

Telco Ltd. Vs. Collector of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-18-1990

Reported in : (1990)(29)ECC266

Appellant : Telco Ltd.

Respondent : Collector of C. Ex.

Judgement :

1. The subject misc. application seeks to amend the memorandum of appeal by incorporating some of the new grounds therein.

2. Ground No. L) in short indicates that both Chapter 38 and Chapter 73 have been notified as input and output under Notification No.177/86-C.E., dated 1-3-1986 issued under Rule 57A covered by MODVAT Scheme. The resin coated sand on which duty has been demanded in the impugned order has been classified under Heading 3801.90 and the castings in which such resin coated sand is used is classified under Heading 73.07. During the period prior to 1-9-1986 castings were cleared after availing exemption under Notification 208/83-C.E., dated 1-8-1983 since no credit of the duty on the inputs thereof had been availed. The appellants/applicants now undertake to pay duty payable on the resin coated sand as demanded in the impugned order and it could be taken as MODVAT credit towards payment of duty on castings. The appellants, it is also submitted may be permitted to take the duty paid on the castings as MODVAT credit to be utilised on motor vehicles or the parts of the motor vehicles. No prejudice would be caused to the Revenue it is urged by the appellants/applicants, by paying duty on

the castings in the manner aforesaid and taking credit of the duty on the resin coated sand. In fact for the period subsequent to 31-8-1986, submits the applicants, this facility has been extended to them by the Collectorate itself by granting exemption under Notification 217/86 dated 2-4-1986 for the resin coated sand used in the manufacture of castings cleared on payment of duty. It has, therefore, been prayed in the said ground that after 2-4-1986 the benefit of exemption under Notification 217/86-C.E., dated 2-4-1986 may be extended to the resin coated sand.

2.1 Against the aforesaid ground, learned JDR Shri A.S. Sunder Rajan, states that this is a question of fact whether Notification 217/86 dated 2-4-1986 or the MODVAT Scheme is applicable to resin coated sand or not. Any rate he submits that it is a mixed question of law and facts. Since this issue was not before the adjudicating authority the ground should not be allowed to be raised.

3. We are inclined to agree with the learned D.R. Notification 217/86 dated 2-4-1986 is not required to be interpreted merely on the basis of the process of manufacture brought out on record or on the basis of incorporation of Chapters in columns 2 and 3 of the table annexed to the said notification. Explanation to Notification 217/86 dated 2-4-1986 is an important part of the said notification which excludes certain machines, machinery, equipment, apparatus, tools etc. from the scope of the word 'inputs' used in the said notification. It would be a question of fact to determine whether the resin coated sand or the cores made from such sand would be covered by the exclusion clause in the explanation. This would be a question of fact for determination for which no admitted material is available on record. In the circumstances, we do not consider that this ground can be allowed to be raised by the appellants/applicants at this stage.

4. Ground M) is essentially based on permission or otherwise of ground L) in the said misc. application. Since ground L) has not been allowed as mentioned supra, ground M) can also not be allowed because it involves determination of question of facts. Ground N) sought to be incorporated by the appellants is essentially an elaboration of their ground on the demand being time barred. This point seeks to be strengthened by Poona Collectorate's Trade Notice No. 103/88 dated 11-4-

1988. Issuance of the Trade Notice is not denied by the learned DR. Hence no further factual enquiry is called for in respect of this ground. This ground is, therefore, admitted subject to the findings in the main order on the appeal of the applicants/appellants.

5. In sum, only one of the grounds i.e. ground N) in the subject application is admitted while disallowing the other two grounds.

(1) Whether the coating of sand by the appellants with the resin described as a resin coated sand is liable to excise duty. If so what is the correct Heading for it.

(2) Whether the demand of duty of Rs. 12,63,979.20p for the period 1-3-1986 to 31-3-1986 is partly time barred inasmuch as the notice has been issued on 28-1-1987 provided the first question is found in favour of the Revenue.

