Flex Engineering Ltd. and Flex Vs. Commissioner of Central Excise

Flex Engineering Ltd. and Flex Vs. Commissioner of Central Excise

SooperKanoon Citation : sooperkanoon.com/36220

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-12-2004

Reported in : (2005)(99)ECC516

Judge : A T V.K., P Bajaj

Appellant : Flex Engineering Ltd. and Flex

Respondent : Commissioner of Central Excise

Judgement :

1. These two appeals have been filed by M/s. Flex Engineering Ltd. and M/s. Flex Industries Ltd. against Order-in-Original No. 71-72/2000 dated 30.12.2000 by which the Commissioner has confirmed the demand of duty and imposed penalties on both the Appellants.

2. Shri K.K. Anand, learned Advocate submitted that M/s. Flex Industries Ltd., Appellant No. 2, imported 100 pieces of seamless carbon steel pipes which were declared by them as capital goods for the purpose of availing the Modvat credit Under Rule 57 Q of the Central Excise Rules, 1944; that they filed an intimation dated 25.3.96 with the Department Under Rule 57 S (5) [subsequently 57 S (7)] of the Central Excise Rules, 1944 for removal of the said pipes for repair/reconditioning to M/s. Flex Engineering Ltd., Appellant No. 1; that two show cause notices were issued to them for demanding Central Excise duty on the ground that the job work done by the Appellant No. 1 was not in the nature of repairing/reconditioning but it amounts to manufacture of a new product, namely,

winder core falling under different Headings of the Central Excise Tariff Act; that the Commissioner vide Order-in-original No. 15/2000 dated 7.10.2000 dropped the proceedings initiated against both the appellants; that on Appeal filed by the Revenue, the Appellate Tribunal vide Final Order No.A/566-68/2002-NB dated 23.5.02 remanded the matter to the Commissioner for re-adjudication in the light of the pleas raised by the Revenue and the stand of the Appellants that they were protected by Rule 57 S (5) read with Notification No. 214/86-CE dated 25.3.86; that the Commissioner Under the inpugned Order has confirmed the demand and imposed penalties on both the Appellants holding that the processes undertaken by Appellant No. 1 have brought into existence an entirely new product with new nomenclature 'winder core' with specific use and distinct characteristic and as such, the processes undertaken by them amounts to manufacture; that the Commissioner has also denied the benefit of Notification No. 214/86-CE dated 1.3.86 on the ground that the benefit of said Notification is available to goods which are manufactured on job work basis and are further used in the manufacture of final products as inputs by the supplier of the raw materials and that the benefit of Notification is not available to goods which are used as capital goods because the Notification provides that the goods should be used in or in relation to the manufacture of final products.

3. Learned Advocate mentioned that the Appellants are not challenging the finding of the Commissioner that the processes undertaken by Appellant No. 1 amounts to manufacture; that the benefit of Notification No. 214/86, as amended by Notification No. 68/95 CE dated 16.3.95 and Notification No. 91/95-CE dated 18.5.95 is available to the impugned goods; that the entire period of demand involved in the present appeals in from March 1996 onwards i.e. after the issue of both the amending notifications. He submitted that Notification No. 214/86, as it was originally issued, provided exemption to the goods manufactured in a factory as job work and is used in or in relation to manufacture of final products on which the duty of excise is leviable; that however, machines/machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance in or in relation to manufacture of final products were excluded from the purview of the Notification by virtue of Explanation n (i); that said Explanation n was substituted by

Notification No. 68/95-CE dated 16.3.95 and Clause (i) relating to machine/machinery etc. was deleted from Explanation II meaning thereby that machine/machinery etc. are now covered by exemption provided Under Notification No. 214/86 if these are used in or in relation to the manufacture of final products on which the duty is leviable. He also relied upon the Delhi Commissionerate Trade Notice No. 35 CE/MISC/35/95 dated 22.9.95, wherein it was specifically mentioned that capital goods can be removed in terms of Notification No. 214/86 as amended, to the job worker.

4. Finally, the learned Advocate submitted that the entire demand for the period March 1996 to March 1998 is time barred as the show cause notice was issued on 25.1.99 which is beyond the normal period of six months specified in the Section 11A(1) of the Central Excise Act; that in the first adjudication Order dated 17.10.2000, the Commissioner has clearly given his finding that "there is no reason for suppression and mis-declaration of exact facts from the Department so as to establish conscious and deliberate intention on the part of M/s. Flex Engineering Ltd. to evade payment of duty"; that thus the Commissioner had clearly held that there was no suppression and as such the demand cannot be raised for extended period of limitation; that this finding of the Commissioner was not challenged by the Revenue in their Appeal filed before the Appellate Tribunal; that no penalty is imposable on Appellant No. 2 as they had only sent the goods to Appellant No. 1 and received the same back from Appellant No. 1 after they had done the necessary processing.

