

Cona Inds. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-15-2005

Reported in : (2005)(190)ELT208Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : Cona Inds.

Respondent : Commissioner of Central Excise

Judgement :

1.1 Considering that the matter of manufacture with / without aid of power is covered by the Boards instructions the appeals were ordered to kept for hearing on 24.5.2005, after waiver of pre-deposit, when the stay application came up on 20.5.2005.

1.2 After hearing both sides in detail on 24.5.05, considering the matter it is found
a) i) appellants are engaged in the manufacture of electrical Switches, plugs sockets for electrical items, telephone, TVs etc falling under heading 85.36, 85.17 & 85.29 of the Central Excise Tariff.

ii) The main unit is at Gala No. 10 to 13, Gandhi Industrial Estate; Safad Pool, Andheri Kurla Road, Mumbai-72. They have manufacturing units at 17 other locations in Mumbai, out of which only at five units full fledged manufacturing activity takes place and only three out of these five manufacturers ISI specification materials, the other two being non-ISI mark units. The other 12 units are engaged

in part processing, assembly for the ISI mark units exclusively (for purpose of this appeal would be referred to as J-workers.) iii) Moulded Articles are sent directly to these J-workers and received back at Main unit and then cleared after final inspection, testing packing to the Customers or a Central godown known as M/s G M Traders from where goods are sent to customers.

iv) All Moulding operations are done by use of Hydraulic Power Presses installed. These machines are claimed to be operated manually and no electric motor was installed in these machines. They however used electric power to heat the plastic moulding powder.

Buffing (Polishing) was also carried out on electricity operated machines.

b) i) Appellants were claiming benefit of notification 56/95-CE, 8/96-CE etc up to 1.4.97 on ISI-Marked good being made without use of power and after 1.4.97 started paying duty since the notification were not available.

ii) For non ISI marks products benefit of notification 1/93-CE was claimed.

c) i) Since goods with ISI mark, non ISI mark was exempt they were shifting the goods inter unit for various operations and in same vehicles.

ii) The ISI marked products were however invariably sent to the Main Unit for testing and thereafter delivered.

1.3 i) the exemptions being available, no registration were obtained.

The preventive officers started an enquiry on 29.9.96 and a SCN dt 26.3.97 was issued, adjudication proceedings were held and an order came to be issued on 12.12.97 and an appeal was filed to CCE (Appeal).

ii) However, based on very same investigation and documents another SCN dt 13.1.99 was issued by the Commissioner to deny benefit of notification 56/95 CE recover duty for the period 1994-95 to 1996-97 & invoked the penal proceedings. The Commissioner (Adjudication) vide an ex-parte order dt 29.10.04, confirmed the duty demands under proviso to section 11A (1) & imposed penalty under rule 173Q of Central Excise Rules, 1944.

2.1 The Commissioner in para 21 of the order impugned before us observes that all the documents were supplied to the appellants on four occasions i.e. 27.11.97, 1.12.97, 5.3.99 & 7.5.99 & therefore the non receipt claim on documents in the show cause notice issued on 13.1.99 was not upheld after considering the correspondence exchanged and taking note of the Supreme Court decision in case of Sanghi Textile Processors 1997 (68) ECR 570 SC brought to the notice of the department. We cannot uphold the supply of documents prior to issue of the present proceedings i.e. 27.11.97 & 1.12.97, to be compliance of the onus on the department to supply the copies relied upon documents in the case initiated by notice dt. 13.1.99. Moreover, if the department is arguing that the material documents are the same as in the earlier proceedings conducted by the Additional Commissioner, then this subsequent notice dt 13.1.99 invoking the proviso to section 11A(1) should be held to be barred by limitation as it demands duties for the period 1994-95 & 1996-97 when facts were already known and cognizance of evasion taken in notice dt 26.3.97 reliance on the apex courts decision in the case of E.C.E. Industries is well founded to hold the proceedings to be barred by limitation.

2.2 There is force found in the plea of the appellants that the documents were not supplied, in any case after the inquiry was over the non relied upon documents have not been returned and that would definitely be held to have caused a prejudice to the notice to make an effective defence and in facts of this case coupled with no effective personal hearing granted the order is to be set aside on grounds of principle of natural justice having been violated. This violation is compounded by the denial of cross examination of witnesses sought.

a) The use of power in the manufacture of ISI Mark products and consequential denial of benefits of notification 56/95 CE as found by the lower authority is not upheld- i) Out of 17 units, only five units are engaged in complete manufacturing activities and the notification stipulates the conditions a) goods are manufactured by using fully hand operated process for moulding.

b) no power is used for any other process except buffing i.e.

polishing or for testing.

b) the Moulding Machines installed, which have led to the denial of the notification is operated manually, the Hydraulic oil compressing the mould. This claim of the machines being used and the nature of the machines has been certified by the Chartered Engineers firm after verification of the specification etc in the following terms- "These machines were inspected by me and are having Hydraulic system for vertical operation of compressing moulds by manually (hand) operated and electricity is used for heating the mould only." This experts opinion which would indicate that electric power is used only for the purpose of keeping the moulds hot & thus the plastic moulding powder material pliable to be shaped in desired shape of the mould would have to be considered as not a use of electric power in the manufacture of Plugs, switches, sockets as per Board institution vide Circular 31/90-CX 4 dt 7.8.1990 issued in the context of predecessor notification no. 144/89-CE dt 19/05/89 having the very same conditions as are in notification 56/95 CE applicable in this case. The instruction specifically stipulates- "2.... It is advised that in case power is used for heating the moulding powder before moulding, exemption under notification no.

144/89-CE cannot be denied, subject to the fulfilment of other condition of the Notification, Proviso (ii) on the notification applies to use of power for any operation after moulding." Revenue cannot be heard pleading against the Circulars issued. The heating of the powder necessary by heating of the moulds before the operation as in this case certified by the Engineer have to be interpreted as not disqualifying the exemption. In any case, the Ld Commissioner by relying upon the stated facts by the supervisor of the manufacturing operators at Cona Industries concluded - When questioned about power operated and hand operated hydraulic moulding machines, he explained that for both the types of machine power is required for heating the powder, but in case of powder operated hydraulic machines, the opening and closing of dies etc.

were done automatically with the help of electrically operated motors and starter switch etc. conducted against the appellants. The experts opinion of an independent Chartered engineer who has certified the use of power only in heating the moulds in the machines under operations cannot be discarded in preference of an statement of a supervisor in the manufacturing expenses. When the Certificate

of the Expert do not indicate any electric motor starters etc to be installed at the site of the Hydraulic process type Moulding Machines in this case. Possibly if the Commissioner had given one last notice before an ex parte decision he would have had the assistance of the expert before him and would have conducted that the appellants have made out a case for the eligibility to the notification. We find no reason to hold the denial of the benefit of notification in the facts presented.

2.4 When the notification benefit cannot be denied, we cannot uphold the duty demands and or reason to invoke the penal clause of confiscation and penalty on merits in this case.

2.5 When the order is found to be in violation of principles of natural justice, barred by limitation and not being upheld on merits, the same is required to be set aside and no demand is called for, since the fact of issue of second notice in this case on 13.1.99, on same material cannot be obliterated by the remand proceedings.

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