9. In order to appreciate the above questions, following salient facts as given in the show cause notice leading to the impugned order are set out below :- 9.1 On collecting the intelligence that the appellants are engaged in the manufacture of resin coated sand and are using the same captively without paying C.E. duty due thereon, the officers of the Preventive Headquarters visited the appellants' factory on 24-11-1986. It was noticed that though they were manufacturing the resin coated sand they had not declared so in their classification list effective from 1-3-1986 and were clearing the same without paying C.E. duty due thereon and without observing the Central Excise formalities. The stock of 14 MTs of resin coated sand lying with the appellants was, therefore, seized under a panchnama on 24-11-1986 on the reasonable belief that the same had not discharged its duty liability. The said quantity of 14 MTs was released to the appellants provisionally on execution of a bond.

9.1A On scrutiny of the records maintained by the appellants the Central Excise officers noticed that the appellants were manufacturing casting falling under subheading 7307.10 of the CETA 1985. They had also classified molten iron and cores under sub-headings 7201.00 and 8480.00 respectively and had claimed full exemption. But they had not declared the instant product resin coated sand. Prior to 1-9-1986 by virtue of Notification 208/83 the appellants were not paying Central

Excise duty on iron castings. The duty is being paid by them w.e.f.

1-9-1986.

9.2 Shri K.S. Sivarao, Manager Foundry Materials in his statement recorded on 25-11-1986 stated that he was looking after purchase of all raw materials required for foundry plant such as steel scrap, ferro alloys, graphite tiles, shell resins/catalyst, sand etc. In the factory there are two resin coated plants for mixing sand and resin and both are identical in operation. There are two processes by which they manufacture resin coated sand - one is by shell coating process in which sand resin and catalyst are mixed together in a mixer and hot air is blown at 60 - 70C. The same is tested by an Inspector for hot tensile strength and moulds. Thereafter such cores/moulds are used for the different castings manufactured in their factory. He is only responsible for supplying raw materials and day to day production is looked after by production personnel. The average production of coated sand is 800 MTs per month as per last year's production. The entire coated sand manufactured by the appellants are used captively.

9.3 Shri A.R. Jagannathan, Deputy General Manager (Finance) in his statement dated 25-11-1986, inter alia, stated that for making cores they use sand and resin brought from the open market. In their sand coating plant the sand resin is mixed together and such mixture is used in core shop. The coated sand is thereafter taken out of the hopper and put into bins. If the mixture is not upto the proper quality it is rejected, otherwise it is used for the manufacture of cores in the core shop. The rejected sand, however, is used in the mould shop.

9.4 On the basis of the above facts a show cause notice dated 28-1-1987 was issued to the appellants asking them as to why (i) duty of Rs. 12,83,389/- on the quantity of 3306 MTs. of resin coated sand produced and cleared during the period 1-3-1986 to 31-8-1986 be not demanded (ii) the quantity of 14 MTs. of resin coated sand be not confiscated and (iii) penalty should not be imposed on them under Rules 9(2), 52A and 173Q of the Central Excise Rules.

9.5 On adjudication, the Collector has confirmed the demand of the aforesaid amount of duty, upheld the liability to confiscation of the 14 MTs. of seized resin

coated sand but since that had been released provisionally to the appellants, he has appropriated an amount of Rs. 4200/- from the security of the bond executed by the appellants for provisional release of the goods. The adjudicating authority however, has not imposed any penalty having regard to the facts and circumstances of the case.

10. Learned advocate Shri V. Lakshmikumaran has urged that coating of sand as resin for the purpose of manufacturing cores does not amount to manufacture of any new commodity. Sand remains sand except that its quality is improved inasmuch as there is a greater binding characteristic in such sand than in ordinary sand facilitating making of cores. In support of this proposition learned advocate cites Tribunal's decision in 1985 (22) 128 (Tribunal) [CCE Jaipur v. Fine Marble and Minerals Pvt. Ltd., Makrana]. This decision, submits the learned advocate, has been confirmed by the Supreme Court.

10.1 As against the above proposition, learned DR submits that the resin coated sand is a new commodity known to the market as such having different name, character and use. Ordinary sand, according to him, admittedly without the coated resin could not be used for making cores.

