

Oriental Textile Processing Co. Vs. Collector of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-25-1990

Reported in : (1991)LC115Tri(Delhi)

Appellant : Oriental Textile Processing Co.

Respondent : Collector of C. Ex.

Judgement :

1. The appellants in their appeal against the order of the Additional Collector No. 6/CE/87(C.No. V(22) ADC/15/63/ AAR/86/3051 dated 27-03-1987 have appealed for setting aside the order involving duty amount of Rs. 12,703.14 and the penalty of Rs. 75,000/-. Briefly stating the case, the appellants have said that they are engaged in processing of fabrics on job work and that the allegation levelled against them was that 3 Cycle Carts carrying 62 Titans (pieces) of man-made fabrics were intercepted near Shingar Cinema and the Central Excise officers found the goods removed from the factory without cover of gate-pass and further it was alleged that in addition to 62 pieces, three Thans lying inside the factory premises were found not accounted in the RG-1 Register and also the allegation that 197 Thans of Acylic knitted fabrics were found in lots in grey condition and not found recorded in the grey goods register and the others were waiting to be entered. The lot numbers were not traceable in the 65 pieces after dyeing, but there is no statutory requirement for marking lot numbers on the pieces and no adverse inference should be taken. Further as per Rule 233(A) of the Central Excise Rules, there is nothing to show that the appellants were the owners of the

seized goods and the redemption fine was excessive and so also the penalty.

2. Shri Harbans Singh, Ld. Advocate appeared on behalf of the appellants and referred to the Annexure-'A' to the seizure memo., containing the details of the goods seized and stated that this list does not indicate the place of seizure whereas other Annexures indicate and, therefore, he held that these were seized from the factory premises. The statement taken from the Rehri Pullers should not be relied upon as they are illiterates. Similarly, the statement of Shri Mewa Lai does not contain the signatures of the officers recording the statement. He further contended that non-marking of lot numbers was not a statutory requirement and the confiscation was also not legal as the appellant was not the owner of the goods.

3. In reply, the Ld. S.D.R., Ms. Renuka Mann, referred to the order of the Additional Collector and the statements of the Rehri Pullers and Shri Mewa Lai, Supervisor of the firm, whereby it was disclosed that no document was handed over to them when the fabrics were removed from the factory and Shri Mewa Lai has also admitted that 3 Cycle Rehries loaded with polyester knitted fabrics were despatched without payment of Central Excise Duty and other central excise formalities and also the statement of Shri Surinder Arora dated 16-03-1986 wherein he had confessed that no lot numbers were made on the said fabrics and the contraventions were established and the redemption fine, penalty and duty were correctly ordered.

4. The submissions made have been considered. It is seen that the place of seizure in the seizure memo, has been shown as Shingar Cinema as stated in the Order-in-Original and as such, therefore, the contention of the Ld. Advocate that the list of goods seized does not contain the place of seizure is not tenable. Moreover, the statement recorded from the Supervisor, Shri Mewa Lai, dated 16-03-1986 is clear that the 62 Tians were despatched without any documents and in respect of the other fabrics where there were discrepancies and without any lot numbers, the statement of Shri Surinder Arora who is the authorised agent of the firm, is a clear indication that the goods were found without lot numbers and these were not entered in the grey fabric register. It is the contention of the appellant that

there is no statutory provision requiring that every piece received for processing should be marked with the lot number. This plea has not been raised before the lower authorities, but it appears that such registers are maintained for receipt of grey fabrics from the merchants to the processors and in order to keep track of the fabric so received, lot numbers are assigned till the complete processing is done and cleared out of the factory. Inasmuch as, Shri Surinder Arora has admitted that no lot numbers were marked on the fabrics, the requirement of assigning lot number has not been complied with and the clearance of the fabrics without payment of duty has also been established. The confiscation of the fabrics is upheld and the redemption fine of Rs. 50,000/- is also found to be reasonable. For the contravention, the liability for penalty is also correct but, however, the same is reduced to Rs. 25,000/-.

5. Shri Harbans Singh, Ld. Advocate completed his arguments on the merits of the case, but before concluding he submitted that he intends to raise a purely legal point to the effect that in the instant case the goods were not excisable and only additional duty was to be levied and paid, and there was no penal action to be taken. Shri Harbans Singh was informed that in the absence of any written application and reasons for not raising the said issue before the authority below, they can move proper application with a copy to the other side so that the Bench can decide as to whether the appellant is to be given an opportunity to raise the alleged pure question of law.

6. Shri Harbans Singh filed a Misc. Application No. E/Misc./476/89-NRB in Appeal No. E/1819/87-NRB and Appeal No. E/1258/87-NRB. The following additional grounds of law were sought to be taken up for consideration of the Tribunal :- (i) The Sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 would not extend to encompass all the provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder, much less those providing for confiscation of the goods and imposition of penalties; (ii) The goods which are subject only to the Additional Duties of Excise (Goods of Special Importance) Act, 1957 would not be excisable goods within the meaning of the definition of the term 'excisable goods' under Rule 2(d) of the Central Excises & Salt Act, only goods 'subject to levy of excise duty' will fall within the scope of

excisable goods; (iii) The Additional duties are not covered by the definition of the term 'duty' as given under Rule 2(d) of the Central Excise Rules.

