

Collector of C. Ex. Vs. Hiper

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-17-1989

Reported in : (1989)(23)LC487Tri(Delhi)

Appellant : Collector of C. Ex.

Respondent : Hiper

Judgement :

1. Collector of Central Excise, Pune, has filed an appeal being aggrieved from order-in-appeal No. M-1437/PN-96/84, dated 25.6.1984 passed by the Collector of Central Excise (Appeals), Bombay.

2. Briefly the facts of the case are that the respondent is manufacturer of filters and filter elements falling under Tariff Itqm 68 of the Central Excise Tariff. In addition, the respondent is also carrying on job work. The respondent was availing of the benefit of notification No.105/80 dated 19th Jund, 1980 for the year 1981-82 on the ground that value of the clearances during the preceding financial year i.e. 1st April, 1980 to 31st March, 1981 were well below the limit of Rs. 30,00,000/- (rupees thirty lacs). The Superintendent of Central Excise, Pune Range I, Pune IV Division, observed that if the cost of raw material is added to job work charges charged by M/s. Hiper, from the customers and if this is added to the value of clearances of Tariff Item 68 goods manufactured and cleared by the party, the value of total clearances exceeded Rs. 30,00,000/- during the period from 1st April,1980 to 31st March, 1981. The Range Superintendent issued the following show cause notices desiring the respondent to show cause as to why the amount

demand from them should not be recovered under Section 11A of the Central Excise Rules, 1944:-

Date of show cause notice	Period	Value	Clearance	Amount of duty	Cause
1.4.81 to 31.8.81	Rs. 16,36,662.33	Rs. 1,30,932.96	10.2.82	1.9.81 to Rs. 6,81,619.64	Rs. 54,529.57
30.11.81 to 31.3.81	Rs. 18,07,82	29.9.80 to Rs. 13,03,499.47	Rs. 1,04,279.98	31.3.81	3.

3. The assessee replied to the show cause notices vide their letters dated 23.10.1981, 5.4.1982 and 30.8.1982 and stated that the clearances during the financial year 1979-80 were at Rs. 24,70,760.91 as the assessee was entitled to exemption under notification No. 120/75 dated 30.4.1975 and was paying duty on the basis of invoice value and had also referred to Government of India's letter No. 350/66/79 dated 22.6.1979 in which it was clarified that in cases where manufacturers had opted for assessment under notification No. 120/75, the expression "value" shall mean the invoice price as set out in the said notification and as such, the cost of raw material supplied by the customers could not be taken into account for computing the value of clearances for home consumption for the purpose of notification No.105/80 and the value of clearances without taking into account the cost of raw material supplied by the customers for the purpose of job work during the financial year 1980-81 comes to Rs. 27,64,059.37 only. It was also contended that the respondent was also manufacturing panel/air handling filter falling under Tariff Item 68 in their factory without the aid of power and these were exempt from duty under notification No.179/77 dated 18th June, 1977 and, therefore, in terms of explanation II of notification No. 105/80, the value of clearances of these filters cannot be taken into account for computing the value of clearances for the purpose of notification No. 105/80 and the value of clearances during the year 1980-81 was of the order of Rs. 2,58,856.50.

4. The learned Assistant Collector took the view that in Notifications No. 89/79 and 105/80 exemption is to be computed with reference to the value of clearances and the value of clearances would be the value as ascertainable under Section 4 of the Central Excises and Salt Act, 1944, and as such, the invoice value would be irrelevant. As regards the applicability of Notification No. 119/75, he was of the view that the purpose and scope of the notification was entirely different. It

restricted the value to the extent of job charges for that limited purpose of assessment, but it does not say that the value of the said goods would be held as such for all purposes and as regards the manufacture of panel/air handling filter under Tariff Item 68 in their factory without the aid of power, and as per respondent's version these were exempted from duty under Notification No. 179/77 dated 18.6.1977.

He had further observed that since the assessee had not claimed exemption in their classification list at the relevant time, this issue could not be brought at this stage. He had confirmed the demands for Rs. 1,30,932.96, Rs. 54,529.57 and Rs. 1,04,279.98 under Section 11A of the Central Excises and Salt Act, 1944.

