

Perfect Chemical Wares and ors. Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-09-2005

Reported in : (2004)(176)ELT701TriDel

Judge : S Kang, Vice, N T C.N.B.

Appellant : Perfect Chemical Wares and ors.

Respondent : C.C.E.

Judgement :

1. All these appeals are directed against duty demands, confiscation and penalties confirmed under adjudication order No. 54 to 60/2002 dated 27.10.02 of the Commissioner of Customs and Central Excise, Indore. They were taken up together and are disposed of under this common order.

2. The duty demand is in regard to Acid resistance clay bricks, coal ash and stone pipes cleared by the appellant without payment of duty from 1992. The duty demands have been confirmed for the extended period by invoking the proviso of the Section 11A of Central Excise Act. We may take up the dispute in regard to each of items separately.

(i) Acid Resistance clay bricks - Only "fire clay bricks" were liable to duty during the relevant period. Other clay bricks were exempt or attracted NIL rate of duty. On this there is no dispute between the parties. The appellants were clearing the bricks under dispute under the name "acid resistance bricks" till 1992, after

payment of duty.

They started clearing the same brick as "acid resistance clay bricks" in 1992 under exemption. Prior to such exempt clearance, the appellant had filed classification list before the Central Excise authorities and had got the same approved. The appellant's claim that the bricks in question were not "fire clay bricks" was based on a test report dated 25.6.92 issued for their product by Central Glass and Ceramic Research Institute (Council of Scientific and Industrial Research, Government of India). The said report opined as under: Reference 10 your letter No. 280 of 28.5.92, please find enclosed our Test Certificate SI. No. GC/NC/275/2002 of 25th June, 92 for carrying out acid resistance and PCE tests of your Acid resisting clay bricks submitted to us.

From the perusal of test report. I am to state that the product can not be classified as fire clay bricks as it can not withstand high temperature application and can be classified as acid resistance (clay) bricks.

It may also be noted here that, with regard to PCE, the report stated as under: 3. The differential duty demand was made based on investigations and test of samples carried out by the Central Revenue Chemical Laboratory.

The Commissioner has held that the appellant has deliberately started misdeclaring the bricks as "Acid Resistance Clay_bricks" with intent to evade duty. He has also held that the appellant's bricks could withstand temperature upto 1520 degree centigrade and according to Lab.

report, such bricks have to be treated as refractory bricks and refractory bricks are fire bricks. He has also noted that the bricks were made from fire clay as stated by the appellant's own officer. The Commissioner has further noted that, according to report of the chemical examiner, the clay contained alumina. The Commissioner also noted that, according to HSN notes, bricks which can withstand temperature of 1500C and higher are refractory bricks.

4. In passing the order, the Commissioner overruled the appellant's contention that fire bricks and acid resistance bricks are commercially different and are for

different uses and fall under different standards of the IS.5. During the hearing of the case, learned Counsel for the appellant has submitted that acid resistance bricks in question do not satisfy the description of fire bricks under any parameters. It is being pointed out that commercially the appellant's bricks were always purchased by parties for use in environment requiring acid or alkali resistance, like masonry construction subject to acid attack, lining of chambers and tower in chemical plants,, linings of sewers carrying industrial effluents etc. and to prevent deterioration of surface by acid. It is the appellant's contention that fire clay bricks are, instead, used in environment involving high temperature during manufacturing process and high alumina content is an important requirement for imparting heat resistance. Learned Counsel has pointed out that according to IS specifications, fire bricks should withstand temperature of at least 1640 degree Centigrade. As against this, the appellant's PCE is "Between Orton Cone 17-18 (close to 18) (1520C)" Learned Counsel's submission is that the Commissioner's order which is contrary to commercial recognition as well as recognition by standards authorities is contrary to well settled principles of classification.

Learned Counsel has also contended that the reliance on note to HSN has not been correctly done inasmuch as commercial understanding in the country of taxation has to determine the classification rather than merely the characteristics mentioned in the HSN being satisfied. He has also submitted that the Commissioner has not understood the statement of the appellant's officer in the right perspective inasmuch as he had stated that the clay used by the appellant is fire clay of "low grade".

Appellant's record also showed that clay was drawn from different sources and not with regard to the qualities of fire clay. Learned Counsel has further pointed out that IS has laid down standards for fire clay also and the clay used by the appellant did not satisfy those standards. With regard to the CRCL report, the submission of the learned Counsel is that the observation in the report that the clay contained alumina did not help the Revenue inasmuch as alumina is a common ingredient in any soil and only when the required concentration for fire clay was present, the clay can be usable as fire clay in the manufacture of fire clay bricks.

