

Unique Industries Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-10-1988

Reported in : (1989)(19)ECC36

Appellant : Unique Industries

Respondent : C.C.E.

Judgement :

1. In this case, appellants have been charged with contravention of Rules 174,9(1), 52-A, 173-B, 173-C, 173-D, 173-F & 173-G of Central Excise Rules, 1944 for allegedly manufacturing, with the aid of power, steel furniture valued at Rs. 4,29,750/- during the year 1971 -72 and valued at Rs. 5,96,973/- during the year 1972-73 (upto 4.1.1973), without applying for a Central Excise licence and clearing the same without payment of Central Excise duty and without maintaining production and clearance records.

2. Appellants have in the first instance contested that the impugned products were covered under Central Excise Tariff Item No. 40 on the ground that the goods in question are supplied by them to hospitals and are known in common parlance as hospital equipment and not as hospital furniture. Appellants also took the stand that the goods were not ordinarily manufactured with the aid of power. It is admitted that power was being used for drilling holes in respect of certain pieces at the time of the visit of the Central Excise Officer, but this, it is submitted, was done by the workers in their anxiety to complete the work for timely supply of the goods against the contract entered into by them.

3. The matter was adjudicated by the Collector of Central Excise, Delhi. He held that the articles manufactured by the appellants namely, head bows, beds sheet, instrument trollies, uppor bow for foot end, invalid wheel chair, instrument and dressing trolley and lower bow for foot end, were steel furniture on the ground that "these can be used in offices, homes and including hospitals".

The learned Collector referred to the letter of Ministry of Finance (D R & I) No. B/2/2/68-CX.I dated 25.3.1968 according to which furniture included all movable articles which had the essential characteristic that they were constructed for placing on the floor or ground and which were used mainly for the utilitarian purpose to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafe, restaurants, laboratories, hospitals, dentists, surgeries, etc. In the light of this definition, the Collector held that the impugned goods were classifiable as furniture under Tariff Item 40-CET.4. As regards the defence of the appellants that the use of power which was observed at the time of visit of the Central Excise Officers was a solitary instance to meet the dead line for supply of goods, it was held that this, in the absence of any other evidence, "would indeed be purely presumptuous". Seizure effected on 9.1.1973 was therefore held to be in order.

5. So far as production prior to 9.1.1973 is concerned, the Collector allowed the appellants the benefit of doubt, accepting their version that they did not use power during the relevant period. This was done keeping in view the statement of Shri Kamla Pat Jain partner of the firm on 9.1.1973 made on the day of seizure. The Collector also took into account the fact that the appellants made use of gas welding set and purchased a large quantity of gas for use in the manufacture of furniture.

6. The learned Collector held that the allegation of use of power was sustainable In respect of the days production on 9.1.1973 although he refused to accept the department's allegation that the power was being used regularly for manufacturing office furniture In the preceding years. Collector upheld seizure of electric machines, namely one drilling machine, one spray painting unit and 3 electric welding sets, totally valued at Rs. 2,500/-.

7. In view of the foregoing findings, the Collector ordered confiscation not only of the seized steel furniture but also machinery used for manufacture of steel furniture valued Rs. 12,725/-. The appellants were given the option to redeem the goods on payment of redemption fine of Rs. 2,500/-. Personal penalty of Rs. 20,000/- was also Imposed under Rule 173Q of Central Excise Rules, 1944. It is against this order that appellants have come up in appeal before us.

8. We have heard Shri M. Ganesan, Advocate for the appellants and Shri K.C. Sachar, JDR for the department.

9. The learned advocate has reiterated the view taken before the lower authorities. He relies on the judgment of the Allahabad High Court in the case of Imperial Surgical Industries. The Commissioner of Sales Tax-1969(23) S.T.C.201 (All.) In which It was held that Hospital furniture is not furniture. The decision of the Bombay High Court In the case of Commissioner of Sales Tax v. Associated Dental & Medical Supply Co. -1976 (37) S.T.C. 336 in which it was held that the dentists chairs are not furniture, has also been eked in their favour by the appellants. It is submitted that power is not normally used by appellants in the manufacture of hospital furniture, and, in view of the tariff description, which extends the levy only to furniture "in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power," Item 40-CET will not cover the goods of the appellants.

10. It is also submitted that the redemption-fine is excessive. The days production, which was seized, valued only Rs. 10,225/-. The redemption fine therefore should have been well below that amount and not more than 25%. It is also submitted that Rs. 20,000/- is an highly excessive penalty.

