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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-12-1989

Reported in : (1990)(25)ECC456

Appellant : Collector of C. Ex.

Respondent : Eastern Metal and Ferro Alloys

Judgement :

1. These are two appeals filed by the Collector of Central Excise & Customs, Bhubaneshwar arising out of two orders of the Collector of Central Excise (Appeals), Calcutta dated 24-12-1986 and 23-2-1987, by which he had allowed the appeals of the respondents herein holding that the product manufactured by the respondents cannot be charged to duty as aluminium powder under the erstwhile Central Excise Tariff Item 27(8) or under Heading 76.07 of the Central Excise Tariff Act, 1985.

The respondents herein manufacture Aluminium Powder which, according to the department, fall under the erstwhile Central Excise Tariff Item 27 (8) and under the Heading 76.07 of the Central Excise Tariff Act, 1985.

The respondents manufacture Ferro Alloys by Alumino Thermic process or Thermit process. In the thermit process, aluminium powder is used for generating energy. The respondents melt aluminium ingots and the molten aluminum is converted into aluminium powder shots and granules by water automisation (wet process) for its use in alumino thermic production of ferro alloys. The department

instituted proceedings against the respondents on the ground that they have manufactured and cleared for captive consumption aluminium powder without payment of duty and without observing Central Excise formalities for the period February 1985 to April 1986 and the Assistant Collector, after issuing Show Cause Notice, confirmed the demand amounting to Rs. 8,41,281.07 in his order-in-original dated 25-8-1986. The second order of the Assistant Collector involved in this appeal followed the reasoning of the first order and was dated 4-12-1986 and this was for the period May to July 1986 and for an amount of Rs. 1,52,465.22. In this order, there was also a penalty of Rs. 5000/- imposed on the appellant. The respondents preferred appeals against these orders, which were allowed by the Collector (Appeals).

2. Shri K.D. Tayal, the learned SDR appearing for the Appellant Collector submitted that the order of the Collector (Appeals) was not correct in law because of the fact that the item aluminium powder and flakes was specifically included in the Tariff Item 27(8) from 1984 onwards. He also referred to the classification list filed by the respondents where they had described the item as 'aluminium powder'.

Further, the Managing Director of the respondent firm had given a statement before the Superintendent of Central Excise on 9-11-1984 in which he had clearly indicated that they had a separate unit for production of aluminium powder and that the aluminium powder is produced and consumed captively. The respondents in a Writ Petition filed before the Hon'ble Orissa High Court had themselves described the process as consisting of melting aluminium ingots in C.I. crucible and converting the molten aluminium into coarse shorts, granules and powder by water atomisation. At this stage, the learned SDR referred to the samples drawn of the product, which were also inspected. A further reference was made by the learned SDR to Materials Hand-Book by Brady and Clauser where under the Section Aluminium, there is a reference to Aluminium Powder inter alia, that it burns with an intense heat and used as fuel. Dealing with some of the contentions of the respondents, that what they produced is not aluminium powder, the learned SDR relied upon the case of Indian Tool Manufacturers v. Collector of Central Excise, Pune - 1984 (18) E.L.T. 527 that a general term used for describing the commodity to cover that commodity in all its forms. He also refuted the claim of the

respondents that they do not sell their product in the market and that, therefore, no duty can be levied thereon. By citing the case of Orissa Construction Corporation Ltd. v.Collector of Central Excise, Bhubaneshwar -1983 (14) E.L.T. 2382, decided by this Tribunal, actual sale in the market is neither essential nor rele\ ant to determine manufacture. Therefore, the product manufactured by the respondents herein was aluminium powder as prescribed in the Central Excise Tariff prior to and after 22-8-1986 and was dutiable having been removed for captive consumption without payment of duty. The Collector (Appeals)'s order was erroneous and should be set aside, according to the Appellant Collector.

3. Shri Gopal Prasad, the learned Consultant appearing for the respondent contended that it is well-settled that it was for the department to establish the classification of the excisable goods beyond doubt as laid down by the decision in the case of Garware Nylons Ltd. v. Union of India & Ors. reported in 1980 (6) E.L.T. 249.

According to the respondents, what they produced was only in the form of shots, pellets and irregular bits. Aluminium powder known to the market is of 50 mesh and above. Their product does not meet this specification and cannot, therefore, be considered as excisable. The product in the form in which it is produced by them is not known in the trade parlance as 'aluminium powder' and the trade parlance criterion should be followed in classification as laid down by the Supreme Court in the case of Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co. - 1988 (37) E.L.T. 480. The learned Consultant contended further that Brady's Materials Hand-book cannot be relied upon as reflecting the trade practice. On the other hand, the Supreme Court had laid down in the case cited that glossary of term prepared by the LSI can be relied upon. The learned Consultant referred to the Glossary of Terms relating to powder metallurgy of the ISI where powder has been defined as an assembly of discrete particles with the maximum dimensions of 1000 microns. The product manufactured by the respondents, according to them would not pass this test. It was also contended further that the samples drawn by the department cannot be relied upon because, according to the respondents, these samples were not representive. He further pleaded that there was in any case, no justification for any penalty on the respondents.

