

C.C.E. Vs. India Explosives Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-12-1988

Reported in : (1988)(18)LC426Tri(Delhi)

Judge : S Jha, Vice-, R T I.J., G T V.P.

Appellant : C.C.E.

Respondent : India Explosives Ltd.

Judgement :

1. The first question that arises for decision in this appeal alongwith cross objection is whether the respondents were entitled to the deduction of Fertilizer Pool Equalisation Charges (FPFC) between 18 7 1975 to 7.8.1975 and, if so, how much. The second question that is to be decided, if necessary, the demands raised against the respondent we barred by limitation. The Assistant Collector held that they arc not caused to any deduction of FPFC whereas in appeal the Collector of Central Fx.sse (Appeals) allowed the deduction of Rs, 335/-for the purpose of assessable value.

2 The facts that led to these questions relate entirely to legalities.

Briefly these facts are that Notification No. 108/74 (as amended) exempted fertilizer specified therein from so much of duty of excise leviabale thereon as these equivalent to the duty calculated on the value specified in the corresponding entry in column 3 of the table annexed to the Notification. There is no dispute that the

respondents manufactured Urea and the levy of exemption is Rs. 610/- per M.T. The Notification is to apply to only those manu-facturers who before clearing the fertilizer specified in the table undertake to credit the amount specified in the corresponding entry column 3 of the said table into Fertilizer Pool Equalisation funds in accordance with the directions issued by the Central Government (emphasis supplied) and produces evidence thereof. The respondents were availing of the benefit of reduction of the assessable value by Rs. 610/- till 16.7.1975. The respondents were informed by a telegram from the Ministry of Agriculture & Irrigation dated 18th July, 1975, that Government of India had decided to reduce the retail prices of fertilizer including Urea from that date and consequently while reducing maximum retail prices for Urea they also reduced the equalisation charge leviable on Urea to Rs. 335/- only. The respondents immediately revised their assessable value and began to deduct Rs. 355/- per M.T. from the assessable value, Notification No. 108/74-CE dated 20.6.1974 was amended by issue of a Notification No. 178/75 which corrected the table. In so far as the respondents are concerned, serial No. 1 (for Urea) the entry of Rs. 610/ was to be amended to Rs. 335/-. This Notification was issued on 8th August, 1975.

3. In the background of these facts, it appeared to the Assistant Collr. that in as much as there is no Notification of the Ministry of Finance during the period 18.7.1975 to 7.8.1975 allowing deduction on account of FPEC, no such deduction was allowed. Therefore, the Assistant Collector issued a show cause notice and after due process held that no Notification was issued by the Ministry of Finance, the directions issued by the Ministry of Agriculture were not binding. The respondents were not entitled to any deduction on account of FPEC during the relevant period. The respondent also pleaded before him that as there was an approved price list allowing the deduction the demand would be time-barred, being beyond the period of limitation prescribed by Rule 10. He rejected this argument holding that for claiming the concession the respondent should have claimed the same on the classification list and not on the price list.

4. The Collector (Appeals) held that the appellants had a case both on merits and on limitation. In his view the instructions of the Ministry of Agriculture and the grant of exemption by Ministry of Finance were parts of package scheme and their effect

would have to be simultaneous.

On limitation Collector held that the show cause notice did not allege the existence of any of the special circumstances which alone would have permitted the substitution of extended period of five years. He allowed the appeal and hence the present appeal filed by the Collector Shri G.V. Naik, JCDR reiterating the appeal submitted that Notification No. 178/75-CE could not be applied retrospectively as was wrongly done by the Collector. He justified the application Under Rule 10(A). He submitted that only Notification issued by the Ministry of Finance could be applied in respect of assessment to Central Excise duty. He admitted that the Assistant Collector was wrong in alleging the fraudulent action by the respondents. As a consequence and in the absence of any fraudulent act Under Rule 10A was the only way to recover the duty. He further pleaded that the price list was approved conditionally and there was not any error nor mis-construction on the part of the Department.

5. Shri Bhaskar Gupta, Learned Advocate for the respondents submitted that the Government's policy was to maintain a particular price for the fertilizers and the deduction, subject to condition, of FPEC from the assessable value as was ordered as a result of such policy. He submitted that the price list was approved on 29.11.1975 long after issue of Notification No. 178/75 dated 8.8.1975. He submitted that if the legal position as seen by the Assistant Collector and explained by the JCDR is correct and there was an error or mis-construction in interpreting of the Notification resulting in mis-construction thereof.

