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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-12-1987

Reported in : (1987)(13)ECC30

Appellant : Collector of Central Excise

Respondent : Cutfast Bonded Abrasives Pvt.

Judgement :

1. The present proceedings have their genesis in notices F.No.198/B/15/71 and 72/81 CX.V dated the 8th June 1981 issued to M/s.

Cutfast Bonded Abrasives Pvt. Ltd. and M/s. Cutfast Abrasive Tools Pvt.

Ltd. ("the respondents" for short), by the Central Government under section 36(2) of the Central Excises and Salt Act, 1944 ("the Act" for short). By the said notices, the Government, for the reasons stated therein, proposed to set aside Order-in-Appeal No. 2316 and 2317/80 dated 19-12-1980 passed by the Appellate Collector of Central Excise, Madras and restore Orders-in-original C.Nos. V/51/30/13/77 and C. No.V/51/30/29/77 both dated 30-1-1980 passed by the Assistant Collector of Central Excise, Madras, which had been set aside by the Appellate Collector. The issues involved in the proceedings against both the respondents being the same, they are disposed of by this common order.

2. The facts, briefly stated, are that the respondents are engaged in the manufacture of coated abrasives and grinding wheels, falling under item No. 51(1)

and 51(2) respectively of the First Schedule to the Act (the schedule is referred to hereafter as "the CET"). Central Excise Notification No. 198/76 dated 16-6-1976 issued by the Central Government under Rule 8(1) of the Central Excises Rules, 1944 ("the Rules" for short) provided for partial exemption from levy of Central Excise duty in respect inter alia of coated abrasives and grinding wheels cleared during a financial year in excess of the base clearances determined in accordance with the said notification. The notification provided for the method of fixation of the base period and base clearances. Accordingly, the base period in respect of grinding wheels (manufactured by Cutfast Bonded Abrasives Pvt. Ltd.) was fixed by the Asstt. Collector as 1975-76 and the base clearance at Rs. 24,67,662.24.

In respect of coated abrasives (manufactured by Cutfast Abrasive Tools Pvt. Ltd.), the base period was fixed as 1974-75 and the base clearance at Rs. 1,12,47,737.07. Cutfast Bonded Abrasives (Pvt) Ltd. availed themselves of the benefit of the notification in respect of their clearances during the period 16-12-1977 onwards in the financial year 1977-78 and 3-11-1978 onwards in the financial year 1978-79. Similarly, Cutfast Abrasive Tools (Pvt) Ltd. availed themselves of the benefit of the notification in respect of their clearances during the period 20-2-78 onwards in the financial year 1977-78 and 3-11-78 onwards in the financial year 1978-79. For the purpose of computing the value of such excess clearances, both respondents adopted the value that prevailed during the relevant incentive periods which, owing to price escalation, was more than that prevalent during the base period. This, according to the department, was in violation of the provisions of the notification and resulted in availment of more duty exemption than the respondents were entitled to. After issue of show-cause notices and holding adjudication proceedings, the Assistant Collector passed the orders dated 30-1-1980 demanding payment of Rs. 1,30,917/- and Rs. 1,90,300/- respectively from Cutfast Bonded Abrasives (Pvt) Ltd. and Cutfast Abrasive Tools (Pvt) Ltd. being the amount of duty concession availed of in excess over entitlement. He also imposed penalty of Rs. 1,000 each on both respondents. In appeal, the Assistant Collector's orders were set aside by the Appellate Collector who held that the show-cause notices demanding duty from the respondents having been issued on 8-12-1979, i.e. after the expiry of six months from the dates of cause of action, were barred by limitation under Rule 10(1). It is this Order that is sought to

be set aside by the Central Government in these proceedings.

3. The appellants had filed two writ petitions before the Madras High Court to challenge the above said show cause notices. Two other writ petitions had also been filed by them with reference to refund claims preferred by them for a later year and which had been rejected by the authorities. The Madras High Court had, by order dated 18-7-1986, directed this Tribunal to go into the matter comprehensively. The High Court had hence refrained from passing orders on merits in any of the said writ petitions. It is, therefore, necessary, in view of the said directions of the High Court, to deal with the merits of the issue, as to how the notification concerned has to be applied, irrespective of the view that we may be inclined to take on the question of limitation on the basis of which the Appellate Collector had disposed of the two appeals before him. That is to say, such findings on the merits of the issue would have to be recorded, as directed by the High Court, as would be necessary for disposal of the refund claims, though such refund claims are not the subject matter of the appeals before us.

