

Amln and Co. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-12-1987

Reported in : (1988)(33)ELT104Tri(Mum.)bai

Appellant : Amln and Co.

Respondent : Collector of Central Excise

Judgement :

1. The brief facts of the case stated in the application are that the applicants are small scale manufacturers. They manufacture inter alia what they describe as red tops, I.U. yellow seals and poly covers, classification of which is under dispute. According to the Department, its classification should be under old Tariff Item 42 pertaining to pilfer proof caps of the first schedule to the Central Excises and Salt Act as it then stood whereas the applicants claimed that these products were classifiable under the then Tariff Item 68 of the said schedule.

The applicants supplied the impugned products to the manufacturers of the dry cell batteries. These were originally classified by the Department under Tariff Item 68 and accordingly the classification list were approved. Later on the Department issued a show cause notice dated 16-11-1984 demanding duty for the past six months preceding the date of show cause notice on the ground that the products were properly classifiable under Tariff Item 42. The original authority namely the Asstt. Collector of Central Excise dropped the proceedings but on an application by the Asstt. Collector under Section 35D of the Central Excises and Salt Act on the direction of the Collector, an application was filed before the Collector

(Appeals) who has upheld the classification of the said products under the old Tariff Item 42. The amount of demand for the past six months comes to Rs. 28,09,744/-.

2. Applicant's learned consultant has contended that the duty was paid according to the Department's own approval of the classification list.

Therefore, there is no reason for demanding duty for the six months preceding the show cause notice, in terms of Section 11 A. For this proposition the learned Consultant relies upon a number of decisions, namely : 3. Apart from this, the applicant's learned Consultant has also relied upon the fact that their financial condition is very bad. It has been stated in the application that their liquidity position as on 24-8-1987 was as under :- The only assets which could be converted into cash is the finished products of Rs. 73,375/- and raw material stock of Rs. 2,90,115/-, but this cannot be converted into cash, because the finished goods are made to order, and the raw material is required to keep the factory running.

Furthermore in addition to the losses of year ending 31-3-1987 as per balance sheet appendix 4 of Rs. 2,39,560.16, there is a further loss of Rs. 71,715.03 from 1-4-1987 to 24-8-1987. The partners have debit balance of Rs. 4,85,424/-. The overdraft facility from the bank is completely exhausted i.e. we enjoy a facility of Rs. 2,45,000/- against fixed deposits, but have actually availed Rs. 2,32,713.44. The applicants have also a huge outside borrowings of Rs. 14,28,465/- out of which the interest amounts to Rs. 1,57,965/- out of which the interest amounts to Rs. 1,57,965/-. This amount of interest has also not yet been paid by us till date to the borrowers due to lack of liquid resources." 4. In view of the foregoing submissions, the learned Consultant for the applicant, submitted that the amount of duty demanded may be stayed unconditionally.

5. The learned SDR, Shri Senthivel appearing for the Department has stated that though he has nothing to controvert against the financial position of the applicants, he has, however to submit that Section 11A gives an unconditional right to the department to demand any short levy for at least six months for any reason whatsoever even if there has been merely a change of reasoning. Section 11 A,

according to him, does not spell out any grounds or reasons or circumstances under which the notice of demand for six months could be issued by the Department. It is only for invoking the larger time limit of five years that certain circumstances have been spelt out in that Section. In the applicant's case, according to the learned SDR only the smaller time limit of six months envisaged in Section 17A has been applied. He has also submitted that the rulings relied upon by the learned consultant for the applicant are based on the peculiar facts of those cases and do not have any application in general.

6. We have carefully considered the pleas advanced on both the sides.

While we would not like to comment whether Section 11A could be invoked in all situation including the circumstances of the applicant, we would only say that the legal position is far from settled. Certain rulings have been relied upon by the learned consultant for the applicants. On the other hand, there are certain other rulings to the contrary. For example, Karnataka High Court in the case of Shyamsunder U. Nichani 1985 22 ELT 751. The Karnataka High Court has held that the Asstt.

Collector proposed to withdraw the approval of the classification list and assess the clearance of the petitioners clubbing up the clearances of the predecessor and that this was clearly a matter falling within the purview of Section 11A of the Act. The Hon'ble High Court has further held that the arguments of the petitioners that Section 11A is only a recovery provision and it does not enable the original authority under the Act to reopen and reassess is not correct, in view of the Supreme Court's decision in the case of D.R. Kohli and Ors. v. Atul Products, Ltd. (1985 20 ELT 21 S.C.). However, having regard to the financial condition of the applicants available on record and nothing being controverted by the Department, we consider that it would be an undue hardship if the applicants are asked to deposit the amount of duty demanded from them in terms of the impugned order. Accordingly, we dispense with the predeposit of duty in terms of proviso to 35F of the Central Excises and Salt Act, 1944. Since however, the stakes involved are fairly high and there may be a recurring effect on the revenue, we direct that the case may be taken out of turn for early hearing.

