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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-21-1989

Reported in : (1990)(25)ECC247

Appellant : Unique Pharmaceuticals

Respondent : Collector of Central Excise

Judgement :

1. The appellant has been engaged in manufacturing of 'Patent and proprietary medicines' covered by Tariff Items 14E and holds Central Excise Licence. IFFIUNIK Pharmaceuticals Pvt. Ltd. (hereinafter referred to as IFFIUNIK) started its factory in the year 1981 and both the factories are located adjacent to each other in the same compound.

IFFIUNIK purchased two boilers and as it was required to install these boilers at some distance from its plant and it had limited land area, the appellant permitted IFFIUNIK to install its two boilers in the appellant's boiler room. These two boilers are connected by pipelines to the IFFIUNIK's factory only. As contended by the appellant, IFFIUNIK manufacture its steam in these two boilers for consumption in its factory.

2. The jurisdictional Assistant Collector visited the appellant's factory on 28-9-1983 and thereafter the Range Superintendent visited the appellant's factory and made a panchnama and statements of concerned persons were recorded under Section 14 of the Central Excises & Salt Act, 1944 (herein referred to as the Act). The

appellant was served with a show cause notice dated 2-4-1984 to show cause why duty of excise should not be levied for the steam illicitly manufactured, removed and supplied to IFFIUNIK and one another factory, namely, M/s.

Unique Chemicals by the appellant during the period 1-7-1983 to 13-12-1983 and why penalty should not be imposed. The appellant paid the excise duty for steam supplied to M/s. Unique Chemicals, but as far as allegation regarding manufacture and supply of steam to IFFIUNIK was concerned, the appellant contended that the steam, in question, was manufactured by IFFIUNIK itself. In adjudication, the demand was confirmed and that order has given rise to the present appeal.

3. We have heard L.A., Shri V. Lakshmi Kumaran for the appellant and Ld. J.D.R., for the respondent.

Two boilers with production capacity of 300 kgs. per hour belonging to IFFIUNIK were situated in the premises belonging to the present appellant wherein two boilers of appellant are also situated. Pipelines were drawn connecting the boilers of IFFIUNIK with the factory of IFFIUNIK and the pipelines were drawn from the boilers belonging to the appellant connecting them with the appellant's factory. As stated in panchnama drawn by the Range Superintendent, in the boiler room one big and one small steel tanks were installed for storing water and LDO oil which belonged to the appellant. From these tanks, water and oil were supplied to all the four boilers. The appellant had filed a classification list dated 27-7-1982 declaring that it used steam produced by it in its factory for captive consumption and the same was approved by the jurisdictional Assistant Collector. IFFIUNIK filed its classification list on 11-10-1982 and mentioned therein production of steam for captive consumption and claimed exemption from payment of C.E. duty.

5. The Ld. Collector came to the conclusion that during the period, in question, the appellant had produced steam in the boilers owned by the IFFIUNIK and had supplied the same to the IFFIUNIK and so as the appellant was the manufacturer of the steam, it was liable to pay C.E.duty, relying upon the following evidence : (i) The appellant was not charging any rent to IFFIUNIK for keeping boilers in the boiler room of the appellant and also for the use of LDO tank and water tank.

(ii) LDO and water from the tanks of the appellant were supplied to both the boilers of the IFFIUNIK. (iii) Debit notes issued by the appellant to IFFIUNIK for consumption of LDO were as a result of an after thought and were issued after the visit of the jurisdictional Assistant Collector to the appellant's factory on 28-9-1983. Debit notes for consumption of LDO for the period from October, 1982 to September, 1983 had been issued only on 30-9-1983 and for the period October, 1983 on 30-11-1983. No debit notes for the period from April, 1981 to September, 1982 were issued. So, according to the Ld. Collector, the debit notes were issued to create an impression that transactions between two companies were genuine.

(iv) The Ld. Collector also found that three labourers, namely, V.K. Patel, Ramesh Janak Patel and P.K. Patel, who were working on the boilers, in question, had received their salaries till October, 1983 from the appellant company and subsequently, they were receiving the payments from the IFFIUNIK. So, the Collector has concluded that prior to 1-11-1983, the labourers were employed by the appellant company.

6. On the basis of above evidence, the Ld. Collector came to the conclusion that the appellant company was the real manufacturer of steam during the relevant period.

7. All the above facts, namely, non-charging of rent, late issue of debit notes, use of water and LDO of the assessee company and payment to labourers by it are not in dispute. But only on this evidence, it cannot be said that the appellant company was the real manufacturer of the steam. The term 'manufacturer' is not specifically defined in the Act, but relevant portion of Section 2F reads as under : "and the word 'manufacturer' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account." 8. The definition is more descriptive or illustrative in nature. So, as per this definition, it is not necessary for a person to be regarded as a manufacturer, that the person has to produce, by himself or through hired labourers only. Now it is an admitted position that the boilers belonged to the IFFIUNIK and pipelines from these boilers were directly connected with the

machinery of the IFFIUNIK. The appellant had no interest or stake, whatsoever, in producing any steam from the said boilers because it is not the case of the Revenue that the appellant company had derived any benefit out of this production. So, at the most, the appellant company had helped the IFFIUNIK in producing the steam from the boilers of the IFFIUNIK for the use of IFFIUNIK. So, in other words, they had acted as agent and the IFFIUNIK had got steam produced from their boilers with the help of the appellant company.

