

Siv Industries Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Sep-22-2004

Reported in : (2005)(98)ECC601

Judge : P Chacko, R K Jeet

Appellant : Siv Industries Ltd.

Respondent : Cce

Judgement :

1. By this appeal, M/s SIV Industries, the appellants herein challenge the Order-in-Original No. 5/99 (C) dated 31.5.1999 passed by the Commissioner of Central Excise, Coimbatore, by which the Commissioner has confirmed a duty demand of Rs. 36,12,733 on the appellants under Rule 9(2) read with proviso to Section 11A of the CE Act 1944. He has also imposed a combined penalty of Rs. 37,00,000 under Rules 9(2), 52A, 173Q, 226 of the CE Rules, 1944 and Section 11 AC of the CE Act, 1944.

2. The brief facts of the case are that, based on intelligence gathered by the officers working in Mettupalayam Range, that scraps of various metals were cleared without payment of duty, enquiries were made from various functionaries of the appellants, and on investigation, unearthed invoices which were used for clearing metal scraps. It was noticed by them that removal of scraps had been carried out under separate set of invoices. It was also found on investigation that the appellants have purchased various grades of virgin metals like steel, stainless

steel, aluminium etc. to the tune of Rs. 3.34 crores from M/s. Hindustan Corporation and M/s. Hindustan Hard Wares alone, who are two of their suppliers. The officers also noticed that there were two maintenance workshops and one Electrical workshop within the factory premises of the appellants and they further noticed that machines were used for mechanical working such as lathes, drilling machines, boring machines, scaring machine, welding machine, shaping machine and hacksaw cutting machine.

As a follow up action, statement was obtained from Shri M.S. Shenbogue, General Manager (Maintenance), on 27.3.98 wherein he stated the objectives of the workshops and also detailed out the various activities like pressing, gas cutting, grinding, welding and melting zinc ingots etc. and also the nature of metals used in the workshops.

He also stated that generally rewinding of electric motors is done through outside agencies, but in emergency, some small motors are also re-wound in the factory in the workshop. Statement was also recorded from Shri S.D. Seshachalam, Manager (Excise) on 31.3.98 wherein he deposed that, waste was emerged as a result of mechanical working such as turning, grinding, threading, drilling etc. of the metals in the workshop. He has also stated that they did not file any declaration under Rule 173B for such waste and that they were not maintaining any stock account for the waste generated in the workshop. When questioned about the re-winding of copper wire waste, he stated that during the course of rewinding, the old burnt-out wire was removed and sold as waste. It was in these circumstances that show cause notice bearing C No. V/72/15/69/98 CX. Adjudated 5.10.98 was issued to the appellants which culminated in the order of adjudication passed by the Commissioner as noted, against which they have filed the present appeal.

3. Shri J. Sankararaman, learned Counsel appeared for the appellants and referred to the grounds of appeal wherein it is inter alia stated as under: (a) The appellant company has been in existence since early 1960s and therefore, the machinery or parts thereof have become unusable due to wear and tear or due to repair etc. Therefore, the appellants had to sell the same. Certain condemned

parts - were also cleared as scrap. The scraps have not emerged as a result of any manufacturing activity undertaken by the appellants.

(b) In term of Section 2(f), duty can be demanded only if the process involved result in emergence of a new product. In the present case, there was no emergence of new product. Hence, demand of duty is not sustainable.

(c) The onus is on the department to prove that the scrap cleared by the appellants is out of virgin material.

(d) The appellants vide their letter dated 2.6.94 and 24.12.94 had brought to the notice of the department that certain revamping activity was being carried out with reference to certain machinery and that scrap generated out of such revamping was being cleared.

(e) The impugned items have arbitrarily classified under Chapter 72,74,76 of the CETA, 1985 without giving an opportunity to the appellants and, therefore, classification adopted by the Department is also not correct.

(f) The Hon'ble Supreme Court in the case of UOI v. Indian Aluminium Co., 1995 (77) ELT (SC) has held that refuse, ashes, rubbish emerging in the course of manufacture are not excisable. It was also held therein that rubbish can be sold but that does not become a marketable commodity.

(g) The department was aware of the clearance of scrap generated by the appellants as the appellants had clearly indicated in their letter that MS scrap, cast iron, etc. were cleared during the year 1991-94. Therefore, the allegation of the department that the appellants have suppressed material fact from the department is not correct. Consequently, longer period of limitation for demand of duty cannot be invoked. Demand of duty for the larger period is not in consonance with the law laid down by the Hon'ble Supreme Court in the case of Tamil Nadu Housing Board v. CCE, 2002 (82) ECC 462 (SC) : 1994 (55) ECR 7 (SC) wherein it was held that when the law requires that an intention to evade payments of duty, then it is not mere failure to pay duty. Similarly in the case of Padmini-Products v. CCE, 1989 (24) ECC 362 (SC): 1989 (43) ELT 195 (SC), it was held that in order to make a

demand for a period beyond six months, and up to a period of five years, something other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knows otherwise, is required before it is saddled with any duty liability, before the period of six months.

