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Collector of Central Excise Vs. Associated Cement Co. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-24-1990

Reported in : (1991)(36)LC292Tri(Delhi)

Judge : S Jha, Vice-, P A K.

Appellant : Collector of Central Excise

Respondent : Associated Cement Co. Ltd.

Judgement :

1. These are two appeals, one filed by M/s Associated Cement Company Limited against the department and the other filed by the Department against the same company in view of the favourable decision obtained by it from the lower authorities. Since the issue in both these cases is the same the two appeals are being disposed of by this common order.

2. The facts are that M/s. Associated Cement Co. Ltd. (hereinafter referred to as the assessee) cleared cement from their factory under Tariff Item 23 on 27th February 1982, that is, the date on which Budget was presented The cement was cleared between 17 hours to 24 hours after furnishing an undertaking as provided under Rule 224(2A) of Central Excise Rules 1944 that they would pay duty at the enhanced rate in case there is any upward revision of duty in the ensuing Budget.

3. In the Budget, rate of Basic Excise Duty on cement was enhanced from Rs. o5/- per M.T. to Rs. 135/- per. M.T. At the same time Special Excise Duty on cement

which was earlier leviable @ 10% of the Basic, Excise Duty was exempted under Notfn. 24/82 dated 28th February, 1982.

In terms of the undertaking executed, under Rule 224(2A) of the Central Excise Rules, 1944 the assesses paid up the Basic Excise Duty at the enhanced rate m respect of the goods cleared after 17 hours on Budget day. The assessee also made a claim for refund of Special Excise Duty which were debited for their clearances after 17 hours on the Budget day.

4. Heard Smt. J.K. Chander, JDR on behalf of the department. None appears on behalf of the assesses, who has made a request that the appeal may be disposed of on merits.

5. Smt. J.K. Chander, has strongly reiterated the view of the department that the assessee cannot get the benelit of the exemption of Special Excise Duty in view of the fact that this exemption takes effect only from the date of the notification which is 28th February, 1982.Vazir Sultan Tobacco Co. Limited v. Collector of Central Excise in support of her contention that Special Excise Duty would be chargeable as per the rate applicable at the time of removal of the goods.

7. As per Rule 224(1) of Central Excise Rules, goods are not to be delivered from the factory or from warehouse before 6 o'clock in the forenoon or after 6 o'clock in the afternoon, nor at any hour on Sundays and Public Holidays except by permission of the Collector and under such conditions, and on payment of such fee as the Central Board of Excise & Customs or the Collector may by general or special order require as per Rule 224(2) no goods shall be removed from a factory or warehouse on the date appointed for the presentation of the annual or any supplementary Budget of the Central Government unless an application for such removal in prescribed form is presented by the licensee to the proper officer before 5 p.m. on the working day immediately preceding the date aforesaid. Where a licensee intends to remove goods from the factory or a warehouse from 5 p.m. on Budget date he is required to obtain permission of Central Government under Sub-rule (2A) for such removal.

8. As per Rule 224(2A) where a licensee intends to remove goods from a factory or a warehouse after 5 p.m. on the date appointed for the presentation of the annual or supplementary Budget he may take an application in this behalf to the Central Government, undertaking to pay duty at the enhanced rate that may become applicable to such goods with effect from the date immediately following the date aforesaid and comply with such conditions as the Central Government may specify and thereupon the Central Government may permit the removal of such goods.

9. I find in these two appeals that the Basic Excise Duty in respect of cement was increased with effect from 28th February, 1982. As a part of this scheme the Special Excise Duty in respect of cement was, by a separate notification exempted. The question for decision before us now is as regards the liability to Basic & Special Excise duties in respect of cement cleared by the assessee after 5 p.m. on the Budget day.

Assessee has duly paid the Basic Excise duty at the higher rate in accordance with the undertaking under Rule 224(2A) and the department is satisfied that the assessee has duly fulfilled the requirement under rules. At the same time assessee has claimed that he should have the benefit of the exemption from Special Excise Duty. This, the department denies him on the ground that the relevant notification under which exemption from Special Excise Duty has been accorded becomes applicable only with effect from the following date, that is, 28th February, 1982 and the benefit thereof cannot be extended in respect of clearances taken on the previous day, I don't agree that this view is correct.