11. The learned departmental representative supports the view taken in the order of the Collector. However, he has no comments to make in the light of the case law died by the appellants on the Sales Tax side, regarding the scope of the relevant entry tariff.

12. It is necessary in the first instance to examine whether the parts which were seized and finally confiscated by the department, were of furniture which can be

classifiable under Central Excise Tariff Item 40. When the officers of the department visited the factory, they found that the electric drilling machine was used for making holes in the Instrument trolleys. Now instrument trollies as well as other items manufactured by the firm, such as head bows, beds sheet, upper bow for foot end, invalid wheel chair etc. are undoubtedly hospital furniture.

The question arises whether such hospital furniture is covered by the Central Excise Tariff Item 40. As per the clarification issued by the Central Board of Excise and Customs vide their F. No. 33/26/68-CX. VII dated 21.11.1968, only movable articles which have the essential characteristic that they are constructed for placing on the floor or ground and which are used mainly for the utilitarian purpose to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes were also held specifically to include such article meant for use in laboratories, hospitals, dentists, surgeries etc.

Notification No. 70/83 dated 1.3.1983 specifically exempted certain items of hospital furniture from the levy of Central Excise duty under Item No. 40-CET including wheel chair, medical table, operation table, plaster table, special hospital bed, maternity cot (with or without crib), surgical instrument cabinet, patient trolley hydraulically operated dental chair etc. As per this notification of the Central Government hospital furniture as was covered under Item No. 40-CET.13. Appellants have strongly contended before us, relying on the decision of the Allahabad High Court in the case of Imperial Surgical Industries that the goods manufactured by them were in the nature of the hospital equipment and could not be considered to be furniture. The Allahabad High Court while deciding a sales tax matter had taken the view that the design of the goods in question was such that they could not be used as furniture. The department had not been able to show by reasons of description and design, that the articles in question were liable to be described as furniture. The High Court also held that to decide whether certain articles are furniture or not, the test should be not whether the articles were capable of use as furniture but whether they were ordinarily so used and whether this could be accepted as such by the merchantile community and the consumer public. The imposition of a technical or artificial meaning to the entry furniture will result in the defeating and frustrating the intention behind the provisions, it was

held.14. The above decision was taken by the Allahabad High Court on 1.11.1968 and it was on the Sales Tax side. The question of liability of hospital furniture under Central Excise Tariff Item 40 came in for consideration more recently by the Supreme Court in the case of Elpro International Ltd. and Ors. v. Joint Secretary, Govt. of India, Ministry of Finance and Ors. -1985 (19) ELT 3(S.C.). In this matter the High Court of Bombay had taken the view that operation tables, which were manufactured by Elpro International Ltd., did not come within the purview of Item No. 40-CET. However, so far as X-ray protective screens were covered, they were held by the Bombay High Court to be steel furniture within the meaning of Item No. 40-CET. The Supreme Court held that the reasons for the view taken by the High Court in respect of operation tables were cogent and sound and agreed with the High Court entirely. The Supreme Court of course did not consider the question with reference to X-ray protective screens.

15. The Supreme Court also held in Civil Appeal No. 2643 of 1980 that orthopaedic and fracture tables manufactured by the appellant Company were not covered by Central Excise Tariff Item 40.

16. In view of the decision of the Supreme Court in the case of Elpro International Ltd. in which the view taken by the Bombay High Court on the scope of Central Excise Tariff Item 40 was upheld, we have to be guided by the said judgment of the Bombay High Court.

17. The Bombay High Court took into account the view taken in M/s.

Chandan Metal Products (P) Ltd. case as well as the definition of furniture in Shorter Oxford English Dictionary, the Webster's Third New International Dictionary, and the Random House Dictionary and observed that the Item 'Steel Furniture' in Item No. 40 has to be understood keeping in view the facts that under the first Schedule of the Central Excise Tariff, the classification is resorted to so that items are included under different headings, such as, food, beverage, crude materials, minerals, fuel etc. Furniture comes under the heading "manufactured goods" and, therefore, the emphasis appeared to be on the metal out of which it is prepared. Accordingly the High Court observed, furniture may have to be interpreted as understood by a common man in common parlance.