From the evidence on record, it can also be inferred as above. When two inferences are possible, one, which is favourable to the assessee, should be accepted. More so, because the Ld. Collector has also drawn an inference based upon various circumstances, as enumerated above and there is no definite evidence on record that, in fact, the appellant company, knowingly, consciously and with intent to produce steam for supplying it to the IFFIUNIK, produced it and supplied the same to the IFFIUNIK. The Ld. Collector has stated in the impugned order itself, that the relations between both the units are very close as there are some common Directors. In that case, non-charging of rent for the premises of the appellant company or non-charging for consumption of water and LDO would not necessarily suggest that the appellant company was manufacturing the steam. One company can help other company even gratis and there is no legal bar to that. It is true that debit notes for consumption of oil were issued by the appellant company to the IFFIUNIK after the visit of the Central Excise officers to the factory of the appellant company. But when the debit notes are, in fact, issued, there is no reason to disbelieve them. So, in our view, it is not conclusively established that during the relevant period, the steam was manufactured by the appellant company.

9. L.A., Shri Lakshmi Kumaran, has pointed out that calculation of the steam produced made by the Ld. Collector, is also not correct because the boilers could not have worked for the entire period and in full capacity and he should have tried to relate it with production in the IFFIUNIK at the relevant time. There is considerable force in this argument. The appellant had raised a contention that the show cause notice should have been issued to IFFIUNIK and in para 22 of the impugned order, the Ld. Collector has held that it was not necessary because the

steam, in question, was manufactured by the appellant company. As discussed above, from the evidence on record, the other inference is also possible and if show cause notice would have been issued to the IFFIUNIK also, it would have helped in arriving at proper finding. Moreover, it could have been ascertained from IFFIUNIK as to what was the quantity of production by the IFFIUNIK during the relevant period from which consumption of steam could have been properly calculated. But as we are allowing the appeal on the aspect of 'real manufacturer', it is not necessary for us to discuss this aspect any further.

10. In the show cause notice, extended period of limitation has been invoked alleging that the appellant had suppressed the fact of production of steam. Show cause notice is not produced. So, it is not possible to vefity and know the exact allegation contained therein. But from the impugned order, it can be seen that IFFIUNIK had, in their classification list, filed on 11-10-1982, mentioned that steam falling under T.I. 68 was being manufactured by them and used for captive consumption. Now, there were no other boilers except the boilers, in question, from which steam consumed by IFFIUNIK was produced and it also appears that IFFIUNIK had, in their classification list, put remarks 'exempted vide Notification No. 118/75, dated 1-3-1975 (captive consumption)'. Now, it is obvious that when a manufacturer claims exemption under notification, the departmental authorities, before taking any decision for the approval of the classification list, have to ascertain about the correctness of description, etc. of the product contended to be manufactured and also about the use to which it is to be put. So, it is obvious that the departmental authorities must have verified all these facts and at that time they must have known where from the steam was manufactured and to what use it was put to by the IFFIUNIK. It is contended by the party that the steam produced in the boilers, in question, was produced by IFFIUNIK for their own captive consumption. The revenue has tried to interpret it as a 'manufacture' by the appellant company. This is a question of law. But as contended by the Ld. Advocate, Shri Lakshmi Kumaran, the appellant company genuinely and bona fidely believed that the IFFIUNIK were the real manufacturer and so there was no obligation on the part of the appellant company to declare that they were producing, this steam during the relevant period for the use of IFFIUNIK. When an assessee bona fidely believes that legal position is different, than what is being decided by the department, the

assessee cannot be under any obligation to pre-judge the mind of the departmental authorities and to act in the manner in which at a later stage, the department would wish and like the assessee to act. In the circumstances, it cannot be said that the appellant had suppressed the facts. So assuming that the declaration by the IFFIUNIK, in their classification list about their producing the steam could not have lead the C.E. authorities to find out about the actual position, then also, the appellant company cannot be alleged to have intentionally suppressed this fact. The question of fraud does not arise because in the circumstances, it cannot be said that the appellant company suppressed the fact about their manufacture of steam and willfully and deliberately evaded payment of duty.

11. L.A., Shri Lakshmi Kumaran has produced several citations on the point, but we do not think the circumstances here require any citation to support the view that we are taking that there is no suppression or fraud on the part of the appellant company and there was no justification for invoking larger period of limitation.

12. In the light of above discussion, the impugned order requires to be set aside. So, we pass the following order : The appeal is allowed and the impugned order is set aside with consequential relief to the appellant, if any.

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