

Collr. of C. Ex. Vs. Commrl. Engineers and Body

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-17-1990

Reported in : (1991)(54)ELT304TriDel

Appellant : Collr. of C. Ex.

Respondent : Commrl. Engineers and Body

Judgement :

1. This is an appeal filed by the department against the order of Collector (Appeals) New Delhi dated 27-10-1989.
2. The learned SDR stated that in this matter, the Asstt. Collector had rejected the refund claim of the respondent as time barred under Section 11B of the Central Excise Act. The respondents build bodies on chassis fitted with engines. They also manufacture 'skip loader' which has a detachable container called bucket.
3. They submitted a classification list effective from 1-4-1987 and indicated buckets under sub-heading 8708.00 and the rate of duty as 20% ad valorem. The Asstt. Collector while considering the matter modified the classification list. He classified buckets under 8428.00 and indicated then rate of duty as 15% ad valorem (basic duty) on 27-7-1987.
4. Pending approval of the said classification list, the respondents had removed 4 buckets under GP1 after payment of duty at the declared rate of 20% ad valorem. Subsequently they filed RT 12 returns showing this payment.

5. RT 12 was assessed by the Superintendent of Central Excise on 31-7-1987.
6. The respondents filed the refund claim with the Asstt. Collector on 9-11-1987 in respect of the excise duty paid on bucket.
7. Since the refund claim was received on 9-11-1987 in respect of excess amount paid on 29-4-1987 the Asst. Collector rejected the said claim under Section 11B as time barred.
8. The Collector (Appeals) however, set aside the order of the Asst.

Collector holding that the case is fully covered under the provisions of sub-section 5(e) of Section 11B.9. The department's contention is that the learned Collector (Appeals) is incorrect both on facts and in law.

10. The learned Collector (Appeals) has misquoted Section 11B as there is no sub-section 5(e) in the said section. In other words, there is no sub-clause (e) in Sub-section (5). Further in the explanation to the said Section 11B the relevant date appearing in the Sub-section (1) has been defined vide explanation B(a) to B(f) depending upon circumstances.

11. The Collector (Appeals) should have mentioned that the case falls under sub-section 5 of Section 11B and the definition of relevant date given under B(e) of the said section would be applicable. That apart even if the intention of the Collector (Appeals) was to refer to the Section 11B(5) even then the order was incorrect as the definition given at sub-clause (e) to the explanation (B) is applicable only where duty of excise is paid provisionally under the Act or the Rules and the relevant date means the rate of adjustment of duty after the final assessment in the case.

12. It was the department's contention that the respondent has not paid the duty provisionally and the assessment had not been made provisionally under Rule 9-B, therefore the question of final assessment does not arise; hence the provision of Section HB(5)(e) could not be made applicable.

13. In the instant case the party had on its own volition classified the goods under 8708.00 and paid duty at the rate of 20% ad valorem.
14. The classification list was approved on 29-7-1987 and the impugned goods were rightly classified under Chapter heading 8428.00 attracting duty at the rate of 15% (instead of 20% ad valorem) claimed/paid and collected by the party.
15. The learned consultant drew attention to the cross objection filed by them and stated that the order of the learned Collector (Appeals) was correct and was required to be upheld.16. He also stated that first and foremost a question arises as to whether a refund claim could have been filed by the respondents before the approval of their classification list 17. It was his contention that cause for action arose only on receipt of the approved classification list; and the respondents were within the limit of six months with effect from the date of receipt of Assistant Collector's order namely 30-8-1987 (in as much as the refund claim was received by the Asst. Collector on 9-11-1987).
18. In any eventuality the classification list was approved on 29-7-1987 and even if the limitation was reckoned from this date the claim was within time i.e. within the period of six months prescribed and enjoined by Section 11B.19. It was also his submission that they had filed the classification as early as 1-4-1987 but it was approved only on 29-7-1987. In the meanwhile they had taken clearances at the declared rates and the department did not insist on any other formalities or Bond under Rule 9B for reasons best known to the authorities. In other words the clearance could only be deemed to have been taken virtually on provisional basis even though no bond was got executed under Rule 9B. This special feature of the case places it under category (e) of explanation (B) given below Section 11B of the Central Excises and Salt Act, 1944 dealing with the "relevant date".
20. Further another view could be taken in the matter from the point of view of completion of RT12 returns as no assessment is final unless the return is checked and passed as being in order. He would like to cite in this connection Govt. of India's order in revision in the case of Standard Tin Works of New Delhi [1977 (1) ELT J 127]. Their RT 12 return was passed and approved only on 31-7-1987 and counting from this date their refund claim was within six months time limit

prescribed under Section 11B.21. It is also their contention that as a matter of fact when the Asst.