5. Being aggrieved from the aforesaid order, the respondent had filed an appeal before the learned Collector of Central Excise (Appeals), Bombay .The learned Collector of Central Excise (Appeals), Bombay had allowed the appeal filed by the respondent and being aggrieved from the aforesaid order, the appellant has come in appeal before the Tribunal.

6. Shri J.N. Nigam, the learned senior departmental representative who has appeared on behalf of the appellant, has reiterated the facts. He has referred to the notification Nos. 119/75 and 105/80 dated 19th June, 1980 and the period involved is 1981-82. Shri Nigam has argued that the respondent did not include the cost of materials supplied by the customers and if this is included, the value of clearances will be beyond Rs. 30,00,000/-. He has argued that the Collector of Cental Excise (Appeals), had allowed the respondent's appeal on the basis of the fallowing judgments: - (1) 1981ELT 859 (Bombay High Court) Narendra Engineering Works v. Union (2) 1980 ELT 168 (Calcutta) Free India Accumulators v. Union of India and Ors.

(3) 1978 ELT J-533 Anup Engineering Ltd. and Ors. v. Union of India and Ors.

Shri Nigam has argued that now the legal position has changed and has relied on the following judgments which are iri his favour:- (1) 1983 ELT 1986 Union of India and Ors. etc. etc. v. Bombay Tyre International Ltd., etc. etc. (paras J 33 and 34) (2) 1983 ELT 733 (Cal.) Union of India and Ors. v. Free India Dry Accumulators

Ltd. (Reference to 1980 ELT 168 para 6) The Hon'ble Calcutta High Court held that the cost of raw material supplied by the customer was includible in the cost of the resultant article.

(3) 1985 (20) ELT 179 (SC) Empire Industries Ltd. and Ors v. Union of India and Ors. The Hon'ble Supreme Court held that: "Section 4 of the Central Excises and Salt Act deals with the valuation of excise goods for the purpose of calculating assessable profits, a notional and conventional sum is laid down by the legislature to be arrived at on a certain basis, it is not permissible for the Courts to engraft into it any other deduction or allowance or addition or read it down on the score that the said deduction or allowance or addition was authorised elsewhere in the Act or in the Rules. A conventional charge should be measured by its own computation and not by facts relating to other method of computation. The contention that thereby the benefit of any exemption granted by the legislature may be lost and that in some cases hardships might result are not matters which would influence courts on the construction of the Statutes. A taxpayer subject is entitled only to such benefits as is granted by the legislature. Taxation under the Act is the rule and benefit and exemption and in this case, there is no hardship." 7. Shri Nigam has argued that the Hon'ble Supreme Court has over-ruled the earlier judgments in the Empire Industries Ltd. case. He has also referred to the judgment of the Tribunal in the case of Vijay Industries, Calcutta v. Collector of Central Excise, Calcutta, vide order No. 306/1988-B1 dated June 3, 1988 in appeal No. 2667/85-B1, wherein the Tribunal in para No. 8 had held that the entire value of the resultant products! on job work should be taken into consideration for calculating the value of annual production. The Tribunal had relied upon the judgment of the Hon'ble Supreme Court in the case of Empire Industries Ltd. and others reported in 1985(20) ELT 179. Shri Nigam has pleaded for the acceptance of the appeal.

8. Shri R.K. Habbu, the learned advocate, who has appeared on behalf of the respondent, states that there were three show cause notices and one show cause notice dated 17th June, 1982 which appears as annexure 'G' of the paper book for the period 29th September, 1980 to 31st March, 1981 is barred by limitation as the demand can be restricted to six months from the date of issue of the show cause notice. Shri Habbu has relied on the order passed by the Collector of Central

Excise (Appeals) and the earlier judgments cited before the Collector of Central Excise (Appeals). Shri Habbu, the learned advocate, states that the facts of the Tribunal's judgment in the case of Vijay Industries, Calcutta v. Collector of Central Excise, Calcutta vide order No. 306/1988-B1 dated 3rd June, 1988 are different. He has pleaded for the dismissal of the appeal.

