

Commissioner of Central Excise Vs. Nrc Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-02-2003

Judge : S T S.S., K Kumar

Appellant : Commissioner of Central Excise

Respondent : Nrc Ltd.

Judgement :

"2.12 The Order of Commissioner (Appeals) is correct in as much as he has ordered that the spent / waste of mercury should be treated as waste arising from the processing inputs. In the instant case since the assessee had admitted that mercury cleared contained impurities and it is sold in market, the test of marketability is fulfilled and the same will be liable to duty. The Hon'ble Supreme Court in the case of M/s. Indian Cable Co. Ltd. v. CCE Calcutta, 1994 (74) ELT 22 (SC) have held that "Marketability is a decisive test for durability". Wyeth Laboratories v. CCE has held that since the catalyst is entitled for input credit under Rule 57A as no distinctions are made in the modvat rules between input catalyst or input raw material, the spent catalyst should be treated in the similar manner as the waste / scrap of input.

2.14 The Commissioner (Appeals) has however erred in setting aside the order in original in as much as he has decided the issue on the basis of submissions made before him which were not raised before the Original Adjudicating authority.

2.15 Rule 5 of Central Excise Appeal Rules explicitly provides that the appellant shall not be entitled to produce before the Commissioner(Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority except in the following circumstances: e) Where the adjudicating authority has refused to admit evidence which ought to have been admitted; or f) Where the appellant was prevented by sufficient cause from producing the evidence which was called upon to produce by the adjudicating authority; or g) Where the appellant was prevented by sufficient cause from producing before the adjudicating authority any evidence which is relevant to any ground of appeal; or h) Where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

2.16 In the instant case at no time during the course of hearing before the adjudicating authority the assessee placed the purported fact that there was 78.375 Mt of pre-modvat Mercury lying in the cells as on December 91. Nothing prevented the assessee to place the fact before the adjudicating authority. As per the provisions under Rule 5 of Appeal Rules it was incorrect on the part of the Commissioner (Appeals) to take cognizance of the above for deciding the issue in favour of the assessee.

2.17 The Commissioner (Appeals) passed the order without confirming the facts from the records available before him in as much as he accepted the submission made by the assessee to the effect that Shri Nisharg K. Rajvant in his statement dt. 15.2.99 has stated that " it was impossible to bring up the non-modvatable mercury that was lying at the bottom of the cells before or after or at the time of adding fresh mercury into the cells" has also erred in setting aside the order in original in as much as he has decided the issue on the basis of submissions made before him which were not raised before the Original Adjudicating authority. On scrutiny of the said statement it is observed that the Shri Nisharg has nowhere in the said statement, stated as claimed by the assessee.

2.18 Based on the above, the Commissioner(Appeals) had arrived at the theory that "the mercury being the only metal which remains in liquid form at room

temperature and the mercury fed into the cell tries to cohere with the mercury lying below and forms a top layer unlike other normal liquids where it gets mixed up".

2.19 The above observation of the Commissioner(Appeals) as stated above becomes unfounded as the basis of arriving at the same itself is non-existent.

2.20 Further, the contention of the assessee in as much as that the entire mercury sold by them belonged to the pre-modvat stock is totally baseless and concocted , without any proof to support the same. It is totally unacceptable that the pre-modvat mercury procured prior to December-1991 was lying in the cells for a period of over six years without being used up/consumed in the continuous process, even though after December 1991 the cells were continuously being fed with mercury on which modvat was being availed.

2.21 In the light of the above, it is strongly contended that the mercury which has been cleared by the assessee, under the Commercial Invoices, without charging the Central Excise duty, was out of the stock of the mercury on which modvat credit was availed by the assessee and since the same is to be treated as waste arising from the processing inputs, duty at applicable rate was to be paid by the assessee at the time of clearance of the same.

2.22 The assessee has come up with a plea that the demand raised in the instant case is time barred. However it is observed that the fact of clearance of spent/used mercury on commercial invoices was withheld by the assessee and information thereof was not furnished in the various returns including RT 12 return and the assessee failed to file the statutory declarations under Rule 173B and the 173C as provided under the Central Excise Rules, 1944. During the investigation it has been established that the copies of the commercial invoices prepared for the subject clearance were not being submitted to the department at any time with an intent to evade payment of duty.

2.23 On the basis of the above it is clear that the spent mercury cleared by the assessee is arising out of the modvat inputs and the same should have been cleared on payment of appropriate duty.

2.24 The applicant as stated hereinabove, have a strong prima facie case. The applicant further submit that this is a fit case in which the operation of the impugned order be stayed, pending the hearing and final disposal of the above appeal." to stay the order of the Commissioner (Appeals) setting aside the order of the lower authority determining duty and penalty on the respondents.

2. After hearing both sides and considering the issues, it is found that the grounds for stay are same which require to be dealt with at final hearing, no reasons are found to involve our inherent jurisdiction to stay the operation and consequences of the order impugned before us. There was no mention or application for expediting the hearing, so no orders are being passed on that aspect. If the order is causing grave danger, surely on expeditious hearing application could have been considered.

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