4. An application dated 15-1-1987 was moved by the respondents seeking transfer of the present proceedings to the South Regional Bench of this Tribunal at Madras on the ground that they did not involve any question having a relation to the rate of duty or valuation of goods. The application was rejected by the Bench by Order No. M.47/87-D dated 6-2-1987 and the deemed appeal (The proceedings constitute a deemed appeal under Section 35.p of the Act) was directed to be posted for hearing on 13-2-1987.

5. We have heard Shri K.C. Sachar, departmental representative, for the appellant Collector, and Ms. Nalini Chidambaram, advocate, assisted by Ms. Seita Vaidyalingam, advocate, for the respondents.

6. Before we proceed further, it will be convenient to set out the basis on which the Central Government proposed to review the order-ih-appeal and restore the Assistant Collector's order-in-original. It is contained in the fourth paragraph of the notice which runs as follows :- "The Central Government, however, observe that the assessees had been informed by the Superintendent of Central Excise of jurisdiction on 30-8-77 as to the correct method of computing the value of specified

goods for the purpose of arriving at the excess clearance for the purpose of the said notification and had also called for certain details in this regard from the assessees on 13-9-77. The Central Government also observe that the assessees did not furnish the said information but proceeded to avail of the benefit on their own in excess of what they were actually entitled to under the provisions of the said notification. It therefore appears to the Central Government that this action on the part of the assessees amount to wilful suppression of facts and therefore the short levy which occurred during the aforesaid periods would prima facie be recoverable under the provisions of Clause (a) of the proviso to Sub-rule (1) of Rule 10 of the Central Excise Rules, 1944 as introduced by the notification No. 267/77 dated 6-8-77 i.e.

within a period of 5 years from the cause of action. It, therefore, appears to the Central Government that the appellate Collector has erred in concluding that the aforesaid demand issued by the Superintendent, Central Excise, was barred by limitation. The Central Government are, therefore, tentatively of the view that the impugned order in appeal is not proper, legal and correct and propose to set aside the said order and restore the orders-in-original dated 30-1-80 passed by the Asstt. Collector of Central Excise, Madras I Division or pass orders deemed fit after considering the submissions made by the assessees." 7. In response to a query from the Bench, the counsel for the respondents stated that the respondents had not submitted replies to' the show cause notices issued by the Government.

8. Notification No. 198/76 lays down the manner in which the base period, base clearances and excess clearances during the incentive year(s) (this term is used by us to denote the year or years during which duty concession in respect of excess clearances is claimed) are to be determined. Paragraph 2 of the notification deals with determination of base period. Sub-para (b) thereof is relevant for the present purpose and reads thus :- 2(b) - "Where the clearances of all specified goods are compared in terms of value as specified in column (4) of the said Table, such value shall be the value as determined under Section 4 of the Central Excises and Salt Act, 1944 (1 of 1944) or,' as the case may be, according to the tariff values fixed or altered under Section 3 of the said Act, as adjusted with reference to the average index number of wholesale prices in India for

manufactures (New Series : Base 1961 - 62 - 100) issued by the Government of India in the Ministry of Industry and Civil Supplies for the relevant financial year.

Illustration - If the values of clearances as determined under Section 4 of the Central Excises and Salt Act, 1944 (1 of 1944) were V1,V2, and V3 in the financial years 1973-74, 1974-75 and 1975-76 respectively and if the corresponding average index number of wholesale prices in India for manufactures in those years were N1, N2 and N3, the adjusted values for the financial years 1973-74, 1974-75 and 1975-76 will be : It is clear that, for the purpose of determining the base period, the value of clearances of goods to be taken into account is the value determined under Section 4 of the Act (the goods herein were not under tariff values) but adjusted with reference to the average index number of wholesale prices in India for manufactures. The formula for such adjustment of values, is set out in the illustration appended to the sub-paragraph. The purpose appears to be to off-set or neutralise the effect of inflation/escalation of price and to bring about a degree of comparability between the value of clearances in the applicable years constituting the three-year block out of which the base year is to be fixed thus ensuring, as far as possible, that only actual, and not seeming increase in production gets the benefit of duty reduction.