4. We have carefully considered the submissions made by the learned SDR and the learned Consultant. The issue is to determine whether the impugned goods are chargeable to duty as aluminium powder under the erstwhile Tariff Item 27(8). The process of manufacture of the aluminium powder has been explained by the respondents as one of melting aluminium ingots in C.I. crucible and producing aluminium granules, coarse shorts and powder below 50 mesh size by water atomisation. This aluminium powder is used by the appellants captively for generating energy. In examining the question of excisability of the product, the interpretation of the Tariff Entry 27 of the Central Excise Tariff by the departmental authorities over the period is of relevance. In this connection, it is seen that in a Trade Notice issued by the West Bengal Collectorate No. 221/81 dated 1-10-1981 -1981 E.L.T.(T 215), it has been stated as follows :- "It is considered that the atomised aluminium powder/dust which is manufactured by melting aluminium ingot and is sprayed by means of atomisation process and used in chemical industries or for exothermic reaction or as a reducing agent is classifiable under Item 68 and not under Item 27 of the Central Excise Tariff." Tariff Item 27 was rationalised in 1984, by the Finance Bill of 1984, and while explaining the rationale for these changes in the Tariff structure, the department had issued Trade Notices, reproduced in 1984 (3) E.T.R. Part III 38. It is stated therein as follows: "The proposed classification for non-ferrous metals, namely, copper, zinc, aluminium and lead broadly follows the Customs classification in respect of these items under Chapters 74,79, 76 and 78 respectively of the First Schedule to the Customs Tariff Act, 1975.

It was further stated that it may also be mentioned that under the proposed Tariff Items, certain products such as 'angles, shapes and sections', 'powders and flakes', 'shells and blanks for pipes and tubes' would get covered. Presently, these items are covereed under Item 68." From the above, it is clear that the intention was to align the Tariff description in respect of aluminium powders and flakes under 27(8) with that of Customs Tariff Act, after the rationalisation of the Tariff in 1984, and that upto that time, these items were covered only under the residuary Tariff Item 68-CET. In considering these items, the specific category of aluminium powder produced by the melting of ingots by the atomisation process and used for exothermic reaction was also to be included as evident from the earlier Trade

Notice referred to supra.

The Customs Tariff Act broadly followed the Customs Co-operative Council's Nomenclature. We find that the Heading 76.05 of the Customs Tariff Act covers aluminium powders and flakes which is the same heading and description given in the CCCN. In the Explanatory Note under Heading 76.05 in CCCN, it has been stated that this heading covers all types of aluminium powders and flakes regardless of their intended use. It is further said that aluminium powders and flakes are also used in pyrotechnics as heat generators (for example in the thermit process). It is also said that in general, these correspond to those powders of copper in Explanatory Note to Heading 74.06 with a due adjustment and under Copper Heading 74.06 in the Explanatory Note, one of the main processes of production of copper powder referred to is atomisation i.e. by injecting a thin stream of molten metal into a high velocity crossjet of water, steam, air or other gases. Therefore, the structure of the Tariff Item powders and flakes would indicate that the item produced by atomisation process including water atomisation, as in the case of the respondents, and used as heat generators, as the respondents do in respect of powder produced by them, are to be taken to be covered by the Tariff Item Powders and flakes. This conclusion follows from the background to the Tariff Item and the rationalisation thereof brought about in 1984 and intentions behind such rationalisation as revealed in (he instructions of the department engaged in the implementation of the Tariff. We also bear in mind in this context the well-settled principle of interpretation that in construing a statute, due weight will have to be given to the interpretation put upon it at the time of its enactment and since by those whose duty has been to construe, execute and apply the same enactment (1989) 19 ECC 46 (SC) - Collector of Central Excise, Guntur v. Andhra Sugars. The background to the Tariff Item and changes thereof, as seen above clearly indicate that the atomised aluminium powder used as heat generating agency in thermic process was intended to be covered by the Tariff description aluminium powders and flakes.

That the water atomisation process employed by the respondents resulted in irregular shapes of the product such as granules and bits would not make any difference in the light of the tariff Item as above. In this view of the matter, we find

a lot of force in the appeals filed by the department and accordingly, set aside the impugned orders and allow the appeals. We, however, hold that the imposition of penalty on the Respondents in the Assistant Collector's order dated 4-12-1986 is not justified since there has been no penalty on the respondents in the other order also covering the same issue. Therefore, penalty on the respondents is set aside. The appeals are disposed of in the above terms.

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