

Maize Products Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-09-1987

Reported in : (1987)(12)ECC99

Appellant : Maize Products

Respondent : Collector of Central Excise

Judgement :

1. The appellants M/s. Maize Products manufacture, amongst other articles, starch. They had filed classification list in respect of various articles manufactured by them and had included in the said list starch slurry also as an excisable product manufactured by them.

Subsequently they felt that it was a mistake since the starch slurry was neither sold nor marketed by them- Therefore they filed a revised classification list 23/78 in which they omitted starch slurry. The Superintendent then called upon them to explain why they had deleted starch slurry from their classification list. The appellants replied giving their reasons therefore Later they filed another classification list in which also they omitted starch slurry. Long subsequent thereto the Assistant Collector issued notice calling upon them to show cause why the two classification lists filed by the appellants ought not to be amended by inclusion of starch slurry therein as falling under T.I.68 CET. The appellants replied putting forward their contentions. They explained that starch slurry emerged temporarily as an intermediate product in the process of manufacture of starch and the same was not goods for purpose of levy of duty. After adjudication the Assistant

Collector passed orders in the form of a memorandum dated 18.10.74 on the two classification lists that starch slurry was also liable for duty under T.I. 68 CET. The two appeals against the same were rejected by the Appellate Collector under order dated 15.1.1982. The revision petition preferred by the appellants to the Central Government against the said order was, on transfer, numbered as Appeal No. 261/82. Later in accordance with the requirements of the procedure of this Tribunal a Supplementary Appeal was filed and it is appeal No. 440/85.

2. We have heard Shri N.I. Mehta, Consultant for the appellants and Shri Vineet Kumar for the Department.

3. Shri Mehta contends that the procedure adopted by the Assistant Collector in the issue of the Memorandum dated 18.10.79 was itself wrong and that he had no power to pass such an order. To understand this argument it would be better if the sequence of events that led to that order on the two classification lists is recapitulated. In the classification list dated 2.3.78 the appellants had included starch slurry as falling under TI 15-C CET but exempt from duty under notification No. 154/70 and this had been duly approved by the Superintendent. Subsequently they had filed fresh classification list omitting starch slurry, the explanation of the appellants being that their inclusion earlier of starch slurry in the classification list dated 2.3.78 was due to mistake and ignorance on their part and that on realising the same they filed the revised classification list.

According to them starch slurry was not excisable since it was not goods as would call for imposition of excise duty and that the same emerged only as an intermediate product in the manufacture of starch.

Shri Mehta contends that starch slurry is highly fermentable and therefore could neither be stored for long nor marketed and hence the same would not be goods. On the filing of the revised classification list as abovesaid the Superintendent had called upon the appellants to explain their omission of starch slurry from the classification list.

They replied putting forward their view as indicated above. There appears to have been some further correspondence also and in the meanwhile another

classification had also been filed by them again omitting starch slurry. Subsequently the Assistant Collector had issued notice dated 6.7.79 calling upon the appellants to show cause why starch slurry also should not be approved under TI 68 CET in the classification lists. It is subsequent thereto that, after adjudication, the Assistant Collector had passed orders by way of memorandum dated 18.10.79 including starch slurry in the two classification lists under TI 68 GET.4. The contention of Shri Mehta is that under Rule 173-B of the Central Excise Rules the proper officer is entitled, after such enquiry as he deems fit, to approve the classification list with such modifications as are considered necessary by him but that this power does not include a power to include in the classification list any new Item. The contention of Shri Mehta is that with reference to the products mentioned in the classification list the Assistant Collector is entitled to grant approval as prayed for or in such manner as may be deemed fit by the Assistant Collector by way of modification of either the item No. or the grant or refusal of the exemption claimed and the rate, but that the Assistant Collector has no power to include a fresh item. In assessing this contention we should remember that the appellants themselves had included starch slurry as an excisable item in their earlier classification list but had omitted the same in their two subsequent lists, without even indicating any reason why they had done so. Thereupon the Superintendent had drawn their attention to the said fact and had called them to explain the said omission. This had subsequently been followed by the show cause notice by the Assistant Collector referred to earlier. It is thereafter that, in granting approval of the classification list, the Assistant Collector had directed inclusion of starch slurry also in the said lists. It appears to us that it would not be correct to contend that the power of modification of the list under Rule 173B(2) of the Central Excise Rules would not include the power to direct inclusion of an item which was mentioned in the earlier list but omitted subsequently. Modification of the list would include directions to include therein an item which has been wrongly omitted by the assessee. We therefore reject the contention of Shri Mehta.

5. It was then contended by Shri Mehta that the subject goods (starch slurry) would not be goods for purpose of levy of excise duty. This submission is on the basis that in order to be goods (for the manufacture of which central excise duty could be demanded) the product must be something which could come to the

market for being traded. The submission for the appellants is that starch slurry is highly fermentable and could not therefore be preserved beyond a short period and hence the same could not be marketed. It is further submitted that the starch slurry manufactured by the appellants is not, and has never been, marketed and that in fact no starch slurry is marketed by any body else also. All these facts had been pleaded before the lower authorities also but the contention as raised for the appellants had been rejected by the lower authorities.

6. Shri Mehta is right in his contention that in order to attract levy of excisable duty the product in dispute must be goods (that is to say) the same must be marketable and have a market. The recent decision of the Supreme Court in the case of Union Carbide Ltd. (1986 Vol. 24 ELT 169 Supreme Court) is to the effect that even if some product emerges out of some manufacturing process being carried out on the raw-material the resultant product would not invite imposition of Central Excise duty unless the same was marketable and has a market. The assertion of the appellants that they have never marketed starch slurry has not been disproved by the Department. Nor has any evidence been produced by the Deptt. to establish that starch slurry has been marketed by anybody else also. The burden would be on the Deptt. to establish that starch slurry has a market, and is being marketed, in order to establish that it would be goods for purposes of levy of central excise duty. In the absence of proof for the Deptt. on this aspect the contention for the appellants has to be accepted.

7. We may in this connection make reference to another decision if the Supreme Court, the case of Ahmedabad Manufacturing & Calico Printing Co. Ltd. (1985 Vol. 21 ELT 633 Supreme Court). The product in question in the said case was a type of fabric called Calikut Special containing a particular percentage of composition of man-made and cotton fibres.

On that percentage the goods fell under TI 22 CET. But in the intermediate stage the fabric contained a different percentage of man-made and cotton fibre which qualified it for classification under TI 19 CET. The Deptt. wanted to levy duty on the fabric at the intermediate stage also on the basis that the said product fell under a different tariff entry than final product and since the two products were

thus different from each other levy was justified at each stage.

The Supreme Court rejected the contention and held that since the intermediate product came into existence in the course of manufacture of the final product in an integrated process, duty could be demanded on the product at the final stage only and not on the intermediate product. It would appear to us that the same principle would apply in the present instance also since starch slurry came into existence as an intermediate product in the course of manufacture of starch and there is no evidence to show that the said starch slurry was either being marketed or was even marketable. For this reason also we hold that the demand for payment of duty on the starch slurry was not justified.

8. Accordingly both appeals are allowed and orders of lower authorities are set aside.

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