In the above context, the definition of furniture in the Oxford English Dictionary had also been referred to by the High Court as under: "Movable articles, whether useful or ornamental, in a dwelling house, place of business or public building. Formally including also the finings." In view of this definition, It was observed that it is necessary for purposes of classification to bear in mind the concept of decoration as well as utility and specific use in the dwelling house or place of business or some other building.

In the Random House Dictionary, the definition of the word 'furniture' covers: (i) Movable articles, such as tables, chairs, desks, cabinets etc.

required for use or ornament in a house, office or the like.

(iii) Also called bearer, dead metal, print pieces of wood or metal etc.

The High Court observed that keeping in view the approach that the definition of the Item should be on the basis of words understood by a common man in common parlance, we would have to omit Items (ii) and (iii) of Random House Dictionary and Centre around Item No. (I). It was added that it was necessary to find out whether the Impugned items were having the purpose of convenience-cum-decoration or they have some different specific utility value.

In the words of the High Court: "When the word furniture' is thus to be understood in common parlance in our opinion, this concept of user and perhaps also of the price to be paid for those items, would offer us a good guide in concluding whether they are pieces of furniture". In this connection the High Court took note of the fact that the prices of the operation tables ranged from Rs. 7,500/- to Rs. 15,000/- and observed that no ordinary reasonable person with any sense of responsibility could classify such Items as pieces of furniture.

18. Significantly, in the Elpro International Ltd. case, operation table was held to be not classifiable as steel furniture under Central Excise Tariff Item 40, not because It was hospital furniture. It was noted that the item consisted of an iron stand with a number of controls, with the table top over which some mechanical gadget was fixed. Above this, there were three pieces of metal which could be

converted into a plain type of bedding in horizontal position, but, with the help of different manoeuvrings, could be converted into various types of positions in respect of the flat tops which, prima facie, appeared useful in attending to the patients for different requirements and when the patients were required to be kept in different positions. It was a sophisticated mechanism for manoeuvring having also certain bars attached to both sides of the Central piece for placing instruments, such as, saline bottles. It was therefore that it was held that it would not be classifiable as furniture.

19. In the light of the decision of the Supreme Court and the Bombay High Court in the case of Elpro International Ltd., it would appear that the ratio is as follows: (a) Hospital furniture as such is not excluded from the scope of Central Excise Tariff Item 40; decision has to be taken on merits of each case; (b) High Cost items of sophisticated nature used as medical equipment such as operation tables, orthopaedic and fracture tables etc. would stand excluded from Central Excise Tariff Item 40; (c) Concept of user and also price may be a useful guide while taking a decision; (d) The common parlance test will finally decide whether the goods in question are hospital furniture falling within the Central Excise Tariff Item 40 or specialised medical equipment excluded therefrom.

20. While considering common parlance, one has to take a view as regards commercial and trade understanding. The common parlance must be related to those who are dealing in furniture and who are concerned with the trade and industry. For ascertaining the commercial understanding, we have to familiarise ourselves with the trade nomenclature. It is, in this context, that the instructions of the Central Board of Excise & Customs issued as far back as in 1968 relied on the Explanatory Notes to the B.T.N., which specifically included furniture used mainly for utilitarian purpose to equip, apart from other places, hospitals.

21. Now, what are the products being made by the appellants. They are making head bows, bed sheets, instrument trollies, upper bow for foot end, instrument and dressing trolley, lower bow for foot end and invalid wheel chairs. Clearly, these are all items which are commonly used in hospitals. They may not be items of decoration but they are certainly items for providing convenience and comfort to

patients. It is not shown or claimed before us that are high cost items of sophisticated nature classifiable as specialised medical equipment. I am, therefore, of the opinion that the items which are referred to in the order-in-appeal would be classifiable under Central Excise Tariff Item 40 provided it can be shown that they are ordinarily manufactured with the aid of power.

22. The learned Collector has accepted the submissions of the appellants that they were manufacturing steel furniture essentially by using gas operated welding sets. The purchase of large quantity of gas by the appellant has been considered as establishing the veracity of the appellants. The Collector also held that there was no appreciable increase in the consumption of electricity when the items of steel furniture under reference were manufactured and has therefore given the appellants benefit of doubt so far as the demand of duty for the period 1971-72 and 1972-73 is concerned which has been set aside by mm.