The character of sand itself undergoes a change as well as the name. He submits that the literature produced by the appellants themselves namely, Shell Process Foundry Practice (Published by the American Foundrymen's Society) itself indicates that coating of sand with resin for the purpose of manufacturing cores is a marketable product. The mere fact that it is not marketed by the appellants would not make any difference to the excisability/dutiability of the product. He also submits that resin coated sand has an economic utility and would, therefore, be covered by the expression 'goods', as held by Delhi High Court in 1978 (2) ELT J-121 (DEL.) - Para 7 [DCM v. CCE]. Other citations given by him in support of his arguments are :- (V) 1988 (37) ELT 369 (Tri.).-Para 18 [Unique Beautycare Product Pvt. Ltd. v. CCE] 11. We have considered the pleas advanced on both sides. We are inclined to agree on the basis of the authorities cited by the learned DR that marketability of a product does not depend upon its being actually marketed. In other words, if it is captively consumed it is still liable to duty provided

it is a new commodity as such known to the market having a different name, character or use. Lack of any chemical reaction does not mean that no new commodity can be manufactured. Some time a mere mixture of various components may bring into existence a new commodity as has been held in Unique Beautycare mentioned supra. Question is, however, still to be resolved whether the instant product is marketable or not. Admittedly the burden of proving marketability is on the department as held in the case of Ambalal Sarabhai supra.

11.1 Learned DR on this aspect makes his submission that the mere existence of technology as found in Shell Process Foundry Practice is evidence enough of marketability of the resin coated sand. On the other hand, the learned advocate for the appellants has urged that resin coated sand is not marketable because it cannot be stored for long and it is likely to get hardened if left over after some period. It is also urged that in the cold box process of making cores resin coated sand does not come into existence at all. The cores are directly made from a mixture of resin and sand.

11.2 We have carefully considered the pleas advanced on both sides on this aspect. On a perusal of the two Chapters namely, 3 (Shell Sand Characteristics) and Chapter 4 (Synthetic Resin Binders) put on record by the appellants, we find the following para in Chapter 4:- "Stick point or melt point - These terms are often used interchangeably and refer to the heat sensitivity of the resin coating on sand and actually indicate the lowest temperature at which the coating becomes soft or tacky enough to adhere to itself or other surfaces. To some degree, the stick point of a coated sand is related to the softening point of the novolak resin, per se, but is not the same since in a resin coating the cross-linking agent hexa is present. The stick point test is a very useful quality control tool employed by most commercial sand coaters and foundries engaged in the shell process. It not only serves to measure the uniformity of the coated sand from batch to batch, but also may serve to indicate its suitability for a particular production purpose".

11.3 The emphasised portion indicates that there are commercial sand-coaters. This shows that coated sand is a commercial and marketable product. This point is further corroborated by the statement of Mr. Jagannathan referred to earlier that

after coating the sand is put into storage bins. It is, therefore, not correct for the appellants/applicants to say that resin coated sand manufactured by them is unstable and would get hardened soon if not used immediately in the manufacture of cores.

11.4 We, therefore, hold that activity of producing resin coated sand is one of manufacturing a new commodity and therefore, resin coated sand is liable to duty under appropriate Tariff Heading in CETA 1985.

11.5 The adjudicating authority has confirmed the demand under Tariff Heading 3801.90 whereas a subsequent Trade Notice 103/88 dated 12-4-1988 issued by the same Collector indicates the classification of resin coated sand as under Heading 6807.00. We notice that Chapter 38 of CETA 1985 pertains to "miscellaneous chemical products" whereas Chapter 68 pertains to "articles of stone, plaster, cement asbestos, mica or similar materials"; Obviously Chapter 68 and consequently Tariff Heading 6807.00 is more appropriate to the product. There is no dispute about correctness of this Heading on the classification of the product under consideration. The learned advocate, however, makes a grievance that the allegation in the show cause notice and the finding in the impugned order is about classification of the product under Tariff Heading 3801.90; that being so the, demand of duty, according to the learned advocate, gets automatically set aside.

11.6 Learned DR, on the other hand, submits that the Tribunal has got authority to mould the demand/relief according to correct classification. He takes support for this argument on Tribunal's decision in the case of Hindustan Polymers [1986 (24) ELT 697-Para 6).

The Tribunal in para 6 of the aforesaid citation observes as follows :- "6. In view of the decision of the Tribunal supra and the submissions made by the SDR, the findings of the lower authorities that coloured polystyrene would be classifiable under Tariff Item 68 for demand of duty cannot be sustained, the respondent's (appellant's) contention that goods would be classifiable under T.I. 15A(1)(ii) of the Central Excise Tariff (as it stood at the material time) would have to be accepted. The question now to be seen is whether whole or any part of the demand of duty

raised against the appellants proposing classification under T.I. 68 can be enforced against the appellants by the Revenue consequent to classification under T.I. 15A(I)(ii) as stated above. While according to Shri Lakshmi Kumaran, the learned SDR, Tribunal was competent to mould the relief according to the changed situation and demand of justice.