(h) In the present case the period of dispute is 1993-98. Section 11AC was introduced with effect from 28.9.96. But the Commissioner has chosen to impose penalty under Section 11 AC with retrospective effect, holding that what is relevant is only the date of issue of show cause and not the time of offence. His view is contrary to the settled proposition of law in this regard.

3.1 The learned Counsel also cited the order of the North Zonal Bench in the case of Hindalco Industries Ltd. v. CCE, Allahabad, 2002 (144) ELT 339 wherein it was held that waste and scrap arising from manufacture for mechanical working of iron or steel only are liable to duty and that metal scrap arising from dismantling of buildings, repair of machinery etc. are not liable to duty. In view of the above, the learned Counsel submitted that the impugned order is not in accordance with law and he prayed for setting aside the same and allowing the appeal.

4. Shri C. Mani, learned JDR appearing on behalf of the Department defended the impugned order. He invited our attention to para 18 of the impugned order wherein the Commissioner has given detailed finding in regard to use of virgin materials such as steel, stainless steel, aluminium etc. to the tune of Rs. 3.34 crores and these materials were worked upon in their own workshop within the factory premises. It was therefore, necessary for the appellants to have maintained necessary account for the scrap generated out of those virgin materials, which exercise they have not done and in the absence of such details, it is established beyond any reasonable doubt, that the waste and scrap were generated out of the virgin materials. He has also invited our attention to the statement recorded from the General Manager (Maintenance) of the appellants, on 27.3.98 wherein he has clearly stated about the objective of the workshop was for the purpose of processing gas cutting, grinding, welding and melting zinc ingots. He has also stated that apart from that, in emergency, motor winding was also undertaken in

the factory. The learned JDR also invited our attention to the statement recorded from SD Seshachalam, Manager, Excise, on 31.3.98, wherein he has clearly stated that waste emerged was, as a result of mechanical working such as turning, grinding, threading drilling etc. and that the appellants have not filed any declaration under Rule 173B of the CE Rules, 1944. The learned JDR, in the face of the above statement recorded from two senior officers of the appellants, submitted that the impugned order is perfectly in order and the appeal is devoid of merits. He, therefore, prayed for rejection of the appeal. While winding up his arguments, he pressed into service the decision of the North Regional Bench in the case of Ranjeev Steel Ltd. v. CCE, Chandigarh, 2003 (154) ELT 450 wherein it is held that waste and scrap arising out of mechanical working of iron or steel are liable to duty, and not waste and scrap as a result of wear and tear of ingots mould.⁵ We have carefully considered the rival submissions and gone through the case records. Before we proceed to examine the case on merits, let us first consider the question whether the demand is barred by limitation or not. It is the contention of the appellants that the department was aware of the generation and clearance of scrap as early as in 1994. In support of their plea, they have referred to their letters bearing No. S/FPS/7293/94-95 dated 24.12.94 and S/FPS/8730/94-95 dated 20.2.95 in response to the letter bearing OC No.2358/94 dated 30.11.94 issued by the Range Supdt, Mettupalayam. We have perused the letter of the Range Supdt. *ibid* copy of which is available on page 53 of the paper book. It appears from the said letter that in spite of the letter of the Range Supdt dated 26.4.94, the appellants have not furnished the details of scraps cleared during the year 1991-92 to 1993-94 with details of buyer etc, apart from the details from which scrap was generated. This letter was replied by the appellants vide their letter dated 2.12.94 (copy filed on page 54 of the paper book) wherein they stated that they require another 30 days to produce the required details. Accordingly, vide their letter dated 24.12.94, they furnished only the quantity of scrap cleared during the aforesaid period but no details were furnished with regard to names of the machines revamped, the quantity of each variety of scrap that arose etc.

Further vide their letter dated 20.2.95, the appellants have clearly and categorically stated that they have not maintained any scrap generation records and that they maintained only the weighment records of stores accumulated by

them. It would thus be seen that neither the appellants have furnished full details called for by the department, nor have they filed RT 12 returns, nor declaration under Rule 173B. In the absence of RT 12 returns, declarations and full details of the scrap generated, and merely because the department had asked for details regarding generation of scrap, which was also not supplied, it cannot be said that the department was aware of the activities being carried on by the appellants. The department cannot be expected to know the activities being carried on by the assessee who are working under the Self-Removal System unless they furnish the details called for by the department. In the present case, in spite of the appellants having been asked to give complete details about the generation of scrap, they have not placed the required information. We also observe that the appellants are working under Self Removal Procedure Scheme (SRP) and lot of faith is reposed on the assessee to maintain all the records correctly, which they have not done in the instant case. Strong reliance was placed by the appellants in the judgment of the Supreme Court in the case of Tamil Nadu Housing Board v. CCE, 2002 (82) ECC 462 (SC): 1994 (55) ECR 7 (SC) wherein it was held that when the law requires that an intention to evade payment of duty, then it is not mere failure to pay duty. Reliance was also placed in the case of Padmini-Products v. CCE, 1989 (24) ECC 362 (SC) : 1989 (43) ELT 195 (SC), wherein it was held that in order to make a demand for a period beyond six months, and up to a period of five years, something other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knows otherwise, is required, before it is saddled with any duty liability, beyond the period of six months. We observe that in the present case, intention to evade payment of duty is clearly established by the evidence on record by not furnishing the details called, apart from non-filing of declaration and RT 12 return, and the assessee have also maintained separate set of invoices to clear the goods without payment of duty. Therefore, we have no hesitation to hold that the appellants have suppressed facts with regard to generation of scraps arising out of the mechanical working on the virgin metal to the tune of Rs. 3.34 crores purchased by them from M/s. Hindustan Corporation and M/s Hindustan Hard Wares, in their workshops, with an intention to evade payment of duty and, therefore, invocation of the longer period of limitation in terms of the proviso to