23. That leaves the question of confiscation of the production of 9.1.1973.1 find that when the Centra Excise Officer visited the premises of the appellants on 9.1.1973, power was being used in the production of the goods. This is admitted in the statement of the partner of the firm. Therefore the confiscation of the goods, including the electric machines used, has to be upheld.24. The total value of the steel furniture in question works out to Rs. 10,225/- and the power operated machinery is valued at Rs. 2,500/-. As against this the redemption fine imposed is only Rs. 2,500/-. This is not considered disproportionate and is also upheld.25. As regards penalty, it is a serious matter indeed that on the one hand appellants claim exemption on the ground that they are manufacturing furniture without the aid of power and on the other hand they are found to be undertaking production with the aid of power. This justified imposition of heavy penalty. On the other hand, the Collector has himself taken the view that there is no evidence that appellants have been undertaking production with the aid of power prior to 9.1.1973 and given them the benefit of doubt. Keeping in view all the facts and the circumstances of the case, I reduce the personal penalty from Rs. 20,000/- to Rs. 5,000/-.

26. I have read the order proposed by Brother Prakash Anand but, to my regret, I am unable to agree with his conclusion.

27. Allahabad High Court's judgment in the case of Imperial Surgico Industries, Lucknow v. Commissioner, Sales Tax, Uttar Pradesh, Lucknow (1969) 23 STC 201 (All.) was no doubt a decision rendered in the context of the entries in the UP. Sales Tax Act read with notification dated 31.3.1956 issued under that Act. The issue before the Court was determination of the scope of item "furniture" at serial number 14 in the list appended to that notification. The entry in Item 40 of the Central Excise Tariff Schedule is "steel furniture" made partly or wholly of steel, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power, whether in assembled or unassembled condition and parts of such steel furniture (but excluding slotted angles and channels made of steel)". This entry is wider than the sales tax entry, in that it covers not only "steel furniture" but also parts thereof excluding specified items. However, the interpretation put on the term "furniture" by the Allahabad High Court would be, in my view, relevant for our present purpose.

28. The goods in the case before the Allahabad High Court were operation tables, beds including Fowler beds, bedside lockers, dressing carriages, instrument cabinets, revolving stools, instrument trolleys, instrument tables and self-propelling chairs. The contention for the Revenue was that these goods though intended for use in hospitals were amenable to comparable use in dwellings. They corresponded, with some variations, to articles in normal use. Nothing in their design or equipment precluded them from being put to domestic use. The Court observed from the catalogue produced by the assessee that the goods were specially designed for use in hospitals and were described as hospital equipment. The Revenue's contention that the description and design of the articles did not preclude them from being used as domestic furniture was not accepted by the Court. The test, in the Court's opinion, was not whether the articles were capable of being used as domestic furniture, but whether they were ordinarily so used and could be accepted as such according to the general or popular notion of what furniture was. In this view of the matter, the Court held that the goods were not "furniture" within the meaning of the entry in the sales tax notification.

29. In the present case, the goods are Head Bows, Bed sheets, Instrument Trolleys, Upper Bows, Wheel Chair, Instrument/Dressing Trolley. The appellants

have produced for our perusal a catalogue of similar products manufactured by Paul Engineers. New Delhi, as also a leaflet of their own goods. It is seen from the catalogue that the Upper Bow, Lower Bow and Head Bow are parts of Fowler Position Bedstead. The Bedstead, in its construction, is certainly not similar to ordinary bedsteads used in households. Besides, the bedstead is fitted with wheels, evidently for ease of mobility, a feature not to be found in domestic bedsteads. The Invalid Wheel Chair, though could be used in households, is essentially an article of common use in hospitals. Instrument Trolley and Dressing Trolley as seen from the appellants catalogue has got provision for attachment of a basin and the bowl which are not normal attachment to domestic or office trollies. The bed seat as seen from the catalogue appears to be similar to that used in camp cots. However, the contention of the appellants is that these are for use in hospitals and, their contention seems to be justified, applying the ratio of the Allahabad High Court judgment in the case of Imperial Surgico Industries (supra). Brother Prakash Anand also in his order accepts that these are hospital furniture. We may therefore proceed on the basis that the Revenue has not established by placing supporting material on record that these are "furniture" to be commonly found or similar to those commonly found in households, offices/public and private buildings. Nor has the Revenue rebutted the appellants' contentions that these are hospital furniture.

30. The question remains whether hospital furniture would be covered by Initiated "furniture". This is the precise question which was gone into by the Allahabad High Court in the Imperial Surgico Industries case.

