

Collector of C. Ex. Vs. Prestige Engineering (India)

Collector of C. Ex. Vs. Prestige Engineering (India)

SooperKanoon Citation : sooperkanoon.com/4916

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-29-1989

Reported in : (1989)(22)ECC171

Appellant : Collector of C. Ex.

Respondent : Prestige Engineering (India)

Judgement :

1. These six appeals are filed by the department against a common impugned order passed by the Collector of Central Excise (Appeals). The original matters relate to seven refund claims of the respondent company herein for different periods filed by them subsequent to the Tribunal's order No. 315/86D dated 21 order the Tribunal had held that the repairing of cops which are old and unserviceable would net amount to manufacture of cops attracting excise duty. Removal of old and unserviceable parts of cops and their replacement by new parts in themselves was equated to retreading of old and unserviceable tyres or reshelling of old and unserviceable roller shafts which were held in earlier decisions as not amounting to manufacture. In respect of other matters involved before the Tribunal the matter had been remanded to the Collector of Central Excise, Meerut for de novo adjudication in the light of the observations made by the Tribunal in the said order. That de novo adjudication order is yet to be passed by the Collector Central Excise (Meerut) for fixing the correct amount.

1.1. Consequent to this order the duty paid by the respondent company under protest on repairing of cops was claimed by filing refund claims during 14-10-1976

to 27-10-1986 for periods subsequent to 17-3-1981 to 7-6-1986. The respondents had also stopped paying excise duty on repair work subsequent to 8-6-1986. Nevertheless the department issued demand notice for excise duty on repair work subsequent to 8-6-1986 by the Asstt. Collector's letter dated 6-10-1986. The respondents thereafter applied before CEGAT to clarify the scope and effect of their order dated 21-5-1986. The Tribunal vide its order dated 30-3-1987 held that its order of 21-5-1986 on the appeal of the respondents company herein was meant for subsequent period also and was binding on the subordinate authority so far as the question of exciseability of repair work of cops was concerned.

2. In spite of the above order it is alleged by the respondent company that the Assistant Collector issued 7 show cause notices dated 21-12-1987 as to why their refund claims for the period 17-3-1981 to 7-6-1986 be not rejected. It is appropriate at this stage to set out the grounds mentioned in the show cause notice for the proposal to reject the refund claims. These grounds are as follows: (1) The order in de novo adjudication has not so far been passed by the Collector, Central Excise, Meerut.

(2) The period involved in the adjudication order passed by the Collector, Central Excise, Meerut leading to Tribunal's order No. 315/86-D dated 21-5-1986 was July, 1978 to July, 1981, 1-10-1981 to 27-2-1981 and 2-3-1981 to 31-3-1981. It was, therefore, felt by the adjudicating officer, namely, the Assistant Collector, Central Excise, Ghaziabad that except for the period from 2-3-1981 to 31-3-1981 the refund claims were not covered by the C.E.C.A.T's order dated 21-5-1986.

(3) The respondent company has not followed the provisions of sub-rule (1) of Rule 233B of Central Excise Rules, 1944 (hereinafter referred to as the Rules) regarding the payment of duty under protest inasmuch as no protest has been lodged by the respondent company. Nor have the provisions of Sub-rule (2) of Rule 233B also been followed. Accordingly, the Asstt. Collector was tentatively of the view that the refund claims were thoroughly filed beyond the limitation of six months prescribed in Section 11B of the Central Excises & Salt Act, 1944.

The cause was to be shown by 31-12-1987 and the respondent company was also directed to appear for hearing on 31-12-1987 itself.

The respondent company's representative attended the A.C.C.E.'s Office, Ghaziabad on 31-12-1987 with a letter dated 29-12-1987 requesting for extension of time for submission of reply till 31st January, 1988. This request was turned down by A.C.C.E., Ghaziabad.

He accordingly decided the case on the basis of available record.

The allegations in the show cause notice referred to above were found to be correct and, therefore, the refund claims were rejected as time barred under Section 11B(1) of the said Act.

3. The lower appellate authority before whom the appeals were filed by the respondent company allowed the appeals and hence these appeals by the department before the Tribunal. The learned representative of the department appearing for the revenue has urged that the classification lists of the respondent company during the relevant period had been approved at a higher rate. If the respondent company were aggrieved by the said approval, the appeals could be filed before the competent appellate authority. That has not been done. The payment of duty under protest by the respondent company therefore, no longer subsists. In these circumstances the duty cannot be said to have been paid under protest at-all. He states that the provisions of Rule 233B are very clear in this respect. Sub-rule (1) according to the learned DR enjoins upon an assessee to furnish a letter of protest to the proper officer giving grounds for payment of duty under protest. Sub-rule (5) stipulates that where the remedy of appeal or revision is not available to an assessee against an order or decision which necessitated him to deposit the duty under protest he may within three months of the date of delivery of the letter of protest give a detailed representation to the Asstt. Collector. Sub-rule (6) envisages that where the remedy of an appeal or revision is available to an assessee against an order or decision necessitating deposit of duty under protest, he may file an appeal or revision within the period specified for filing such appeal or revision. In view of these various provisions of Rule 233B, the learned DR submits that the protest filed by the respondent company cannot be considered as a protest because the appellant had failed to avail of the remedy of the appeal against approval of classification list at a higher rate. He also submits

that even the grounds of payment of duty under protest have not been given by the respondent company in the paper-book enclosed with the cross objection.