9. Sub-para (2) of para 2 of the notification sets out the manner of determination of base period and base clearances. The respondents come within the scope of Clause (c) thereof, having cleared the "specified" goods (i.e. the subject goods) from their factories for the first time earlier than 1st April 1973. In the case of such factories, and hence in the case of the respondent's factories, "the base period", says Clause (c), "shall be the year in which the aggregate of the clearance of such goods during any of the financial years 1973-74, 1974-75 and 1975-76, was the highest and the clearances during such base period shall be the base clearances." The Assistant Collector had fixed 1975-76 as the base-period in the case of Cutfast Bonded Abrasives Pvt.

Ltd. and 1974-75 as the base period in the case of Cutfast Abrasive Tools Pvt. Ltd. There is no dispute about this aspect of the matter.

10. Having fixed the base period, the next thing to do is to fix base clearances. Clause (c) of para 2(2) of the notification says that "the clearances during such base period shall be the base clearances". Now, how should the clearances during the base period be computed? On the basis of values determined under Section 4 of the Act, subject to the exceptions (in respect of exempted goods) set out in the notification, as the department claims, or, the "adjusted" values arrived at for the purpose of determining the base period as the respondents claim? 11. We may observe that the provisions set out in para 2(1) of the notification, including the illustration appended thereto, is, as the opening words say : "For the purpose of determining the base period".

The notification provides for the adjustment of values with reference to the average index number of wholesale prices in India for the purpose of determining the base period. It does not say such adjustment is to be made for the purpose of arriving at the base clearances i.e.

the value of clearances during the base period. Nor, in our view, is there any reason to suppose that that is the intention.

12. The contention of the learned counsel for the respondents is that para 5 of the notification makes the intention clear. It says "In this notification, "base period" and "base clearances" mean the base period and base clearances as determined in the manner specified in paragraph 2". For the purpose of determining the base period, the value of clearances in the 3 years 1973-74, 1974-75 and 1975-76 have to be "adjusted" in the manner set out in para 2. And, says the learned counsel, having fixed the base period as that year out of the said three years in which the aggregate clearances of the specified goods was the highest, the notification provides that the clearances during the base period shall be the base clearance. It is, therefore, clear that the same figure of clearances have to be used for both purposes : to fix the base period and to fix the base clearances.

13. On the face of it, the above contention looks attractive. However, we have to read the entire notification as a harmonious whole and try and avoid inconsistencies. Explanations 1 and 2 to para 1 of the notification reads as follows :- "Explanation 1. - (a) in determining the excess clearances in a financial year

over and above the base clearances, such excess shall, except as provided in Clause (b), be calculated in terms of weight, number or volume where such weight, number or volume has been specified in column (4) of the said Table against the serial number specified in the corresponding entry in column (1) thereof.

(b) where value as specified in column (4) of the said Table against the serial number specified in the corresponding entry in column (1) thereof is to be applied for determining the excess clearances in a financial year over and above the base clearances* such value shall be calculated - (i) in a case where an article similar to the specified goods was produced in the base period, by adopting the value that prevailed in the base period in respect of such article and where in respect of such article the value has been varying in the base period, by adopting the average of the values; (ii) in any other case, by adopting the value that is applicable in respect of the article on the date of clearance.

Explanation 2. - In this paragraph, unless the context otherwise requires, "value" means the value as determined under Section 4 of the Central Excises and Salt Act, 1944 (1 of 1944) or, as the case may be, according to the tariff values fixed or altered under Section 3 of the said Act.." 14. We note from the above that for determining the value of excess clearances in the incentive year (in a case, as the present ones, where similar goods were produced during the base period) over and above the base clearances, the value to be adopted is "the value that prevailed in the base period in respect of such articles and where in respect of such article the value has been varying in the base period, by adopting the average of the values" . Explanation 2 makes it clear that the expression "value" means the value as determined under Section 4 of the Act (tariff value is not relevant for the present purpose), unless, of course, the context otherwise requires. It is thus clear that the value of clearances during the incentive year (for the purpose of computing excess clearance) is to be determined on the basis of the value, or the average value, of like goods during the base period. The object evidently appears to be to bring about a degree of comparability in determining the value of excess clearances having a nexus to the actual increase in production and not to the apparent increase in production which would be the result if values

determined under Section 4 as such were to be adopted in respect of the incentive year. The comparison is with the value of clearances during the base period, the value being that determined under Section 4. A plain reading of the two explanations makes it clear that the intention and purport is as we have set out above. It follows that the value of base clearances is not to be arrived at on the basis of "adjusted" value [adjusted in the manner set out in sub-para (b) of para 2(1) of the notification].