5. Countering the arguments Ms. Neeta Lal Butalia, learned Senior Departmental Representative, submitted that in the intimation letter filed by Appellant No. 2 with the Department for removing of seamless carbon steel pipes Under Rule 57S(5), the Appellant No. 2 have mentioned repairing/reconditioning whereas the seamless pipes have been sent by them to Appellant No. 1 for the purpose of converting them to winder core; that this clearly shows their malafide intention in suppressing the vital fact from the Department; that the Appellants are not challenging the finding of the Commissioner that the activity undertaken by them amounts to manufacture. She also mentioned that on the challans while returning the goods to Appellant No. 2, the Appellant No. 1 had written against the column

nature of processing done "for repairing and reconciling" or "without doing any job work"; that there was positive mis-declaration by the appellants in the present matter and in view of this, the extended period of limitation is applicable; that as the Board had reviewed the Adjudication Order and the Appeal was filed, the entire order was challenged and it cannot be claimed by the learned Advocate that the Commissioner's finding on the aspect of suppression was not challenged. She also submitted that benefit of Notification No. 214/86-CE is not applicable to Appellant No. 1 as the conditions stipulated in the notification had not been complied with; that as per Para 2 of the Notification, the supplier of the raw material has to give an undertaking to the Assistant Commissioner having jurisdiction over the factory of job worker that the goods shall be used in or in relation to the manufacture of final products in his factory and the supplier produces the evidence that the goods have been so used and he also undertakes the responsibility of discharging the duty liability in respect of Central Excise duty leviable on the finished goods; that as these conditions have not been fulfilled, the benefit of Notification No. 214/86 cannot be extended.

Finally, he submitted that the plea of revenue's neutrality will also not be available to the appellants in view of the findings of the Larger Bench in the case of the Tribunal in the case of Jay Yuhshin Ltd. v. CCE, New Delhi, 2000 (72) ECC 407 (LB): 2000 (39) RLT 501 (CEGAT-LB) wherein it has been held that the revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods; that in the present matter, the Modvat credit of the duty payable by Appellant No. 1 would have been available to the Appellant No. 2 and this fact would not make the situation revenue neutral.

6. In reply the learned Advocate submitted that out of 100 seamless carbon steel pipes imported by Appellant No. 2, 22 pieces were returned by the Appellant No. 1 without doing any work and, therefore, in, the challans in respect of those 22 pieces, it was mentioned "no repairing or reconciling" or "without doing any job work"; that in respect of 78 pieces only the processes were undertaken by Appellant No. 1.

7.1 We have considered the submissions of both the sides. As the Appellants have not challenged the findings in the impugned order that the processes undertaken by the appellant No. 1 amounts to manufacture, the said finding of the Commissioner in the impugned order is upheld.The only question which remains to be decided whether the benefit of Notification No. 214/86 CE is available to the Appellant No. 1. The Commissioner has disallowed the benefit of the said Notification on the ground that intention of the Notification is to provide exemption to such goods which are manufactured on job work basis and further used for manufacture of final products as inputs by the supplier of the raw material and undoubtedly the goods were not used as inputs but were used as capital goods. Learned Advocate has mentioned in detail the various amendments made in Notification No. 214/86 particularly the amendment made by Notification No. 68/95-CE dated 16.3.95. Initially, when the Notification was issued on 25.3.86 Explanation II read as under: "For the purpose of this notification, the expression 'said goods' does not include-- (i) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the manufacture of the final products; 7.2 Notification No. 68/95 substituted the Explanation II which reads as Under: "For the purposes of this Notification, the expression, "said goods" does not include -- (i) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being availed or for the packaging any final products, (ii) packaging materials or containers the cost of which is not included in the assessable value of the final products Under Section 4 of the Central Excises and Salt Act, 1944 (1 of 1944)" 8. It is thus evident that after Notification No. 214/86 was amended by Notification No. 68/95, the expression "goods" does not include only the specific packaging materials or containers. The machines, machinery, plant, equipment etc. which were earlier excluded are no more covered in the exclusion Clause in the substituted Explanation II.Thus, the winder cores, which are capital goods, would be covered by Notification No. 214/86. We do not agree with the Commissioner that because of use of the phrase "in or in relation to the manufacture of final products", Notification No. 214/86 applies only to inputs because these words having been used in Rule 57 Q of the Central Excise Rules

which provides for Modvat Credit of the duty paid on capital goods. It is not the case of the Revenue that winder core, which came into existence after the processes have been undertaken by Appellant No. 1, have not been used in relation to the manufacture of their final products which are leviable to duty whether in whole or in part. As the fact of use of impugned goods in the manufacture of final products is not in dispute, the benefit of Notification No. 214/86 cannot be denied to the Appellants. We also observe that in the initial Adjudication Order dated 17.10.2000, the Commissioner had clearly mentioned that the procedure and conditions specified Under Rule 57S(5) and Notification No. 214/86-CE were fully observed and followed by Appellant No. 2. We also observe that there is no finding in the impugned Order that the conditions stipulated in Notification No. 214/86 have not been complied with. We also observe that Rule 57 S (5) [subsequently Rule 57 S (7)] also provided more or less similar procedure for removing the capital goods which is contained in the Notification No. 214/86 that is giving the intimation to the Assistant Commissioner having jurisdiction over the factory. Accordingly, we hold that the benefit of Notification No.214/86-CE, as amended, is available to the goods manufactured on job work by the Appellant No. 1. We, therefore allow the Appeal without considering the issue of invocability of extended period of limitation.