Secondly only Rule 10 has to be applied and only normal period of limitation thereunder would apply. He further submitted that Government of India consists of several Ministries including the Ministry of Agriculture and as far as possible the respondents are concerned with an order issued by Ministry of Agriculture has equal force. He also argued that Notification No. 178/75 was a clarificatory nature and, therefore, had retrospective effect. In each rejoinder the learned JCDR denied that the Notification was of such a nature.

6. We have considered the arguments of both sides. Rule 8(1) of Central Excise Rules, 1944 - in itself a piece of subordinate legislation-empowers the Central

Government by Notification in the Official Gazette to exempt, subject to such condition as may be specified therein, any excisable goods from the whole or any part of duty leviable on such goods. Irrespective of Government's policy as conveyed to respondents by Ministry of Agriculture & Irrigation's telegram dated 18th July, 1975, the fact remains that between 8.7.1975 and 7.8.1975 there was no exemption notification available to the respondents. In *Bakul Cashew Co. and Ors. v. Sales Tax Officer, Quilon* AIR 1987 SC 2239 it has been held that an authority which has the power to make subordinate legislation cannot make it with retrospective effect unless it is so authorised by the legislature which has conferred that power on it. In view of all this the Notification No.178/75 could not be given effect to retrospectively. Besides, we have also perused Notification No. 178/75 and find nothing therein to justify an argument that it is of a clarificatory nature. We, therefore, hold that the respondents were not entitled to benefit under the notification and consequent benefit in assessment between the dates 18.7.1975 to 7.8.1975.

7. In so far as limitation is concerned, we note that there is nothing to show any fraudulent act on the part of the respondents. On the other hand it is clear that they acted under a bona fide belief that what they were doing was correct. They cannot be blamed for this. However, at the appropriate time (show cause notice was issued on 16.5.1975) only normal limitation under Rule 10 Central Excise Rules read with Rule 173J thereof namely one year was available. The alternate rule under which the demand could be made and was made is Rule 10A. In the circumstances, as discussed by us, there was an error or mis-construction in respect of understanding the Notification No.178/75 on the part of the respondents and, at the relevant time, on the part of the Department also. Therefore, Rule 10A cannot be applied in this case. Only Rule 10 was available and the show cause notice having been issued on 16.5.1975 for the period 18.7,1975 to 7.8.1975, the same was time-barred.

8. The appeal is, therefore, dismissed. We, therefore, hold that on merits the Revenue have succeeded but the demand cannot be enforced as it is hit by limitation. We order accordingly. The Cross Objection abates in view of this order.

1. I agree with Brother Rao that the appeal should be dismissed but in my view it should be dismissed both on merits as also on the demand being hit by limitation. I would like to record my reasons for this view.

2. While there can be no quarrel with Shri Naik's submission that a notification issued under Sub-rule (1) of Rule 8 of Central Excise Rules, 1944 would operate not retrospectively but prospectively, we observe that exemption under Notification No. 108/74 dated 20th June, 1974 is subject to the conditions set out in para 2 of the notification. Notification No. 178/75 dated 8.8.1975 in Serial No. 1 for the entry Rs 610/- substituted Rs. 335/-. Clause 2 of the main Notification No. 108/74 inter alia stipulates an undertaking to credit the amount specified in the notification into Fertilizer Pool Equalisation Fund in accordance with the directions issued by Central Government and producing within 60 days of the date of clearance of the, said fertilizer sufficient proof to the satisfaction of the proper officer that the amount has been so credited. While this notification has been issued by the Ministry of Finance, Clause 2 of the notification refers to directions issued by Central Government. This direction naturally would not be from Ministry of Finance, Central Government but from Ministry of Agriculture. We have on file Ministry of Agriculture and Irrigation notification G.S.R. 418(E) New Delhi dated 18th July, 1975 synchronising with the telegraphic direction issued by Ministry of Agriculture. The exemption under the notification is available, as already referred to above, on producing sufficient proof to the satisfaction of the proper officer of credit of the amount within 60 days from the date of clearance. Before this 60 days expired the amending Notification No. 178/75 had been issued on 8.8.1975. It may be pointed out that under Article 77(3) of Constitution of India the President shall make rules for the more convenient transaction of the business of the Government of India and for the allocation among Ministers of the said business. A notification issued by Ministry of Agriculture is as much a notification issued by Government of India as a notification issued by Ministry of Finance. The two are entitled in their own spheres to equal weight and an attempt should be made to read and interpret them harmoniously and not in an isolated way. Reading the two together, it appears to us that the Collector (Appeals) committed no error in holding that even on merits the respondents were entitled to relief under the notification.

3. I agree with Brother Shri Rao that the appeal should be dismissed on the grounds of limitation and Brother Shri S.D. Jha, Vice-President that on merits also the respondents are entitled to relief as held by the Collector (Appeals).

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