

Sidhmukh Flexible Packaging (P) Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-11-2005

Judge : S Kang, V Rpesident, A T V.K.

Appellant : Sidhmukh Flexible Packaging (P)

Respondent : Cce

Judgement :

1. The issue involved in this appeal, filed by M/s. Sidhmukh Flexible Packaging Pvt Ltd is whether it is open to them to pay excise duty even if the excisable goods manufactured by them are exempted from payment of whole of duty under a Notification.

2.1 The Appellants, in their letter dated 24.12.2004, has requested to decide the appeal on merit. We, therefore, heard Shri O.P. Arora, learned SDR, and perused the records. The Appellants, a SSI Unit, manufacture lay flat tubing, polymer bags and polythene sheets falling under Chapter 39 of the Schedule to the Central Excise Tariff Act.

Notification No. 5/98-CE, dated 2.6.98 (Srl. No.71) exempts lay flat tubing from payment of whole of the excise duty unconditionally. The Appellants, instead of availing the benefit of the exemption Notification, paid duty at the tariff rate in respect of lay flat tubing and availed of MODVAT Credit of the duty paid on inputs used in or in relation to the manufacture of lay flat tubing. The Deputy Commissioner, under Order-in-Original dated 20.1.2000, disallowed the Modvat

Credit amounting to Rs.5,41,849/- and imposed a penalty of Rs.25,000/- holding that 'in terms of Rule 57C of the Central Excise Rules, 1944, no Credit of the duty is available if the inputs are used in the manufacture of final products which are exempt from the whole of the duty of excise or are chargeable to nil rate of duty. The Commissioner (Appeals) also under the impugned Order has rejected their appeal.

2.2 The Appellants have submitted that since the inputs were common, it was quite difficult for them to maintain separate records and separate manufacturing process for inputs and final products; that, therefore, they paid fully duty instead of taking the benefit of Notification N.5/98-CE in respect of lay flat tubing; that it has been held by the Tribunal in the case of Mafatlal Industries Ltd. v. CCE, Vadodara, 2003 (162) ELT 1143 (T)s that "in the face of an exemption Notification the choice was still left to an assessee to avail the benefit thereof or otherwise." Reliance has also been placed on the decision in the case of Bansal Auto Parts v. CCE, New Delhi, 2003 (161) ELT 1163 (T) wherein the Tribunal has held that "if the Notification issued under Section 5A(1) is to be forced upon the appellants, the same would lose its character of being an exemption notification and would become power to simply fix the rates of duty which the assessee would be bound to follow. It is definitely a beneficial piece of legislation and it is up to the assessee to claim the benefit of such offer made by the Government of note." 3. It has also been held by the Tribunal in Bansal Auto case that there is nothing in the MODVAT Rules which says that if an exemption is available to the manufacturer by way of an exemption notification, then he is ousted from the purview of MODVAT Scheme." Reliance has also been placed on the decision in (T) and CCE v.VIP Industries, 4. On the other hand Shri O.P Arora, learned SDR, submitted that the lay flat tubings manufactured by the Appellants are exempted from whole of the duty unconditionally under Notification No.5/98-CE, dated 2.6.98 (Srl. No.71); that Rule 57C of the Central Excise Rules, 1944 clearly mentions that no credit of the duty shall be allowed on such quantity of inputs as is used in the manufacture of final products which are exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty." He thus contended that provisions of Modvat Rules clearly bars the availment of Modvat Credit when the final product is exempted from payment of duty; that Rule 57C refers to a product

which is exempt from payment of duty and does not mention of an option to the manufacturer to ignore the exemption from payment of duty provided by the Notification. He, further, submitted that duty of excise is levied and collected in such manner as may be prescribed as per Section 3 of the Central Excise Act, on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act; that Section 5A empowers Central Government to exempt excisable goods from the whole or any part of the duty of excise; that as per Section 38 of the Central Excise Act, every Notification issued under Section 5A shall be laid before each House of parliament which has powers either to make amendments or annul it or leave it as it is; that thus exemption Notification has the approval of the Parliament and as such has to be followed as such. He relied upon the judgment of the Supreme Court in the case of CCE v. Parle Exports (P) Ltd., 1988 (38) ELT 741 (SC) wherein the Apex Court has held that the Notification issued under Central Excise Rules should be read along with the Act and when a Notification is issued in accordance with the powers conferred by the Statute, it has statutory force and validity and therefore, the exemption under Notification is as if it were contained in the Act itself. Reliance has also been placed on the decision in the case of Orient Weaving Mills (P) Ltd. v. U.O.I., 1978 ELT J 31 (SC) and Orient Paper Mills Ltd. v. Deputy Director of Inspection, Customs & Central Excise, 5. Finally the learned SDR referred to Article 265 of the Constitution of India which mentions that "no tax shall be levied or collected except by authority of law" and submitted that a legal levy of duty and collection thereof is as per law and not as per the convenience of the assessee; that it has been held by Madras High Court in Muthiah Chettiar v. CIT, (1959) 35 ITR 339 (Mad) that "the liability of the assessee to pay Income-tax is created by the Income Tax Act. The amount on which the tax is to be paid, the rates at which the tax has to be computed and the relief which the assessee are entitled to, must be determined in accordance with the provisions of the income Tax Act and the relevant Finance Act. The liability to pay tax cannot be founded on any agreement." He mentioned that the Delhi High Court in the case of Orient Paper Mills Ltd. has affirmed the following findings of honorable single judge:- "Can it be legitimately said that for the purpose of income tax credit certificate I should look only at the Tariff Schedule and then a blind eye to the notification?" 6.1 We have

