vs. CCE 1999 (113) ELT 609 a single member of this Tribunal has held to be inapplicable the provisions of Rule 57D to cases of loss by means of evaporation during storage on the ground that the loss did not occur in the process of manufacture and occurred before that process commenced. That decision clearly does not apply to the facts before me. There is no dispute that the loss occurred during filling of the cylinders. In Gujarat Chemicals Pvt. Ltd. v. CCE 1996 (87) ELT 292 a single member of this Tribunal has held that sulphuric acid that was spilt on the factory flooring in the course of manufacture of detergent was not waste covered by provision of Rule 57D. He said that Rule 57D only applies to waste, residue and byproduct that has physical existence and will not apply to goods which are lost by means of spillage or evaporation.

4. With great respect it is difficult to comprehend this distinction.

Goods which are lost to their owner on account of spillage and evaporation are clearly continued to exist. Milk or sulphuric acid spilt on the floor does clearly have physical existence. It can be seen and touched. Petrol or alcohol which evaporates from a container in which it is kept has a physical existence. The molecules of the alcohol and petrol continued to exist in the atmosphere as such molecules. It is a sample of the air in the room in which they evaporated were to be subjected to chemical analysis, that would clearly reveal the presence of these substances. It is clearly incorrect to say because a product has no visible identity it cease to exist. A simple example would be metal lost in burning during manufacturing operations. There has been a consistent practice of extending the provisions of Rule 57A to such loss. Hence therefore going by the words in this decision, the goods which have physical existence even though evaporation are covered by Rule 57D. The decision in Rajiv & Co. and Gujarat Chemical are in fact per incurim judgment of the Allahabad High Court in Varuna Sulphonators Pvt. Ltd. v. UOI 1993 (68) ELT 42. In that judgment a bench of the High Court has held that credit of the duty paid on entire quantity of sulphuric acid used by the assessee would be taken notwithstanding some quantity of the acid was not actually contained in the finished product. The same reasoning would apply to the facts before me.