9. Shri Nigam, the learned senior departmental representative, has stated that the plea of time bar has been taken by the learned advocate before the Tribunal for the first time and fresh plea cannot be taken at this stage. Shri Nigam has argued that in the present matter the judgment of the Hon'ble Supreme Court in the case of Empire Industries Ltd. and Ors. v. Union of India and Ors. reported in 1985 (20) ELT 179 (SC) (supra) is fully applicable and the revenue's appeal should be allowed.

10. We have heard both the sides and have gone through the facts and circumstances of the case. The main issue to be decided in this case is whether the value of raw materials should or should not be included while calculating the value of the goods manufactured on job work basis. The Collector of Central Excise (Appeals) had allowed the appeal mainly on the basis of the Gujarat High Court judgment in the case of Anup Engineering Ltd., Ahmedabad and Ors. v. Union of India and Ors.

reported in 1978 ELT J-533, where the Hon'ble Gujarat High Court had held that: "Notification No. 119/75-CE, dated 30.4.1975, envisages payment of excise duty only on the charges for the job work done and not on the total value of the articles when it leaves the factory of the job worker so long it can be shown that the job worker is returning an article after subjecting it to a manufacturing process irrespective of the trade nomenclature at the time of the receipt and at the time of despatch." This law no longer holds good in view of the Hon'ble Supreme Court's judgment in the case of Empire Industries Ltd. and Ors. v. Union of India and Ors. (supra) where the Hon'ble Supreme Court had held that: "When the textile fabrics are subjected to the processes like bleaching, dyeing and printing etc. by independent processes, whether on their own account or on job charge basis, the value for the purposes of assessment under Section 4 of the Central Excise Act

will not be the processing charges alone but the intrinsic nature of the processed fabrics which is the price at which such fabrics are sold for the first time in the wholesale market. That is the effect of Section 4 of the Act. The value would naturally include the value of grey fabrics supplied to the independent processors for the processing." The Hon'ble Supreme Court in the case of Ujagar Prints etc. v. Union of India and Ors., etc. reported in 1988 (18) Excise and Customs Cases 435 had confirmed its earlier view in the case of Empire Industries Ltd. and Ors v. Union of India reported in 1985 (20) ELT 179 (SC). The Hon'ble Supreme Court had held that: "Consistent with the provisions of section 4 of the Central Excise Act and the Central Excise (Valuation) Rules, 1975 framed under section 37 of the Act, it cannot be said that the assessable value of the processed fabric should comprise only of the processing charges. This extreme contention, if accepted, would lead to and create more problems than it is supposed to solve; and produce situations which could only be characterised as anomolous. The incidence of the levy should be uniform, uninfluenced by fortuitus considerations. The method of determination of the assessable value suggested by the processors would lead to the untenable position that while in one class of grey fabric processed by the same processor on bailment, the assessable value would have to be determined differently dependent upon the consideration that the processing house had carried out the processing operations on job work basis, in the other class of cases, as it not unoften happens, the goods would have to be valued differently only for the reason the same processing house has itself purchased the grey fabric and carried out the processing operations on its own. Empire Industries Ltd. and Ors. v. Union of India and Ors. (1986) 7 ECC 208 does not require reconsideration."Vijay Industries v. Collector of Central Excise, Calcutta, vide order No. 306/1988-B1 dated 3rd June, 1988. Relevant extract from para No.8 is reproduced below: "Following the Supreme Court judgment we hold that the entire value of the resultant products on job work should be taken into consideration for calculating the value of annual production." 11. In view of the law laid down by the Hon'ble Supreme Court and the earlier judgment of the Tribunal, we hold that the value of the raw materials supplied by the customers has to be included in the value of the goods manufactured by the respondent for the calculation of the benefit of the notification No. 89/79 dated 1st March, 1979 (now notification No.

105/80 dated 19th June, 1980). Accordingly, we set aside the order passed by the Collector of Central Excise (Appeals) in this regard.