Collector approved the rate of duty as 15% ad valorem (as against 20%) declared by them, the Asst. Collector in all fairness should have granted them suo motu refund in respect of excise duty which was refundable to them in the wake of his own order.

22. If this view is taken then Sub-section (3) of Section 11B would become applicable.

23. It was also his submission that the authorities should not take shelter behind the technical pleas to defeat legitimate claim of a citizen as pronounced in the Supreme Court in the case of Madras Port Trust.

24. On hearing both the sides the Bench, recollected Tribunal's decision in the case of Oriental Insulated Conductors Pvt. Ltd. reported in 1990 (47) ELT 630 and gave opportunity to both the sides to make submissions with reference to it.

25. The learned SDR thereupon stated that this case was distinguishable as in that case even the application was made prior to the date of assessment. He would also like to emphasise and reiterate that the present case was not of provisional assessment.

26. The learned counsel for the respondent stated that the ratio of the aforesaid order of the East Regional Bench was applicable to the present case inasmuch as in this order the Tribunal has held that the amount paid before assessment could only be considered as 'deemed duty' and not 'duty' and the clearance before assessment could only be considered as provisional.

28. I observe that in this case admittedly the so called 'duty' was paid (at the rate of 20% ad valorem) under TI 87.08 BEFORE the approval of the classification list by the Assistant Collector, (2) that the Assistant Collector DID NOT approve the above rate, and (3) that the Asst. Collector determined the appropriate rate as 15% ad valorem (under T.I. 84.28), and (4) that this assessment was done by the Assistant Collector on 27-7-1987.

29. Now in terms of the ratio of this Tribunal's order in the case of Oriental Insulated Conductors Pvt. Ltd. [1990 (47) ELT 630 (Tribunal)], the amount determined by the assessee himself in anticipation of assessment by the proper officer did not amount to duty. Hence the payment thereof did not amount to payment of duty and deposit thereof could only be considered as that of 'deemed duty' determined in anticipation of approval of the classification list and assessment thereon. Such a payment could only be deemed to be 'provisional' irrespective of whether a bond was executed in terms of Rule 9B or not.

It is noteworthy that the bond is merely a mechanism provided to safeguard revenue interest. This provision is virtually discretionary and may at the most be considered as directory but not mandatory. Even otherwise execution or non-execution of bond does not change the nature or character of payment, which having been made prior to assessment by the proper officer could only be considered as that of an amount determined to fulfil anticipated liability for duty and not as an assessed 'duty'. Hence the date of such deposit is not relevant and cannot be considered as the date of payment of duty in terms of Section 11B.30. In the circumstances the time period of 6 months provided under Section 11B would only start running from the date of communication of the order of assessment (and not from the date of deposit of some amount in anticipation of assessment).

31. Furthermore at the time of completion of assessment the Superintendent is required to implement the Assistant Collector's order correctly and properly. In fact he was duty bound to do so.

32. In other words he was not competent to ignore or deviate from the Assistant Collector's orders. Therefore if in terms of Assistant Collector's order the Superintendent notices that there have been an over-payment or under-payment (by way of deposit in anticipation of Assistant Collector's order or otherwise) then it was his duty in terms of Rule 173(1) to make appropriate adjustment by way of allowing/approving credit or debit as may be required to be made at the time of completion of RT 12 and finalising the assessment in terms of 173(1).

33. In other words in such cases even a refund application was not called for and the action was required to be taken by the Superintendent to implement the Assistant Collector's order irrespective of whether a request to that effect was made or not made by the assessee. There is however no bar for an assessee to draw attention of the authorities towards this requirement by way of a letter or application for refund or otherwise by way of assisting and reminding the authorities but if the assessee does not do so the duty of the Superintendent and the department own...nevertheless to perform the same in accordance with the rules and adjust the amount by allowing necessary credit or debit as per the prescribed rules and proceedings.

34. In the instant case in any eventuality the refund application was admittedly filed within six months from the date of assessment. Hence it was within time. As such the appeal is rejected as already announced in the open court.

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