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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-26-1988

Reported in : (1989)(21)LC14Tri(Delhi)

Appellant : Patna Estate Graphite Mining Co.

Respondent : C.C.E.

Judgement :

1. As these two appeals involve common question of law and facts, they are clubbed together. Hence, this is common order.

2. Subject of challenge in Appeal No. 1637/86-C is the demand of duty of Rs. 2,33,031.61 for the year 1979-80.

3. Subject of challenge in Appeal No. 1638/86-C is the demand of duty of Rs. 2,04,782.19 for 1980-81.

4. According to the Department, the appellants are manufacturer of Graphite Crucibles and Graphite powder. The clearances of their manufacturing product during the year 1979-80, according to the Department, was more than the value of Rs. 30 lacs and as such, they were called upon to pay duty under two different show cause notices dated 19.1.82 and 14.7.1982 respectively.

5. Appellants among other things contended in their replies to the show cause notices that no duty is demandable in respect of Graphite crucible and Graphite powder by reason of Exemption Notification. They also urged that the demands

are barred by time. Initially the Assistant Collector who held adjudication rejected both the contentions and confirmed the demands.

6. On appeal, Collector (Appeals) set aside the Assistant Collector's order and demanded the matter for fresh disposal in accordance with law after observing the principles of natural justice. After remand, the Assistant Collector again confirmed the demands.

7. As regards the question of limitation the Assistant Collector observed that "Coming to the applicability of Section 11A on the ground of absence of malafide intention, it must be pointed out that though the party has placed all the information before the departmental officers, they have only done so when asked. The fact that they have not filed any classification list under Rule 173B which was made applicable to T. I. 68 w.e.f. 1.8.79 vide Notification No. 235/79 dated 23.7.79, nor have they filed any declaration as required under Notification No. 111/78 as amended, lends strong evidence to the fact that all the while they have kept the department in dark about the manufacture and clearance of Graphite powder/special dust and have thereby wrongly availed of the exemption under Notification No. 105/80 dated 19.6.80 as amended." 8. On appeal, the Collector (Appeals), however, proceeded on the footing that earlier the remand order did not require the Assistant Collector to consider the question of limitation and the only aspect required to be examined is regarding clearance value of the appellants during the year 1979-80 and on that basis he confirmed the order of the Assistant Collector.

9. During the hearing of these appeals, Shri D.N. Kohli contended that the Collector (Appeals) wrongly construed the scope of the remand. He submitted that before the remand, one of the contention taken before the Collector (Appeals) was that in the show cause notices issued, there was no allegation of mis-representation or wilful suppression of facts. The show cause notice was issued only on the basis of the audit objections and, therefore, any demand for exceeding six months preceding the date of show cause notice is barred by limitation. This contention was accepted by the Collector (Appeals) and in this connection, we refer to the impugned order of the Collector (Appeals) wherein a reference is made

as to the contention taken by the appellants before the Collector (Appeals) before the remand. The relevant portion reads "The demands are time-barred under Section 11A.R.G.I is maintained for graphite powder since 1975 and graphite powder was sent for chemical test by the C.R. authorities in 1981. The Asstt.

Collector passed his order based on Audit Report without application of mind." Shri Kohli submitted that the question of limitation was all along urged by the appellants and their contention has been accepted by the Collector (Appeals) and while remanding the matter, he had directed the Assistant Collector to consider that point afresh. Therefore, it was incorrect on the part of the present Collector (Appeals) to take a view that the remand order did not require the Assistant Collector for considering the question of limitation.

10. Shri Sunder Raj an also contended that the remand order did not require the Assistant Collector to consider the question of limitation and it was confined only to the value of clearances and therefore, the appellants cannot, now, be permitted to urge the ground of limitation which would be beyond the scope of the remand order.

11. We have carefully considered the submissions made by both sides and perused the available records. This has been rightly contended by Shri Kohli that before remand among other contentions the appellants did urge that demands are barred by time and there was no scope to invoke the longer period of limitation and on that ground, the Assistant Collector ought to have rejected the demands. This contention was accepted by the Collector (Appeals). The relevant observations of the Collector (Appeals) in his order dated 5.8.1983 reads as under: "With regard to the argument of Mr. Banerjee that to invoke the proviso to Section 11A which extends the time limit for raising demand from 6 months to 5 years the same had to be mentioned in the show-cause notice and the nature of suppression of information has to be indicated, it is enough to say that since the show cause notice dated 14.7.82, it is seen that the original show cause notice dt. 19.1.82 was issued under Rule 10(1) of the Central Excise Rules, 1944 which had been deleted by that time. But a corrigendum was issued on 14.7.82 substituting Section 11A of the Central Excise Act, 1944 for Rule 10(1) of the Central Excise

Rules'44. It was not necessary to allege suppression of material information in the show cause notice. However, the Assistant Collector in his order dated 7.10.82 seem to have based on the finding of the alleged A.G. (Orissa) Audit party. This is not a material on the basis of which adjudication proceedings can be initiated. I, therefore, set aside the order of the Assistant Collector and remand the case back to him to ascertain by himself or through his subordinate regarding the clearance value of the appellants during the year 1979-80 and decide the case afresh in accordance with law and after observing the principles of natural justice." Thus, if the Collector (Appeals)'s order dated 5.8.83 is read as a whole, it is clear that remand is not only to determine the value of clearances but also to consider the question of limitation. As a matter of fact, after remand, the Assistant Collector clearly understood the scope of the remand and did go into the question of limitation. In the said circumstances, the Collector (Appeals)'s presumption in the impugned order that remand order did not require consideration of the limitation, in our opinion, is erroneous and mis-reading of the remand order.

12. The short question for consideration is whether the demands are barred by time. Admittedly, the demands relate to the year 1979-80 and 1980-81. We have perused the show cause notices dated 19.1.1982 and 14.7.1982. It was alleged in both the show cause notices that duties have been short-levied and in the show cause notice dated 19.1.82, it was stated that amount is recoverable under Rule 10A of the Central Excise Rules and in the show cause notice dated 14.7.82, it was stated that duties are recoverable under Section 11A. In both the show cause notices, there was no allegation of mis-representation or wilful suppression or violation of the provisions of the Central Excise Act or Rules with intent to evade duty. It is now well settled that in the absence of the allegation of mis-representation/wilful suppression/violation of the provisions of the Act or Rules with intent to evade central excise duty, the enlarged period of limitation cannot be invoked. In the instant case, enlarged period of limitation is invoked without alleging necessary ingredients required to be alleged.

Therefore, the demands which are beyond the period of six months preceding show cause notices are clearly barred by limitation. In short, both the demands covered by both show cause notices are beyond the period of six months and was,

therefore, barred by time. We, therefore, allow these appeals set aside the orders passed by the authorities below. The appellants be granted consequential relief.

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