Strictly both the enhanced rate of Basic Excise Duty as well as the exemption from Special Excise duty are effective only from 28th February, 1982. The assessee has, however, paid Special Excise Duty at the enhanced rate in terms of the provisions of Rule 224(2A). Under this Rule the assessee had undertaken to pay "duty at the enhanced rate if any that may be applicable with effect from the date immediately following ". Clearly the undertaking given by the assessee should be deemed to relate both to Basic Excise Duty as well as to Special Excise Duty and in the event, as in this case, the enhancement of the Basic Excise Duty is made simultaneously with suitable exemption of the Special Excise Duty, a view can hardly be taken with any claim to reasonableness that the assessee should pay both the Basic Excise, at the enhanced rate, as well as the Special Excise Duty, which stands exempted, consequent upon the enhancement of the Basic Excise Duty. It seems to me that the view has to be taken that Rule 224(2A) must relate to the assesse's total liability to duty and, therefore, while paying Basic Excise Duty at the higher rate the assessee must get the benefit of exemption of Special Excise Duty which is simultaneously notified by the Government.

10. In view of the provisions of Rule 224, the normal criteria of duty being leviable as per the rate enforced at the time of removal as applicable [neither to the collection of Basic Excise Duty nor to Special Excise Duty.Vazir Sultan Tobacco Co. v. Collector of Central Excise (supra), in view of the above discussion is of no avail. In Vazir Sultan case the issue of interpretation of Rule 224 was not there at all. In the view that' I am taking, I am fortified by the decision taken by the Government of India in their Order No. 517 of 1979 in a revision application filed by the same assessee to the effect that for the purpose of enforcing the undertaking under Rule 224(2A) for effecting clearances on Budget day the net total change in the duty should be taken into account for recovery of any due from the petitioner.

12. Accordingly, the appeal of the department in ED/SB/A. No. 2980/ 83-C is rejected and the appeal of the assessee in ED/SB/2987/83-C is allowed.

13. I have carefully gone through the order proposed by Brother Anand, Member Technical but I have not been able to persuade myself into agreeing with the order proposed. I, therefore, record my dissent in the following words.

14. Repetition of the facts and arguments already referred to by Brother Anand appear unnecessary. In Vazir Sultan Tobacco Co. Ltd. v.Collector of Central Excise on which Smt. Chander places reliance the question for decision was whether special excise duty was leviable on goods manufactured prior to the date of its imposition even though basic excise duty was leviable on the date of manufacture. For answering this question the decision held that special excise duty and basic excise duty are different. To the same effect is the decision of the

Supreme Court in Union of India and Ors. v. Modi Rubber which, Inter alia, holds that exemption from duty of excise does not ipso facto mean exemption from special excise duty, additional excise duty or auxiliary duty. The two decisions are not directly on the issue involved in the appeal which primarily involves interpretation of Rule 224(2A) of Central Excise Rules.

15. For the purpose of these appeals it is not necessary to record a finding on the question whether the expression 'any duty' occurring in Sub-rule (2A) of Rule 224 without anything more embraces special excise duty also. The question turns on the effect of an application made under the Sub-rule by manufacturer in writing to the Central Government undertaking to pay duty at the enhanced rate, if any, that may be applicable to such goods with effect from the date following the date appointed for the presentation of annual or supplementary budget as referred to in the Sub-rule. But for this provision and application it would not be permissible for the manufacturer to remove the goods from the factory or warehouse after 5 P.M. on the date appointed for presentation of the Budget in Parliament. The permission is granted in consideration of the application and undertaking to pay duty at the enhanced rate. The rule does not so what there is any corresponding obligation on the part of Central Government to refund the amount collected as duty if consequent to Budget duty be reduced. At the time the goods were removed the manufacturer was liable to pay special excise duty which they paid. In absence of any corresponding obligation on the part of Central Government under the Sub-rule to refund any difference if duty be reduced or done away with the Revenue is correct in denying to the manufacturer refund or adjustment of special excise duty which according to the two decisions is distinct and different from basic excise duty. Merely because exemption from special excise duty effective from 28.2.1982 was granted, the manufacturer cannot claim with respect to goods removed at a time when such special excise duty was leviable that granting benefit of the exemption, refund of special excise duty should be granted. Though the view might appear inequitable, it is well settled that in matters of taxation there is no room for equity.