considered the submissions of both the sides. The submissions made by the learned SDR are well founded. The Constitution of India (Article 265) clearly mandates that no tax shall be levied or collected except by authority of law. The Supreme Court in the case of *subba Rao v. State of Andhra Pradesh*, AIR 1965 SC 1773 has held that the words 'levy and collection' are used in this Article in a comprehensive sense and are intended to include the entire process of taxation and commencing from taxing statute to the taking away of money from the pocket of the citizen. What the Article enjoins is that every stage in this entire process must be authorized by the law. Section 3 of the Central Excise Act also mentions of levy and collection of duty of excise as, and at the rates, set forth the Schedule to the Central Excise Tariff Act. Further Section 5A of the Act provides that if the Central Government is satisfied that it is necessary in the public interest so to do, may, by notification exempt excisable goods from the whole or any part of the duty of excise leviable thereon. Thus the duty of excise is to be levied and collected as per the rates set forth in the Schedule read with the Exemption Notification. Otherwise the levy and collection shall be without authority of law. The Supreme Court has held in *Parle Exports (P) Ltd.* as under:- "The Notification must be read as a whole in the context of the other relevant provisions. When a notification is issued in accordance with power conferred by the Statute, it has statutory force and validity and, therefore, the exemption under the notification is, as if it were contained in the Act itself." 6.2 It is thus clear that the duty has to be discharged by an assessee at the rates specified in the Tariff Act read with any exemption Notification. It is not open to any assessee to disregard the Notification and pay the duty at the Tariff rate as notification becomes part of the act itself. This principle has also been clearly enunciated by the Supreme Court in *Orient Weaving Mills* wherein it has been held that "By virtue of Section 38 of the Act, all rules made and notification issued by the Central Government, as aforesaid, are required to be published in the Official Gazette, and thereupon those rules and notification shall have effect as if enacted in this Act." Thus it is manifest that the notifications and the rules impugned in this case have been incorporated into the Act itself, and have become part of the taxing statute." The Delhi High Court also in the case of *Orient Paper Mills Ltd.*, *supra*, has held that "whenever there is an exemption notification, the duty leviable gets reduced in term of the exemption

notification and to that extent the exemption notification has to be read as forming part and parcel of the statute of the relevant provision authorizing the levy." The Delhi High Court after relying upon the decision in Orient Weaving Mills, supra, has held "Therefore, if the exemption notification in the case of paper mills is read as part of the statute the rate of the levy gets reduced and the distinction between leviable and payable as put forward by the paper mills becomes meaningless." 7. In view of these pronouncements of the Supreme Court and the High Court and the provisions contained in Article 265 of the Constitution and the Central Excise Act, we are of the view that the duty of excise has to be discharged after taking into consideration the exemption ground by a Notification. If the Notification contains certain condition, certainly an assessee can not be compelled to fulfill those conditions. Once an assessee does not comply with the condition stipulated in a notification the exemption from duty provided by the said Notification is not available to him. In the present case Notification No.5/98(Srl. No.71) exempts lay flat tubings from the whole of the duty of excise leviable thereon without any condition and accordingly the provisions of Rule 57C of the Central Excise Rules, 1944 would be attracted making the Appellants ineligible to the Modvat Credit.

8. The Appellants have relied upon mainly on the decision in the case of Bansal Auto Parts in which the decision of the Supreme Court in the case of Parle Export Ltd. and Orient Weaving Mills as well as the decision of the Delhi High Court in the case of Orient Paper Mills have not been considered while holding the view that the Department cannot press upon an assessee to choose the option of exemption and ignore the option of Modvat Credit. It is not the case of choosing one option and ignoring the other one duty has to be discharged by an assessee as per the rates set out in the Central Excise Schedule read with Notification issued under Section 5A of the Central Excise Act. If any duty of excise is payable on the final product manufactured by an assessee he is eligible to avail of Modvat Credit of the duty paid on inputs. If the final product is exempted from payment of whole of the duty or is chargeable to nil rate of duty the assessee is not eligible to avail of the Modvat Credit. All the provisions of law have to be read harmoniously. It is not open to an assessee to go against the provisions of the law for the purpose of availing the Modvat Credit. In other decisions relied upon by the Appellants we find that the decisions of the Supreme Court and the Delhi High Court to the effect that

notification is to be treated as it is contained in the Act itself have not been considered. We, therefore, hold that the Appellants were not eligible to discharge the duty on lay flat tubings which were exempted from payment of duty unconditionally under the exemption notification and avail of Modvat Credit. We, therefore, uphold the disallowance of Modvat Credit to them. However, as the issue involved is one of interpretation and there were decisions to the contrary no penalty is imposable on the Appellants which is set aside.

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