6. Learned SDR would contend that since the bricks in question fell within the definition of refractory bricks (1500C and above) according to the report of Central Glass and Ceramic Research Institute, and MSN notes have clarified that bricks which can withstand 1500C and higher are refractory bricks the finding of the Commissioner is required to be confirmed. It is his submission that distinction made under the exemption notification and the tariff is between refractory bricks and other clay bricks and once the bricks have refractory property, it was not open to the assessee to claim that only bricks which satisfied the I.S. standard in regard to heat resistance can be treated as fire clay brick. The issue raised is as to the meaning and scope of the term "fire clay brick". It is not being disputed that the appellant's bricks are not bought by parties requiring fire clay brick and that they are being purchased only by parties requiring acid resistance brick. Thus, commercial identity is not in dispute. Classification in terms of commercial identity is being discarded by the Revenue authorities based on HSN explanatory notes relating to refractory items, Therefore, the question that arises is whether tax authorities are right in treating all refractory bricks as "fire clay bricks". Allowing such an expanded scope is not warranted since the taxing statute levies tax only on "fire clay bricks" and not on refractory bricks. A note in HSN is attracted only when there is doubt about the scope of the language in the statute. Present is not such a case. The words of exemption/tariff are clear "other than fire clay bricks", These terms should be understood in their commercial context since excise is a tax on traded goods and commercial understanding should be taken as the understanding of the statute also. Further, the standards laid down in the country help in understanding the scope of terms. IS specifications exist for the bricks in question. They recognise only bricks which withstand 1640C temperature as fire bricks. The standard also specifically indicate the types of clay which are suitable for making fire bricks Neither the clay used by the appellant nor the bricks produced by the appellant satisfy these standards. There is also no case made out that appellant is manufacturing and selling substandard fire bricks as acid resistance bricks. Instead, the evidence is positive that the appellant is producing and selling acid resistant bricks and not "fire clay bricks". Thus, under none of the accepted standards (commercial and technical) the appellants bricks fall under the dutiable item namely "fire bricks". With regard to HSN notes, it is to be observed

that they relate to refractory goods in general and not specifically to fire clay bricks, which is a narrower group. Further, while the note mentions.

1500C temperature and higher as refractory, it also mentions additionally that the goods must be 'designed' for high temperature work. HSN also covers goods for use in chemical industry' as refractory. Thus, HSN note is no authority for equating refractory bricks with fire clay bricks. All fire clay bricks would be refractory bricks; but all refractory bricks would not be fire clay bricks. The duty demand made and penalty imposed by the Commissioner cannot be sustained in these facts and circumstances of the case, They are required to be set aside.

(ii) Coal Ash: The ash in question is the result of burning coal in the appellant's factory. The submission of the appellant is that it is well settled that coal ash is not a manufactured product and cannot be subject to excise duty. There is merit in this contention of the appellant. This issue remains settled in favour of appellant by the ruling of the Hon'ble Supreme Court in the case of C.C.E. v. Swadeshi Cotton Mills Ltd. 1996 (82) ELT A160 (SC). Therefore, this demand and penalties relating to this are also not sustainable. We set them aside and allow the appeals on this issue also.

(iii) Stone Pipes. The appellant had cleared stone pipes declaring them as Salt glazed. And salt glazed pipes were exempt from duty.

The impugned order has held that the appellant's declaration that they were salt glazed was false and that the pipes in question were actually slip glazed. This finding has been reached based on the test report and opinion of the Chemical Examiner. The appellant's submission in defence was that the process followed by it was that of salt glazing. It was also submitted that, as an experiment, it had tried glazing some pipes with "GERU" and ferric oxide and this experiment was not successful. It is being pointed out that the test report dated 19.3.98, of the Central Glass and Ceramic Research Institute clearly brought out that this experiment did not succeed.

The Commissioner rejected the appellant's explanation with the observation that the sample tested by the Central Glass and Ceramic Research Institute had been

drawn behind the back of the Department and therefore, the report cannot be considered. It has also been noted that the assessee was required to disclose critical raw materials used by it along with manufacturing process under Rule 173B and since that had not been done in regard to the test production, the contention cannot be accepted.

8. The contention of the appellant before us is that the Commissioner's finding is incorrect and unjust. It is being submitted that requirement for filing declarations and payment of duty would arise only when commercial production and clearance is made and not in regard to experiments carried out. Learned Counsel has emphasized that the experimental nature of coating with "GERU" is clear from the report of the Central Glass and Ceramic Research Institute inasmuch as the report has brought out that this is not a satisfactory method. The contention of the learned Counsel is that, in any case, merely for the failure to report an experiment carried out, pipes manufactured under salt glazing method cannot be held to be slip glazed. Learned Counsel has also pointed out that the appellant had relied on the decision of this Tribunal in the case of C.C.E., Indore v. Perfect Stone Ware Pipes, Jabbalpur [Final Order No. 42/2001-D dated 29.1.2001]; but the same has not been considered by the Commissioner. Clearly, the adjudicating authority has not examined the dispute from all relevant aspects and record. The report of the Central Glass and Ceramic Research Institute states that the experiment of coating with GERU suspension is not a satisfactory method as it does not give proper glaze to the surface. This points to the experimental nature of the product. The Chemical Examiners opinion about the methods used for glazing would appear to be more theoretical than a finding as to what actually was carried out by the appellant in regard to the goods cleared as salt glazed. The Commissioner has also not considered the contemporary records about the manufacture, raw materials used and technology and machinery available with the appellant. As also the commercial identity (salt glazed or slip glazed) of the pipes cleared to various parties, In these circumstances, this issue is required to go back to the Commissioner for a detailed reconsideration (i) the duty demand and penalties attributable to fire clay bricks and coal ash are set aside, (ii) The dispute relating to glazing is remanded for a fresh decision after giving the appellant an opportunity to be heard in the matter.

11. All the appeals of the assesseees and officers of assesseees are ordered in the above terms.

12. Appeal No. E/3488/03 of the (revenue contends that Commissioner was in error in not imposing an amount equal to the! j duty demand as penalty. The contention) is that such quantum of penalty is mandatory under Section 11 AC of Central Excise Act, 1944.

13. There is no merit in this contention as it is well settled that quantum of penalty is discretionary. Moreover, we have set aside bulk of the duty demands as not sustainable. In view of this, revenue's appeal fails and is rejected.

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