Shri Ravinder Narain has strongly contended that the basis of the demand of duty was classification under T.I. 68 of the Central Excise Tariff and that having been set aside demand, if any, consequent to classification under T.I. 15A(I)(ii) *ibid* cannot be made or sustained. It is to be remembered that the main dispute between the parties was one of classification - whether the goods fall under one tariff item or the other and when goods have been found to be classifiable under the tariff item claimed by the appellants there is no good reason why the appellants should not be called upon to pay so much of duty appropriately quantifiable under the item claimed by them subject of course to other procedural safeguards like limitation, demand not exceeding the one originally made. It is also well settled that Courts and Tribunals have full powers to mould the relief in a case according as the ends of justice require".

11.7 Keeping in view the aforesaid decision of the Tribunal in Hindustan Polymers we accept the contention of the learned DR and hold that the duty would be demandable under Tariff Heading 6807.00 instead of Tariff Heading 3801.90.

11.8 Next question that arises for consideration is whether the demand made by the Revenue should be limited normally to the period of six months or the larger period could be invoked as has been done by the adjudicating officer. On this issue, learned advocate has urged that the adjudicating officer has refrained from imposing any penalty on the appellants having regard to the overall facts and circumstances of the case. This itself, according to him, is an intrinsic evidence of absence of *mens rea* on the part of the appellants. Accordingly, he submits that normal period of six months only is available to the department for demand of duty. He relies in support of this argument on 1987 (29) ELT 259 (Tri.) [CCE Indore v. Central India Board Products].

He further submits that the Trade Notice 103/88 mentioned supra itself indicates that there was confusion about its dutiability all around.

The department had itself been changing the classification of the product from time to time. It is an admitted fact, according to the learned advocate that prior to 1-3-1986, the product under consideration was not dutiable inasmuch as Notification 118/75 was applicable to the product. Finance Minister's speech while introducing CETA 1985 Bill clearly indicated that the new Tariff was being brought into effect for the sake of structural changes and for the sake of alignment with the Customs Tariff rather than for the sake of increase in revenue. Learned advocate also submits that there was no intention of evasion of duty because they would be otherwise covered under Notification 217/86-CE., dated 2-4-1986 (We ignore this last argument because we already disallowed a new ground based on Notification 217/86).

11.9 Opposing the aforesaid submissions of the appellants' learned advocate, learned DR, Shri A.S. Sunder Rajan has urged that no positive action was taken by the department to generate a bona fide belief in the mind of the appellants not to apply for licence or not to pay any duty. Unless there is any positive action on the part of the appellants to generate such a belief, the appellants cannot take advantage of their own lapse. He relies for this proposition on 1989 (43) ELT 195 SC Para 8 [Padmini Products v. CCE].

11.10 In order to appreciate the aforesaid contention of the learned DR it is appropriate to extract the observations of the Hon'ble Supreme Court in Padmini Products :- In order to sustain an order of the Tribunal for a period of more than six months and upto a period of 5 years in view of the proviso to Sub-section (1) of Section 11A of the Act, it had to be established that the duty of excise had not been levied or paid or short levied or short-paid or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder with intent to evade payment of duty. It was observed by this Court that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew

otherwise is required before it is saddled with any liability beyond the period of six months had to be established. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case" 11.11 We observe that the learned DR is not correct when he asserts that the positive action on the part of the department is required to be shown so that a bona fide belief generated in the mind of an assessee/manufacturer for not applying for the licence or for not paying the duty. On the other hand, we notice that something positive on the part of the manufacturer/assessee is to be established, as observed by the Supreme Court, rather than the mere inaction or failure on the part of such manufacturer or assessee. Since the product was not being assessed to duty prior to 1-3-1986 we find sufficient force in the plea of the appellants' learned advocate that no mens rea can be attributed to the appellants in this respect. This is further strengthened by the plea of non-imposition of penalty by the adjudicating authority on the appellants. Hence we hold that the demand should be limited under Tariff Heading 6807.00 to six months period alone.

12. Subject to the aforesaid modification the appeal is otherwise rejected.

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