7. During his arguments, Shri Harbans Singh, Ld. Advocate referred to Rule 173-Q of the Central Excise Rules, its application is for excisable goods. As per the definition, 'additional duties' under the Additional Duties of Excise (Goods of Special Importance) Act, 1957, means the duties of excise levied and collected under Sub-section (1) of Section 3. The scope of Section 3 Sub-section (1)(3) is as follows :- "The provisions of the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duty, shall so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in Sub-section (1)". Associated Cement Co. Ltd. v. Director of Inspection, Customs and Central Excise, N. Delhi, and stated that expression "duty of excise" in the circumstances of the case referred to therein, would relate to the procedural aspect, such as quantification and collection of duty and similarly, in the Additional Duties of Excise Act, the provisions of Section 3(1)(3) relate to the procedural aspect of levy and collection of duty and no provision for imposition of penalty is explicitly provided.

He further argued that the term "duty of excise" used in the Additional Duties Act would not render the goods as "excisable goods". He cited the decisions in 1978 (2) ELT (J-57) - Tamil Nadu (Madras State) Handloom Weavers Co-operative Society Ltd. v. Asstt. Collector of Central Excise, Erode, and to emphasise his point of contention, the term 'Subject' used in the definition 2(d) will mean conditionally i.e.

on the condition that it is levied to a duty of excise under the Central Excise Tariff. He raised the point on penalty, whether duty includes penalty and referred to the decision in Geep Industrial Syndicate, Allahabad v. Collr. of Cent. Excise, Allahabad, -1987 (37) ELT 1040 (Tribunal) and stated that Rule 173Q cannot bring in lost duty - only penalty. And penalty does not take the place of duty in Central Excise taxation procedure and accounting because it is not duty, but is or can be in addition to duty.

8. In reply, Shri A.S. Sunder Rajan, Ld. JDR, referred to the decision of the Supreme Court in *Ujagar Prints Etc. Etc. v. Union of India and Ors.* -1988 (38) ELT 535 (SC), wherein the Supreme Court has held that what applies to the main levy applies to the additional duties as well, meaning thereby, levy under the Central Excise Act would be applicable to the additional duties as well. He referred to the decisions in 1985 (21) ELT 636 (SC) - *Dhanpat Oil and General Mills v. Union of India and Ors.*, and *Upper Ganges Sugar Mills Ltd., Chandausi v. Collr. of Cent. Excise, Allahabad*, where in respect of Produce Cess Act, which is similar to the Additional Duties of Excise Act, the provisions of the Central Excises and Salt Act and rules thereunder shall so far as may be, apply in relation to the levy and collection of produce cess, as they apply in relation to the levy and collection of any duty under the Central Excises and Salt Act.

Therefore, so far as levy and collection is concerned, the wordings being similar in both the acts (Produce Cess Act and Additional Duties), the provisions of the Central Excises and Salt Act will apply.

The Ld. JDR pointed out that excisable goods will not become non-excisable by virtue of the goods being exempted. He referred to the decision of the High Court of Karnataka - *Kamataka Cement Pipe Factory v. The Supdt. of Central Excise, Hubli and Anr.*, 1986 (23) ELT 313 (Kar.), the relevant paras are :- "In the decisions relied upon by Sri Shivashankar Bhat, namely : (i) Allahabad (sic), (ii) Andhra Pradesh and (iii) Madras High Courts their Lordships on a detailed examination of the definition of 'excisable goods' vis-a-vis the Schedule and effect of notifications issued under the Act, have taken a uniform view that even though the excisable goods are exempted from excise duty by virtue of notifications issued by the Central Government, they do not cease to be 'excisable goods'.

"I am of the opinion that the view expressed in the above said decisions clearly support the contention of the Union of India.

The character of a product, as excisable goods, does not depend upon the actual levy of duty, but depends on the description as 'excisable goods' as contained in First Schedule to the Act.

'Excisable goods' is defined in Section 2(d) of the Act. 'Excisable goods' means, goods specified in the First Schedule as being subject to a duty of excise, and includes salt. Under the charging Section 3 of the Act, duty as specified in the First Schedule is levied on all excisable goods. The Schedule to the Act gives description of goods, which are excisable and the rate of duty. It is significant to note that in respect of some of the goods given in the Schedule, the duty is 'nil'." Therefore, he was of the view that even if no specific provision is made for penalty under the Additional Duties of Excise Act by virtue of the goods being "Excisable Goods", they will be liable for provision of the Central Excises and Salt Act, including the penal provisions.

9. In his rejoinder, Shri Harbans Singh, the Ld. Advocate was of the view that provisions of the Produce Cess Act will apply only in relation to levy and collection under Section 15 as wordings are similar, but will not all other provisions.

The citations in 1985 (19) ELT 455 (Tribunal) refer to procedural matters and will not be directly applicable. The case law in 1985 (21) ELT 636 (SC) is with reference to prosecution and is not applicable.

