Orient Cement Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-26-1988

Reported in : (1989)(23)LC605Tri(Delhi)

Judge : G Sankaran, S Vice-, V Raghavachari, V Gulati

Appellant : Orient Cement

Respondent : Collector of Central Excise

Judgement :

1. This is an appeal against the order of the Collector of Central Excise, Hyderabad. The point involved in this appeal is classification of ANFO. This product is formed by mixing ammonium nitrate of explosive grade with small quantities of fuel oil and is used for the purpose of the blasting the rocks.

2. The show cause notice dated 5.1.1987 was issued to the appellants by the Collector demanding duty for the period 1.3.1986 to 31.10.1986 and the duty was demanded under Rule 9(2) read with Rule 11A of the Central Excise Rules invoking the longer time limit of 5 years and he also invoked Rule 9(2) and Rule 173Q for levy of penalty.

3. The appellants pleaded before the Collector that goods were not leviable to Central Excise duty as prepared explosives. The appellants stated that there was no suppression of fact on their part as there was no question of levy of duty on the mixture of ammonium nitrate and furnace oil. The Collector however, confirmed

the demand of duty as raised in the show cause notice and also levied a penalty of Rs. 5,000/- on the appellants. The appellants were sent a notice of hearing before the Tribunal. They have however, sent written submissions and have requested that the case be decided on the basis of their written submissions. The appellants have taken note of the order of the Tribunal bearing No. 103/88-C dated 2.2.1988 passed in Appeal No.E/2568/87-C in the case of M\s. Kesoram Cement by which ANFO has been held to be liable to Central Excise duty as prepared explosive under Chapter 36 of CET They have pleaded that in that case, the Tribunal had remanded the matter to lower authority for consideration of MODVAT credit and pleaded that inasmuch as they were also under the bona fide impression and belief that no duty was chargeable on the mixture ANFO, they also did not make any application for MODVAT benefit and that their case should also be considered for availment of MODVAT. They have further pleaded that Tribunal in the order cited, have held the ANFO as prepared explosive based on the Harmonised Coding system of CCCN and explanatory notes thereto and pleaded that no reliance should be placed on this nomenclature as no statutory basis exists for the same. They have also stated that ANFO was not being charged to duty in any other Collectorate. They have also stated that this Tribunal in the case of Food Corporation of India v. Collector of Central Excise, Patna 1987 (12) ECR 1005 have held that ammonium nitrate (Melt)/prills would not be a fertilizer but would merit assessment based on its end use as explosive grade ammonium nitrate and pleaded that in this view of the matter, samples of the ammonium nitrate should be tested to find out whether ammonium nitrate is explosive or not. The plea is that ammonium nitrate itself is an expolosive and that there can be no further duty on the mixture as it would amount to double taxation.

4. We observe that this matter was listed for hearing along with Appeal No. 462/88-C pertaining to M/s. Singareni Colleries 1988 (17) ECR 600 Cegat and the pleas made on merits by the appellants have been taken note of in that case and this Tribunal has passed order in that case holding ANFO assessable to duty under Chapter 36 of CET. Adopting the ratio of that decision, we hold that ANFO has been correctly charged to duty under Chapter 36 of the Central Excise Tariff. So far as the plea of the consideration for MODVAT is concerned, there is nothing on record that appellants made such a plea before the Collector. In any case, they

should approach the Collector in this regard and he should examine the case in terms of the relevant provisions of the Central Excise Rules and law and allow the of MODVAT if they are entitled for the same under the law.

5. We find in this case a penalty of Rs. 5,000/- has been levied on the appellants and the demand has also been raised beyond the period of six months invoking the longer period of 5 years. We observe that the facts and circumstances in this case are similar to those in the case of Singareni Colleries referred to supra and Collector in that case has refrained from levy of penalty against the appellants. On similar facts and circumstances, we have held in the case of Singareni Colleries that longer time limit beyond six months period cannot be invoked as there are no findings from the Collector that the appellants cleared the goods in contravention of the provisions of the Central Excise law with the intent to evade payment of duty.

6. As in the other case, we find that here also it is reasonable to accept that in the facts and circumstances of the case, the appellants bona finely believed that no duty was leviable on the goods. In view of this, we hold following the ratio of our decision in the case of Singareni Colleries that longer time limit for raising the demand could not be invoked and demand should be limited to six months period reckoned from the receipt of the show cause notice by the appellants.

7. In regard to the levy of penalty as observed by us the Collector on the same facts and circumstances, refrained from levy of the same on the assessees in the Singareni Colleries case. In view of this and also what we have held above, we hold that the levy of penalty is not called for in this case and we set aside the order of the levy of penalty.

The appeal is thus partially allowed in the above terms with consequential relief.