The Court held that the test was not whether the articles were capable of being used as furniture in households or similar places but whether they were ordinarily so used and could be accepted as such according to the general or popular notion of what furniture was. On this point there is no material on record except a catalogue published by Paul Engineers on similar products manufactured by them and the appellants' own leaflet. Applying the ratio of the Allahabad High Court judgment, the present goods must also be held to be not "furniture" within the meaning of Item 40 CET.³¹ In the case of Elpro International Ltd. (supra) the goods in dispute were operation tables no doubt equipped with sophisticated

devices and accessories to make them particularly suitable for surgical purposes. Apart from the special features of the operation table, they were not considered as "furniture" applying the common parlance test. I do not think it is permissible to invoke the aid of explanatory notes in the Customs Cooperation Council Nomenclature to interpret the entries in CET Schedule for the reason that the two Tariff Schedules are not *pari materia* and the CET was not, at the relevant time, patterned on the basis of CCCN.³² In the above view of the matter, I am of the opinion that it has not been shown that the goods in dispute in the present case fall under Item 40 CET. As such I would propose an order setting aside the impugned order and allowing the appeal.

Of these items 1,2,4 and 7 are but parts while items 3, 5 and 6 are complete articles by themselves. The question is whether these completed articles would be furniture and the other parts of steel furniture, both falling under Item 40-CET.³³ After having carefully perused the orders prepared by Shri Anand and the Senior Vice-President I agree with the Senior Vice-President as to his reasoning and the conclusion as to the disposal of the appeal.

However, I am writing this separate order only to express another view point with reference to the appreciation of the evidence and the conclusion drawn by the Collector under the impugned order and the effect of the said conclusion with reference to the operative portion of his order. The charge against the appellants in the show cause notice was that they had been manufacturing the abovesaid articles which were liable for duty under Item 40 CET but without taking out a licence and had been removing the same without payment of duty. Some articles had been seized on 9.1.1973 on the date of visit. In his order the Collector holds that the use of electricity prior to 9.1.1973 has not been established beyond doubt. Therefore, he does not call for payment of duty in respect of removals affected before 9.1.1973. In effect, therefore, duty would become payable only with reference to the articles seized on 9.1.1973. In coming to the conclusion that these articles were liable for classification under Item 40 CET, and were thus excisable, the Collector relies upon the statement of Shri Kamalpath Jain recorded on 9.1.1973. In that statement he had admitted that at the time of visit electric drilling machine was being used for making holes in the instrument trolley. In his order the

Collector had in one portion of his order held "to accept that this was a solitary one day incident to meet the time deadline would, in the absence of any other evidence, indeed be purely presumptuous. Accordingly, I hold the seizure effected on 9.1.1973 is in order". But In the next paragraph he has held "I am inclined to give benefit of doubt and accept the version of the party that they have not used power in the manufacture of steel furniture during the abovesaid period (previous to 9.1.1973) on account of the following reasons". The reasons stated in the subsequent paragraphs are: 1. The statement of Shri Kamalpath Jain was in respect of use of electricity on 9.1.1973 only.

2. The quantum of electricity used as seen from the records does not support the case of use of electricity for manufacture of furniture in the earlier period.

3. The allegation of the Department (evidently in the show cause notice, copy of which is not available to us) was that power was found being used for making holes in the Instrument Trolley, and evidently not in other things.

34. Therefore, while the Collector has specifically held that there was no acceptable evidence of use of electric power in the manufacture of steel furniture prior to 9.1.1973, he had at the same time held that the stock found on 9.1.1973 was properly seized as the same had been manufactured with the aid of power.

35. When we look into the number of pieces seized his conclusion that all of them should have been manufactured with the aid of power is not acceptable since it is apparent that not all of them could have been manufactured on 9.1.1973 itself. Further, of ail the seized articles only one was Instrument Trolley and the other an Instrument-cum-Dressing Trolley, all the rest being other articles only. If power was being used (as held by the Collector) with reference to making holes in the Instrument Trollies the conclusion that the other seized articles should also have been manufactured with the aid of power cannot be supported.

36. Therefore, it appears to me that the Collector's order would be incorrect (even following his own findings) except with reference to one Instrument Trolley and, possibly, an Instrument-cum-Dressing Trolley. It, therefore, appears to me that for this reason itself the Collector's order has to be substantially set aside except to

the limited extent mentioned above.

37. However, I agree that the order is to be entirely set aside for the reasons stated by the Senior Vice-President.

38. I, therefore, agree that the appeal is to be allowed and the impugned order set aside with consequential relief if any.

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