3.1. Replying, Shri S.P. Gupta, Sr. Advocate, has urged that Section 11B(1) of the Act clearly stipulates that the limitation of six months was not applied where any duty had been paid under protest. Rule 233B is only an assistance to the main Section 11B. It cannot place any restriction on the provision of the section. Nevertheless he points out that in their basic letter dated 21-4-1981 the grounds of protest are clearly mentioned. *Andhra Cement Company Limited v. Collector of Central Excise, Guntur* 1986 (26) ELT 553 (Tribunal). We have carefully considered the pleas advanced by both sides. We observe that the Assistant Collector has exhibited unseemly hurry in disposing of the refund claims of the respondent company herein while a show cause notice rejecting their refund claims was issued and a time of only 10 days was given for replying the show cause notice and the date of hearing was also fixed soon after 10 days.

Despite the respondent company's request for adjournment, the Asstt.

Collector did not accede to their request by giving any valid reasons.

The procedure followed by the Asstt. Collector smacks of a desire to reject their refund claims even before considering the reply of the respondent company. This procedure, to say the least, is only a lip service to the principles of natural justice and it is no credit to the adjudicating officer.

4. Coming to the facts of the case, we do not find that the rejection of refund claims has been done on valid grounds. Asstt. Collector's objection that the refund claims are not valid as long as the Collector has not decided the issue in de novo adjudication is untenable. The refund claims have been filed on the ground that the repairing of the cops by the respondent company was not a process of manufacture and this was held so in unmistakable terms by the Tribunal in its order No.315/86-D dated 21-5-1986 and by a subsequent clarificatory order of the Tribunal dated 30-3-1987. The fact that the payment of duty has been made under protest right through is also not in doubt. The Asstt.

Collector's observations in order-in-original that they did not file any letter of protest under Rule 233B and that no evidence to that effect has been produced by the respondent company despite a clear show cause notice is an erroneous finding on the face of the record. When the respondent company sought adjournment for giving a suitable reply to the show cause notice, the Asstt. Collector did not give any extension of time. It is not, therefore, correct on the part of the Asstt. Collector to say that the respondent company failed to give any reply to the show cause notice and produce evidence. The respondent company have now produced the entire correspondence from the beginning alongwith their cross objections. The letter of protest has already been brought on record as referred to above. Apart from this they have been mentioning in each classification list filed by them consequent to each budget about the payment of duty under protest. They had also been giving the reasons why they treat their process as exempted from duty.

We have perused all these lists and their covering letters. No doubt is left that the payment of duty was made under protest.

4.1. Once a protest has been lodged it becomes the duty of the Asstt.

Collector to dispose of the protest by an appealable order so that the respondent company could go in appeal against those orders. Unless the Asstt. Collector disposes of the protest in the aforesaid manner, as enjoined under Rule 233B, the protest cannot be deemed to have subsided. The protest is alive till it is disposed of by the Asstt.

Collector by a suitable speaking order. This view is fortified by the Tribunal's judgment in Andhra Cement Company Ltd. (mentioned supra) relied upon by the learned advocate for the respondent company. The Tribunal in the said decision has observed as follows: "If the Asstt. Collector noticed the letter of protest prior to his approval of the price list, he owed it to the appellant to have specifically referred to it in his order of approval and stated why he did not accept the protest but over-ruled it. If however, he sighted it but did not take it into account while approving the price list, then obviously, the letter would constitute a surviving protest in terms of Rule 173C(8). Thus, we find that in the present case, duty has

indeed been paid under protest." 4.2. The aforesaid observations of the Tribunal are squarely applicable to the facts in this case. The protest has not only been lodged by the respondent company by a separate letter but also with each separate classification list. It, therefore, became the duty of the Asstt.

Collector, as emphasised above, to dispose of that protest in terms of Rule 233B. The question of filing an appeal against the approved classification list, as urged by the learned DR did not arise till their protest had been properly disposed of by the Asstt. Collector, 1988 (38) ELT 181, cited by the learned DR is not relevant to the facts of this case.

5. In view of the aforesaid discussion, we are clearly of the view that the orders in original passed by the Asstt. Collector are untenable and the appeals by the lower appellate authority filed by the respondent company were rightly allowed against the impugned orders. The appeals of the department, therefore, are dismissed. Cross objections are also disposed of in the above terms.

6. In view of the fact that there has been long delay in settling the refund claims of the respondent company herein after passing of the CEGAT orders dated 21-5-1986, we direct that the refund claims of the respondent company should now be settled by the Asstt. Collector within two months from the date of receipt of this order.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com