

Abb Limited Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Dec-10-2003

Reported in : (2004)(168)ELT240Tri(Bang.)

Judge : G B Deva, M T K.C.

Appellant : Abb Limited

Respondent : Commissioner of Central Excise

Judgement :

1. These are two stay applications filed by the applicants against the common impugned order passed by the Commissioner of Customs and Central Excise, Visakhapatnam.
2. By the impugned order, duty has been demanded to the extent of Rs. 7,21,08,691/- on the appellants, M/s. ABB Ltd. and equivalent penalty under Section 11AC of the Central Excise Act, 1944. Further a penalty of Rs. 2 lakhs has been imposed on the appellants, M/s. GVK Industries under Rule 209A. Through these stay applications, they are seeking waiver of pre-deposit and stay of the recovery proceedings.
3. Shri G. Shivadass, learned Advocate appearing for the appellants, M/s. ABB Ltd. submitted that the appellants entered into a contract with M/s, GVK Industries Ltd. for erection and commissioning of power plant at Jegurupadu. One of the components of the power project is Heat Recovery Steam Generator (HRSG)

which is a boiler that uses the waste gas of gas turbine, M/s. GVK Industries imported HRSG for erection at its site by classifying the said items under Heading 9801 of the Customs Tariff Act, as project imports.

4. A show cause notice was issued to the appellants alleging that they had manufactured and cleared the HRSG classifiable under Ch.

Sub-heading 8402.10 of the Schedule to the Central Excise Tariff Act, 1985 without payment of duty. It was alleged that the HRSG was marketable since an order was placed for manufacture and erection and the same was executed.

5. Shri Shivadass, in support of the stay petition, contended that the liability to duty under Section 3 of the Central Excise Act would arise only if the activity carried out resulted in the manufacture of excisable goods. Excisable goods should be those which emerge as movable goods capable of being brought to the market and sold. He said that the HRSG has emerged at the site as an immovable item which is permanently fixed to the earth. The HRSG was installed piece by piece and permanently fixed to the floor with concrete and only thereafter the equipment were connected by pipes and ducts. It cannot be removed as such. The fact that HRSG can be removed only in parts and not as a whole, is evident from the finding of the Commissioner in Para 16(h) of the impugned order. Relying upon the various decisions including the decision of the Supreme Court in the case of Triveni Engineering & Industries Ltd. v. CCE, reported in 2000 (120) E.L.T. 273 (S.C.), he said that it is settled position that the plant and machinery which has come into existence as a result of erection and commissioning work at the site and which cannot be taken to market as such, are to be regarded as immovable property not liable to Central Excise duty. He also said that the HRSG is permanently embedded to the earth and cannot be easily dismantled. Such embedding is not just to ensure wobble-free operation but because that is the method of erecting such machinery step by step so as to make it workable. Thus it is an immovable property and therefore, the test of marketability is not satisfied in this case. He also referred to the Circular dated 15-1-2002 issued by the Central Board of Excise and Customs wherein it is clearly states that the goods assembled or erected at site and attached to the foundation to earth cannot be considered as

movable property and therefore not excisable goods. Alternatively, he argued that even if the HRSG is considered as an excisable commodity, the benefit of Notification No. 67/95-C.E., dated 16-3-1995 would be available to the appellants, relying upon the various decisions including the decision of this Bench in the case of Asea Brown Boveri Ltd. v. CCE, Patna reported in 2003 (154) E.L.T. 493, 2003 (55) RLT 430.

6. Heard Smt. Radha Arun, SDR for Revenue who justified the action of the Department in raising the demand and imposing penalty on activities carried out by the assessee. She also drew our attention to the finding given in Paras 16(g) and (h) in particular of the impugned order by the Commissioner which are as under :- (g) The settled legal position is that if the fixing to the ground is for stability in operations, the goods do not automatically become immovable. The crane is a bulky commodity, yet it is dutiable if the individual parts can be dismantled and reassembled again without losing their identity. The case of HRSG seems to be in the same category. While no technical opinion can be expressed, yet by the way the activities are described, it is apparent that the modulesm slings, drums etc. can be dismantled and again re-assembled to perform as HRSG. The duct system is only a fixture for operational purposes.

(h) The system, as a whole, is bulky but can be dismantled and called back. Therefore, in my view, when the individual components are assembled at site, they are presented in the form of boiler which is a distinct new commodity with a distinct use and is distinct from the individual components form which HRSG is assembled. It is classified under Heading 8402 of Central Excise Schedule and as per the facts given by the assessee, it is known to the market as a distinct commodity. Even though connected to the earth and interconnected through ducts or pipelines, the boiler parts can be dismantled without much damage to its components and brought back in the original form when they can again be assembled as required. There is a distinct product which arises as a result of the erection of the individual parts like modules, side sections etc. The goods are attached to earth for stability, they can still be dismantled if required without disturbing the individual parts as it is made out from the case facts. The processes carried out at site are distinctly a manufacturing processes as a distinct commodity

HRSB comes into existence as a complete machine. The complete agreement, if seen, is shown to put specific conditions of testing after erection and commissioning. Therefore, being a distinct tariff entry for the steam boiler, the same shall be dutiable under 8402. The boilers are known to be of huge sizes but still if they are assembled at site through a process of integration of individual components, it should be taken as a manufacturing activity. Their case is covered in Para 4(i), (iv) and (v) of Board's Order under Section 37B, dated 15-1-2002 and accordingly, I conclude that HRSB is liable to duty." 7. We have carefully considered the submissions made by both sides.

Whether the activity carried out by the party amounts to manufacture or not is a question of fact and factual position requires to be examined in detail with reference to case law and that can be done at the time of regular hearing. However, we find lot of force in the arguments advanced on behalf of the assessee with reference to the claim of exemption in terms of Notification No. 67/95. When the activity is considered to be an excisable commodity, prima facie there is no justification in not giving the benefit in terms of Notification No.67/95. This Bench has already taken the view in the case of Asea Brown Boveri Ltd. v. CCE, Patna (supra) that the disputed period has covered under the Notification No. 67/95-C.E., dated 16-3-1995 and accordingly the party is entitled to benefit in terms of Notification No.67/95-C.E. Following the ratio of the earlier decision, we find that prima facie case in favour of the party. Accordingly the stay applications are allowed unconditionally.

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