The citation in 1985 (21) ELT 607 (Tribunal), the issue relates to refunds. The citation in 1988 (38) ELT 535 (SC), he referred to Para 44 of the judgment and stated that all the provisions of the Central Excise Act will not apply. In 1987 (31) ELT 211, with reference to Para 12, he said that on similar ratio as held, no provision has been made in the Additional Excise Duties Act for imposition of penalty.

10. The legal issue submitted and argued by both the sides has been considered. The Additional Duties of Excise (Goods of Special Importance) Act, 1957, as already pointed out, refers to levy and collection of Additional Duties. Section 3(1) provides for the levy and sub-section 3(1) (3) refers to the application of the provisions of the Central Excises and Salt Act, 1944. The view held by the appellant is that the provisions will apply only in so far as levy and collection of the duties of excise specified in Sub-section (1) including those relating to refunds and exemption. The provision for imposition of penalty is not specifically mentioned. The rule for imposition of penalty is Rule 173Q and is applicable to "Excisable

Goods". Section 2(d) defines "Excisable Goods" as goods specified in the Schedule to the Central Excise Tariff Act, as being subject to a duty of excise and includes salt. The appellants' contention is that these goods are not, "as being subject" to a duty of excise under the Central Excise Act, but only under Additional Duties of Excise Act and, therefore, not "excisable goods", for invoking the provisions of the Rule 173Q for imposition of penalty. The question is whether they are goods specified in the Schedule to the Central Excise Tariff Act. In the present case these are man-made fabrics under the Schedule under Tariff Heading 22 of the erstwhile Tariff and Heading 55 of the present Tariff. The term "subject to a levy" would mean "liable for levy". The term "subject" has been defined in the Dictionary, 'Chambers Twentieth Century Dictionary' in various terms - "under rule, government, jurisdiction, or control etc. etc." and the word 'liable' is also defined. Therefore, it appears to be the most appropriate meaning that 'excisable goods' means goods specified in the Schedule to the Central Excise Act 1985 as being "subject" or "liable" to a duty of excise and includes salt.

Therefore, if the goods are specified in the Schedule they become "liable" for a levy, whether they are subsequently exempted or carry a 'nil' rate of duty, becomes secondary. Therefore, the goods man-made fabrics, figuring in the First Schedule to the Central Excise Tariff Act become liable for levy of duty of excise and are, therefore, excisable goods. A nil levy or non-levy will not render it non-excisable. The citation already quoted in 1978 (2) ELT (J-57) - Tamil Nadu (Madras State) Handloom Weavers Co-operative Society Ltd. v. Asstt. Collr. of C. Excise, Erode, has decided that "the character as excisable goods does not depend on the actual levy of duty, but on the description as excisable goods in the First Schedule to the Act". The Karnataka High Court's decision in Kamataka Cement Pipe Factory v. Stipdt. of Central Excise, Hubli and Anr., 1986 (7) ECC 25 quoted supra is relevant. The Supreme Court in 1988 (38) ELT 535 (SC) - Ujagar Prints, Etc. Etc. v. UOI, in its final analysis about the applicability of the provisions of the Central Excise Act to the levies under the various other acts specified has very clearly concluded as follows :- "The present case falls within the scope of these exceptions, even if Section 3(3) is construed as incorporating certain specific provisions of the 1944 into itself. The legislation presently in question is clearly in pari materia with the 1944 Act. It is also merely supplemental. While the

1944 Act imposes a general levy of excise duty on all goods manufactured and produced, and aim of the present Act is to supplement the levy by an additional duty of the same nature on certain goods. The duration of the applicability is undefined but the statute is clearly enforceable as long as it is in the statute book side by side with the normal excise duties. The clear intention is that the same provisions shall govern both the levies except that the duty under the later Act is confined to certain goods only and its distributability among the States may perhaps follow a different pattern from the principal duty. There is no reason or logic why all the incidents attaching under the earlier legislation, in so far as they are not clearly inconsistent with the later one should not be extended to the later legislation as well.

As has been pointed out earlier, the Finance Acts which levied special or regular or additional excise duties, contained in themselves all the elements of charge of duty. The goods were mentioned and the duty as to be levied either at a percentage of the normal excise duty payable under the 1944 Act or at a percentage of the value of the assessable goods as determined under the 1944 Act.

All that was further needed was the applicability of the procedural provisions of the 1944 Act. Here, however, the 1957 Act is incomplete as to the basis of the charge and its provisions would become totally unworkable unless the concepts of 'manufacture' and 'assessable value' as determined under the 1944 Act are carried into it.

In the circumstances, I agree that we should give full and literal effect to the language of Section 3(3) and hold that it has the effect not only of attracting the procedural provisions of the 1944 Act but also all its other provisions, including those containing the definition." 11. Therefore, the provisions including the definitions are applicable to the Additional Duties of Excise Act, and by inference the definition of "Excisable Goods" and the penal provisions extending to such goods in Rule 173Q, will thereby apply. The legal points raised in the Miscellaneous Application are disposed of accordingly.