16. As for reliance by the manufacturer on Govt. of India decision in their Order No. 517/79 the same cannot be followed in view of the two decisions, one of the

Supreme Court and the other of Tribunal, making a distinction between special excise duty and central excise duty, as also the discussion aforesaid.

17. In view of the above reasoning, the finding of Collector (Appeals) Calcutta directing refund of special excise duty on clearance made between 17 Hours to 24 Hours of 27.2.1982 is hereby set aside and the claim of the respondent manufacturer to that extent dismissed. Appeal filed by the manufacturer M/s. Associated Cement Co. Ltd. against Collector of Central Excise (Appeals) Madras order dated 24.9.1983 dismissing the claim of Rs. 2588.96 of special excise duty is dismissed and the order upheld. Dt. 11.3.1988 Sd/-(S. D. Jha) Vice-president (J) 18. Difference having arisen between Member Technical and Vice-President (Judicial) constituting the Special Bench on the following point Whether the manufacturer appellant having executed bond in terms of Rule 224(1) of Central Excise Rules 1944 undertaking and binding themselves to pay enhanced excise duty by the imminent Budget can claim refund of special excise duty if by the Budget central excise duty be enhanced but there be no exemption from special excise duty? while the Member (Technical) is of the view that refund of special excise duty should be granted, Vice-President (Judicial) differs from the Membre (Technical).

19. The point of difference, as formulated above, is therefore submitted to President under Section 35D of Central Excises & Salt Act, 1944 read with Section 129-C(5) of the Customs Act, 1962.

Sd/- (K. Piakash Anand) Sd/- (S. D. Jha) Dated 11.3.1988 Member (T) (Vice-President (J) 20. This matter was taken up for hearing today. M/s. Associated Cement Co. Ltd. was not represented in the Court. They had earlier written to say that they would not be appearing in person. Accordingly, I have perused the records and heard Shri V. Chandrasekaran, SDR, for the Department.

21. The Learned Departmental Representative supports the opinion expressed by the Learned Vice-President (Judicial) Shri S. D. Jha. His submission is that the exemption from Special Excise Duty would take effect only from the midnight of 27/28.2.1982 and that, therefore, the exemption which was not in force during the material period, that is, from 17 Hours to 24 Hours on 27.2.1982, would not be

applicable in the instant case.

22. I have carefully considered the aforesaid submission and perused the orders written by the two Learned Members who originally heard the appeals. The question whether Basic Excise Duty at a higher rate brought about by the changes introduced by the Finance Bill of 1982 would apply to the instant clearances is not in issue. The only issue is whether the benefit of Centnil Excise Notification No. 24/82 is admissible in respect of the clearances of cement effected between 17 Hours and 24 Hours on the 27th February, 1982. The said notification exempted inter alia cement from the whole of the Special Excise Duty leviable thereon under Sub-clause (1) of Clause 50 of the Finance Bill, 1982. The exemption was in terms of Sub-rule (I) of Rule 8 of the Central Excise Rules, 1944 read with Sub-clause (4) of Clause 50 of the Finance Bill, 1982. The exemption notification is dated 28th February, 1982 and would, therefore, have come into force only from 00.00 Hours of 28th February, 1982 that is, the midnight of 27/28.2.1982. This would be so in respect of any exemption notification. All the more so in the present case Clause 50 of the Finance Bill, 1982, providing for levy of Special Excise Duty would have come into force, by virtue of the declaration given in the Finance Bill under the Provisional Collection of Taxes Act, 1931, only from the midnight of 27/28.2.1982.

The exemption notification is dated 28.2.1982. Therefore, there is no question of the said notification having any effect prior to the midnight of 27/28th February. The clearances in the present case, with which we are concerned here, were effected from 17 Hours to 24 Hours of 27th February. Therefore, the exemption was not applicable of the said clearance.

24. The file may now be placed before the Special Bench 'C' for disposal of the appeals in accordance with law.

25. In view of the majority decision, M/s. Associated Cement Company Ltd. are not entitled to the benefit of the Central Excise Notification No. 24/82 between 17 Hours and 24 hours on 27th February, 1982.

Therefore, the exemption was not applicable to the said clearances.

26. In the result the appeal filed by the Department is allowed and the appeal filed by M/s. Associated Cement Company Ltd. is dismissed.

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