Otherwise, the comparison will be between two sets of non-comparable figures.

[We may note that there is no dispute before us as to the manner of arriving at the value of clearances (for the purpose of computing excess clearance) during the incentive year, as the learned counsel for the respondents fairly stated before us. And that manner is the one set out in explanation Kb) of the notification and not the values "adjusted" with reference to para 2(b) of the notification].

The fallacy in the respondent's contention, in our view, is in comparing the value of clearances in the incentive year worked out on the basis of Section 4 values, or average values, prevalent during the base period [vide explanation 1 (b)] with the "adjusted" values of clearances in the base period [vide para 2(b)] worked out having regard inter alia to the average index number of the whole-sale prices in India for manufactures and not on the basis of Section 4 values. This would render the exercise contemplated in explanation l(b) - of determining the value of excess clearances on the basis of the Section 4, or average, values prevalent during the base period - a meaningless one and consequently foul up, or vitiate, the comparison since it would then be a comparison between non-comparables.

15. Another way of putting the matter would be like this : In the base period, the quantum of production is represented, for the present purpose, by the value of clearances of goods during the period. For, that is the value on which duty was chargeable on the goods cleared.

And, such value would evidently have been the value as determined under Section 4 of the Act. There is no scope for, or sence in, trying to "adjust" this value of clearances during the base period - with reference to the average index number of

whole-sale prices for manufactures; such an exercise would distort the picture of production (clearances) in the base period. But when we come to quantifying the production (clearances) in the incentive year, (for the purpose of computing excess clearances) one has to neutralise the cost escalation or inflation factor and that is why the Section 4 values are required to be moderated in the manner set out in explanation 1(b) with reference to the Section 4 value, or average value, prevalent during the base year. This puts the two figures on a comparable basis and would provide a fairly reliable index to the quantum of increased production (clearances). Otherwise, the comparison would be between two non-com parables.

16. The object of the exercise laid down in para 2 of the notification is entirely different. It is to normalise or standardise the figures of value of clearances during the three years 1973-74, 1974-75, 1975-76 with reference to the average index number of whole-sale prices. Only when such a normalisation or standardisation is done will it be possible to arrive at a realistic basis for comparison of the clearances of the 3 years "for the purpose of determining the base period", viz. the year in which the aggregate clearances was the highest [vide para 2(2)(c) which is relevant to the present case].

17. As observed in para 14 the learned counsel for the appellants accepted in the hearing before us that the method adopted by the appellants for computation of the value of clearance during the incentive year (for the purpose of computing the excess clearance) was not correct. That is to say, she did not dispute that the quantum claimed for concessional assessment had been incorrectly computed by the appellants.

18. But having, said so, the learned Counsel for the respondents cited, and relied upon, the judgment of the Delhi High Court in Modi Rubber Ltd., Modinagar vs. Union of India and Ors. - 1978 (2) E.L.T. (J 127).

An issue similar to the one involved in the present cases before us arose for consideration of the Delhi High Court in that case also and the Court observed as follows in para 16 of its judgment : "It was argued by Mr. Lokun for the respondents that paragraph 2(1)(b) was concerned with the determination of the

base period and not of the base clearances. It is true that para 2(1) starts with the words "for the purpose of determining the base period". But base period itself is determined only by the fixation of the base clearances. In fact, base period has no meaning except in relation to base clearances. The base is of clearance and not of any period.