12. Shri R.K. Habbu, the learned advocate, had pleaded that the show cause - notice dated 17th June, 1982 pertaining to the period 29th September, 1980 to 31st March, 1981 was hit by limitation as there was no suppression of facts in the said show cause notice and extended period of limitation for five years is not applicable. Shri J.N. Nigam, the learned senior departmental representative, had objected for raising this ground of appeal before the Tribunal for the first time.

We do not agree with the contention of the learned senior departmental representative that this plea is being agitated by the respondent before the Tribunal for the first time. We have perused the grounds of appeal agitated before the Collector of Central Excise (Appeals). Memo of appeal filed before the Collector of Central Excise (Appeals) is a part of the paper book filed by the respondent. Ground of appeal No. 5 on page 36 of the paper book is reproduced below:- "5. Neither the Supdt. has alleged in his notices (to show cause)-cum-Demands nor has the Asstt. Collector held in his order in original referred to above that there was any fraud, collusion or any wilful mis-statement or suppression of facts on our part or that we had contravened any of the provisions of the Central Excises and Salt Act, 1944 or of the Central Excise Rules, 1944 with an intent to evade the payment of the C.E. duty. Therefore, the time limit of 5 years is not applicable to any of the three notices (to show cause)-cum-Demands. The Notice (to S.C.)-cum-Demand No. PRI/Hiper/Show Cause/82 dt. 17.6.1982 for the period from 29.9.1980 to 31.3.1981 for Rs. 1,04,279.98 is, therefore, clearly time barred.

The other two notices (to S.C.)-cum-Demands are within the time limit of 6 months, but in view of the factual as well as the legal position stated above, they also do not stand on the merits and are not tenable in law.

In short, the order in original of the Asstt. Collector deserves to be set aside forthwith." A simple perusal of the ground of appeal shows that this plea was agitated by the respondent before the Collector of Central Excise (Appeals) and it is not a fresh plea before the Tribunal. Even if it is assumed that this plea was not there, a legal plea can always be taken for the first time before an appellate

authority and a fresh plea can also be taken before the Tribunal for the first time on the basis of the material available on record. The Hon'ble Andhra Pradesh High Court in the case of Commissioner of Income-tax, A.P. v. Gangappa Cables Ltd. 116 ITR 778 had held as under:- 'The Appellate Tribunal disposing of an appeal under the I.T. Act has got the power to allow the assessee to put forward a new claim, notwithstanding the fact that such a claim was not raised by him before the ITO or the AAC, provided there is sufficient material on record to allow such a claim.

The assessee, for the first time, raised a plea in second appeal before the Appellate Tribunal that the expenditure incurred by the assessee before it went into commercial production was an admissible deduction for the purpose of Section 80J(1) of the I.T. Act. The revenue resisted the claim on the ground that the said claim having not been put forward by the assessee before the ITO or the AAC, it could not be raised in second appeal. The Tribunal held that the directors' report accompanied by balance-sheet and profit and loss account and other statements were filed by the assessee before the ITO and practically all the details for allowing a claim under S. 80J(1) of the Act were on record and hence it was open to the Tribunal to allow such a claim. On a reference : Held, that the Tribunal was correct in allowing the claim of the assessee as there was material on record for allowing the same." 13. On the basis of the material available on record, we hold that the plea was taken by the respondent before the Collector of Central Excise (Appeals) and the respondent has rightly taken the plea of limitation before the Tribunal. We have perused the show cause notice No.PRI/Hiper/show cause/82/536 dated 17th June, 1982 issued by the Superintendent of Central Excise Pune Range I, Division IV, Pune. There is no allegation of suppression of facts. The demand pertains to the period from 29th September, 1980 to 31st March, 1981 for Rs. 1,04,279.98. The show cause notice is dated 17th June, 1982. This demand is much prior to six months from the date of issue of the show cause notice. The extended period of limitation cannot be invoked in this case. Accordingly, we hold that this portion of the demand is hit by limitation. The demands in respect of the other two show cause notices dated 28th September, 1981 and 10th February, 1982 are in time.

14. In view of the conclusions arrived at in the foregoing paragraphs, the revenue's appeal is allowed partly. The revenue authorities are directed to give consequential effect to this order.

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