

Commissioner of Central Excise Vs. Modi Tyre Factory

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-30-2005

Reported in : (2005)(189)ELT286TriDel

Judge : R Abichandani

Appellant : Commissioner of Central Excise

Respondent : Modi Tyre Factory

Judgement :

1. The Revenue has preferred this appeal against the order of the Commissioner (Appeals) setting aside the order-in-original made by the Additional Commissioner by which a duty demand of Rs. 1,86,713/- was confirmed under Rule 9(2) of the Central Excises Rules, 1944 read with Section 11A of the Central Excise Act, 1944 and a penalty of the like amount was imposed under Rule 173Q read with Section 11 AC and interest was also directed to be paid under Section 11AB of the said Act.

2. The matter was called out for final hearing on 29-9-2005. No one appeared for the respondent. After the authorised representative of the department for the appellant Commissioner completed his arguments, the matter was kept in the second sitting to enable the authorised representative of the respondent to appear. However, no one was present through out the day for the respondent and the matter was, therefore, kept today to give a further opportunity to the respondents, to argue the matter. Even today, no one appeared for the respondent. The learned

authorised representative for the Department has assisted the court by referring to all the relevant record including the record pertaining to the contentions raised by the respondent during the proceedings.

3. It had come to the notice of the Revenue officials during the course of their visit to the factory premises of the respondent that the respondent assessee was selling the waste arising from the processing of inputs on the strength of private invoices other than those prescribed under Rule 52A of the said rules. It was alleged in the show cause notice that the assessee was required to pay excise duty on clearances of any waste arising from the processing of inputs in respect of which credit had been taken and which may be removed on payment of duty, as if such waste was manufactured in the factory as per the provisions of Rule 57F(18). On being asked to pay appropriate duty, the respondent had filed a declaration under Rule 173B on 5-12-1997 and initiated payment of duty under protest. The respondent was availing of Modvat for all excisable goods under Rule 57A and was selling waste of polycrystalline, bladder, tube valve and bead wire on the strength of private invoices other than those as prescribed under Rule 52A. They had taken Modvat on the inputs from which the waste was generated.

4. The adjudicating authority, on the basis of the material on record, found that the information was wilfully suppressed because the private invoices were not submitted to the Department nor was any declaration filed before 5-12-1997. The applicability of the extended period of demand was, therefore, held to be justified. The adjudicating authority further held that the scrap generated as outlined in the reply of the respondent would show that it was generated during the course of manufacture and Rule 57F(18) was clearly attracted. The adjudicating authority rejected the contention of the respondent that this case was covered by the ratio of the decision of the Delhi High Court in *Modi Rubber Ltd. v. Union of India* observed by the adjudicating authority that in *Modi Rubber* case, it was held that waste and scrap specifically covered by the Central Excise Tariff shall be excisable. It was held that waste and scrap under reference was covered by the Central Excise Tariff, as also acknowledged by the respondent by submitting a declaration under Rule 173B for such waste wherein it was classified under specific sub-headings. The demand was, therefore, confirmed and penalty

imposed, as stated herein above, by the adjudicating authority.

5. The Commissioner (Appeals) relying upon the decision of the Delhi High Court in *Modi Rubber Ltd. v. Union of India* (supra) found that the waste and scrap obtained in the course of manufacturing process of tyres, tubes, etc., was not dutiable. He, therefore, set aside the order of the adjudicating authority. It appears that though he referred to the contention about the demand being time barred, he did not give any finding on that issue and did not interfere with the order of the adjudicating authority on its finding about the justifiability of invoking of the extended period of demand. It is clear from the record that there was full justification of the extended period of demand and the Commissioner (Appeals) rightly did not interfere with the order of the adjudicating authority on that count.

6. In *Modi Rubber Ltd.* (supra), the Delhi High Court, as it is clear from paragraph 13 of the judgment, rendered its decision in the context of Rule 50 of the rules which dealt with non-excisable products which cannot be removed without permission. Rule 50, inter alia, provides that the manufacturer shall not, without permission of the proper officer remove from the approved premises any non-excisable goods produced in such premises, or any intermediate or residual product except waste matter. It was observed that so far as waste matter was concerned, it had been treated as a non-excisable product with no restrictions on its removal. The High Court observed that no amendment was made even after the introduction of Tariff Item No. 68 w.e.f.

1-3-1975 and the waste matter was still treated as non-excisable in Rule 50. It is clear from paragraph 4 of the judgment that the quantity of processed waste/scrap was declared by that assessee on 5-1-1982 i.e.

when the Modvat provisions were not in existence. This aspect, however, has been overlooked by the Commissioner (Appeals) who has not cared to consider the provisions of Rule 57F(18) though they were specifically referred in the show cause notice and dealt with in the order of the adjudicating authority. Rule 57F(18) clearly provides that any waste, arising from the processing of inputs, in respect of which credit had been taken, maybe removed on payment of duty as if such waste is manufactured in the factory. In the present case, it had come on the record in

the statement of Mr. P.L. Trikha, Excise Officer-cum-Authorised Signatory of the respondent which was recorded on 9-7-1998, that the assessee was availing of Modvat on all excisable inputs under Rule 57A and that it was selling the waste of poly scrap, bladder, tube valve and bead wire. It was admitted that the assessee took Modvat on the inputs from which the said waste was generated.

Therefore, the case squarely fell under Rule 57F(18)(a) of the said rules and such waste could be removed only on payment of duty, as if such waste was manufactured in the factory. Sub-rule 18(a) of Rule 57F creates a deeming fiction in respect of such waste arising from the process of inputs by treating it as if it was manufactured in the factory. Therefore, there was no scope for applying the ratio of the decision of the Delhi High Court in Modi Rubber Ltd. (supra), which was rendered in the context of Rule 50 of the said rules, as is evident from the paragraph 13 of the judgment. The waste so produced has been classified by the assessee under Heading 40.04 which relates to: "waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom". It, therefore, becomes clear that there was absolutely no justification for the Commissioner (Appeals) to interfere with the order of the adjudicating authority.

The impugned order of the Commissioner (Appeals) is, therefore, hereby set aside and the order of the adjudicating authority stands restored.

The appeal is allowed accordingly.

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