The base period simply means the period for which the clearance is to be taken as the base clearances. It is because this is taken as the base clearances, the time to which the base clearance extends is simply called the base period. Once this is realised, the meaning of paragraph 2(1)(b) becomes clear. It is wholly devoted to the modification of the value of the goods found under Section 4 of the Act, by adjustment of the said value with the wholesale price index number. It is because such adjustment is not contemplated in Section 4 that paragraph 2(1)(b) of the notification was enacted. The exemption of duty is, therefore, to be given not on the value found under Section 4, but after adjustment of that value made under paragraph 2(1)(b). The making of such adjustment is necessary only for the purpose of finding out the clearance of the goods. When such a clearance is found for a particular period, it becomes the base clearance for the base period." No contrary decision of any other High Court has been pointed out to us. Applying the aforesaid observations to the facts of the present cases, the result will be that the contention of the respondents as to the method of computation of excess clearances is tenable and not the method sought to be adopted by the Revenue in these proceedings.

19. No decision of any other High Court, on the issue of interpretation of the terms of notification 198/76, than the Delhi High Court decision cited supra has been brought to our notice. Normally we would have felt compelled to follow that decision in rendering our decision in this appeal in the absence of any contrary decision brought to our notice.

But it should be noted that even the learned counsel for the appellants (respondents?) did not urge for acceptance of that interpretation in so far as she had conceded that the method of calculation of the value of clearances (for the purpose of computing excess clearances) in the incentive year adopted by the

department was correct. In effect, she had conceded that the quantum of relief claimed by the appellants (and had been earlier granted to them) was not correct. It should also be noted that two refund claims are yet to be disposed of and that they will have to be disposed of with reference to the interpretation now accepted by the learned counsel to be. appropriate (i.e.) not in accordance with the interpretation earlier put forward but in accordance with the interpretation now accepted by the appellants to be correct which we have already dilated on. In view of these peculiar circumstances, we feel that we should dispose of the present matter in accordance with our interpretation of the notification though it may not be in accordance with the interpretation in the decision of the Delhi High Court cited supra.

20. To sum up, we hold, on a proper construction of Notification No.198/76, that - (i) the value of base clearances is to be determined not on the basis of the "adjusted" value [adjusted in the manner set out in sub-para (b) of para 2(1) of the Notification] but on the basis of the values determined under Section 4 of the Act; and (ii) the value of clearances in the incentive year (for the purpose of computing the excess clearances eligible for duty concession) is to be determined on the basis of the value, or the average value, of similar goods that prevailed in the base period, value in this context being that determined under Section 4 of the Act (reference Explanation l(b) to para 1 of the notification).

21. In view of the above we hold that the orders of the Assistant Collector dated 30-1-1980 were correct on the merits of the issue. But then the question would be whether the view of the Appellate Collector that the show cause notices issued by the Assistant Collector were barred by limitation is correct or not. On a consideration of the materials furnished by them, the Assistant Collector had passed orders fixing their base clearance and base period for purposes of the notification. Subsequently, the Superintendent had, under letter 30-8-1977, informed the appellants as to how benefit under this notification has to be availed of and, in that connection, under letter dated 13-9-1977, called for certain particulars by way of statements.

Much later than that, the two appellants had filed supplementary classification lists indicating therein the dates when, according to them, they had crossed base clearances and were, therefore, after that date, entitled to clear their goods at the concessional rate. It is in pursuance of the orders passed on these supplementary classification lists, approving of the claim made by them, that they had been availing themselves of the concessional rate. The notice dated 8-6-1981 of the Central Government reads as if the appellants (respondents?) proceeded to avail of the benefit of the concessional rate on their own without furnishing the information earlier called for. This is not correct since, as mentioned earlier, the appellants had filed revised classification lists and it was in terms of the approval granted thereon that they had availed themselves of the benefit of the concessional rate. It was open to the Department, in granting the approval of the supplementary classification lists, to have insisted upon the furnishing of the particulars already called for, or any other details as may have been feit necessary. But this had not been done and approval had been granted in the manner prayed for by the appellants.

In view of these peculiar circumstances it appears to us that the finding of the Appellate Collector, that the show cause notices issued by the Assistant Collector were beyond time since they had been issued after the expiry of the normal period of limitation, cannot be said to be incorrect. In that view, we are of opinion that there are no grounds to interfere with the order of the Appellate Collector .under which he set aside the orders of the Assistant Collector confirming the demands.

Hence we hold that so far as the present appeals are concerned, they are to be dismissed, upholding the order of the Appellate Collector.

22. Accordingly, this apeal is dismissed and the notice dated 8-6-1981 is discharged.

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