Section 11A of the CE is correct and we uphold the same.

6. Coming to the merits of the case, it is the contention of the appellants that the waste and scrap were not emerged due to any mechanical working, but due to wear and tear. This plea of the appellants cannot be countenanced inasmuch as the General Manager (Maintenance) of the appellants in his statement dated 27.3.98 has clearly stated that there were two mechanical workshop and one Electrical Workshop within the factory premises. He has further elaborated about the machines installed in each of the workshop and also the number of persons employed in each workshop as under :No. of workers : 6 Workers and one Engineer/SupervisorMechanical Workshop No. 2 He has also stated that approximate power used for both the works is 160 HP. His statement is corroborated by the statement of Shri S.D.Seshachalam, Manager, Excise dated 31.3.98 wherein he had clearly stated that the waste and scrap were generated by the mechanical working such as turning, grinding, threading drilling etc. By no stretch of imagination, it can be held that the two senior officers of the appellants, could have given wrong statements. Further, it is not the case of the appellants that there was any threat or coercion while obtaining the statements. Further, there is also no retraction of the statements of these officers. There statements, therefore, strengthens the case of the Revenue that the waste and scrap was generated by mechanical working on the virgin metals valued at Rs. 3.34 crores and not the waste which has arisen due to wear and tear or revamping etc.

as claimed by the appellants.

The burden was on the part of the appellants to have come out with details that the scrap generated was because of the revamping of the machines, wear and tear and condemned or worn out parts of the machines, which burden has not been discharged by the appellants.

Therefore, this plea of the appellants cannot be accepted. As regards the dutiability of the scrap generated, the case law in the matter of Hindalco Industries Ltd. v. CCE, Allahabad, 2002 (144) ELT 339 does not support the case of the appellants. Rather it support the case of the department. What is held therein is that waste and scrap arising from manufacture or mechanical working of iron or

steel are liable to duty.

Similar view has been taken in the case of *Rajeev Steels Ltd. v. CCE, Chandigarh*, 2003 (154) ELT 450, relied upon by the Revenue. Therefore, the issue with regard to dutiability of scrap generated by manufacture or mechanical working of iron or steel, is no longer *res Integra* by the decisions cited *supra*. We have held above that going by the evidence on record/ including the statement of the two senior officers of the appellants, who have given a detailed account of the existence of the three workshops and the machines installed therein, as noted above, the waste emerged was as a result of mechanical working on the virgin metals valued at Rs. 3.34 crores. The appellants have also taken a ground in the appeal that the classification of the goods have been adopted arbitrarily and in support of their plea they have cited the case judgment of the Hon'ble Apex Court in the case of *UOI v. Madhumilan Syntex*, 1988 (35) ELT 349, This case law has no application to the facts of the present case inasmuch as in the cited case the classification approved was modified without any notice to the party.

There is no such situation in the present case. Further, in the present case, the appellants have not come out with any other proposed classification while contending that the classification adopted by the Department is incorrect. They challenge the classification on the ground that no manufacturing activity has taken place. Section note 8(a) of Chapter 72 clearly specifies that the expression waste and scrap means "metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons. Therefore, we hold that there is force in the plea of the appellants that the classification was arbitrarily fixed or that it was incorrect.

Accordingly, we are of the considered opinion that duty has been correctly demanded from the appellants and we confirm the same in terms of the impugned order.

7. Now coming to the issue of imposition of mandatory penalty in terms of Section 11 AC, while the period of dispute is 1993-98, Section 11 AC was introduced with effect from 28.9.96. It is now well settled proposition of law that provisions of

Section 11 AC cannot be applied retrospectively, no matter whether the show cause notice was issued after 28.9.96. Therefore, only a portion of the disputed period is covered by Section 11 AC. Mandatory penalty under Section 11 AC, therefore, calls for drastic reduction. The appellants are also liable for penalty under Rules 9(2), 52A, 173Q and 226 of the CE Rules, as held by the adjudicating authority as they have contravened the provisions of these rules. The adjudicating authority has imposed a combined penalty of Rs. 37,00,000. We are inclined to think that interests of justice would be met if the penalty is reduced to Rs. 15,00,000 (Rupees fifteen lakhs) and we order accordingly.

8. In the result, except for the reduction in the quantum of penalty, the appeal is otherwise rejected.

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