Advance Transformers and Vs. Collector of Central Excise

Advance Transformers and Vs. Collector of Central Excise

SooperKanoon Citation : sooperkanoon.com/622

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-13-1983

Reported in : (1984)(16)ELT452TriDel

Appellant : Advance Transformers and

Respondent : Collector of Central Excise

Judgement :

1. These three appeals relate to the combined Order-in-Appeal passed by the Appellate Collector of Central Excise, Bombay, against the three Orders-in-Original mentioned above. The appellants had filed a single Revision Application to the Government of India which under Section 35P of the Central Excises and Salt Act has been transferred to the Tribunal to be disposed of as if it were an appeal filed before it.

Since the Appellate Collector's order is a combined one, against three Orders-in-Onginal, the appellants have subsequently filed two supplementary appeals. All these appeals are interconnected and have been dealt with together.

2. The basic facts are that the appellants have entered into an agreement with Messrs. Industrial Meters Pvt. Ltd., Kandivli (hereinafter referred to as "IMP") to fabricate and assemble HT and LT distribution transformers from the raw materials/components supplied to them by IMP. The transformers were to be assembled according to the specifications/design of IMP and under their direct supervision and control. For this puppose the appellants were allotted an area on

the ground floor of the factory of IMP where they were to assemble transformars only for IMP. The appellants were prohibited from assembling transformers or any other article for others. On the introduction of Item 68 the appellants filed a classification list under that Item and started paying duty on the job charges collected by them from IMP, invoking notification No. 119/75-C.E., dated 30-4-75, which provided for payment of duty on job charges. Later, the appellants sought permission to remove the transformers from their factory without payment of duty under Notification No. 118/75-C.E., dated 30-4-75, which exempted goods falling under Item 68, manufactured in a factory and intended for use in the factory in which they are manufactured, or in any other factory of the same manufacturer. This permission was granted on 15-6-76. Subsequently, the appellants were issued with a notice to show cause why the aforesaid permission should not be withdrawn. Show cause notices were also issued to them proposing to demand duty on the goods removed by them earlier without payment of duty. After receipt of their replies the Assistant Collector passed three separate orders. By the order he cancelled the permission granted by the Superintendent for duty-free clearance from the factory of the appellants to the factory of IMP, and by two other orders he called upon them to pay the duty determined to have been short-levied over different periods. Against these three orders appeals were filed to the Appellate Collector, who in his order under reference has rejected all the three appeals.

3. Appearing before us for the appellants, Shri D'Souza stated that he was not pressing the appeal on the first point, namely the withdrawal of the permission granted by the Superintendent with reference to Notification No. 119/75, and that this appeal could be treated as withdrawn.

4. As regards the duty demands under the other two orders, Shri D'Souza raised a number of grounds, namely ;- (i) The appellants were not "manufacturers" within the meaning of the definition contained in Clause (f) of Section 2 of the Central Excises and Salt Act; (ii) Even if they were held to be manufacturers, they would be entitled to the benefit of the exemption under Notification No. 119/75 ; (iii) The transformers in the condition in which they were removed from the premises of the appellants were not "excisable goods" ; and (iv) The demands issued to the appellants were wholly or partly barred by limitation.

5. It may be observed that there is no dispute at present as the appellants have subsequently become eligible for exemption under certain other notifications.

6. Shri D'Souza argued at great length that the appellants could not be considered as manufacturers as defined in the Central Excises and Salt Act. In particular, he referred to the definition of "manufacturer" in Section 2 (f) ibid, where it has been laid down that this word "shall include ... a person who employs hired labour in the production or manufacture of excisable goods". Shri D'Souza quoted at length from the provisions of the contract dated 10-1-1973 between the appellants and IMP in support of his contention. He pointed out that under Clause 1 of this contract, the testing, painting and packing of the transformers was to be done by IMP with its own workmen. Under Clause 2 the fabrication would be in the manner as directed by IMP and under their direct supervision and control. Under Clause 4 the appellants were precluded from using the premises allotted to them in IMP's factory for the manufacture of the appellants' own products. Nor could they manufacture or fabricate goods for any other person without the permission of IMP.7. Shri D'Souza referred to the definition of "employees" under the Industrial Disputes Act and sought to rely on a number of decisions of the Supreme Court under that Act. According to him, the appellants had to be regarded as employees of IMP and not manufacturers in their own right.

8. On the question whether the transformers as fabricated by the appellants were "excisable goods", Shri D'Souza submitted that the transformers were supplied only to the Electricity Boards of various States. It was invariably a condition of the contract with the Electricity Boards that a certificate should be produced from a recognised laboratory to the effect that the transformers conformed to the relevant ISI Standards. The transformers also had to be painted and packed before they could be supplied. The processes of testing, certification, painting and packing were all carried out by IMP after the transformers had been delivered to them by the appellants. Shri D'Souza therefore contended that in the condition in which the transformers were supplied by the appellants, they were not saleable and therefore not excisable goods.

9. Shri D'Souza also referred to the judgment of the Gujarat High Court in the case of Anup Engineering Ltd. and Ors. v. Union of India and Ors., reported in 1978 E.L.T. (J 533). In that case the petitioners fabricated equipments and components out of tin plates, sheets, pipes, etc., furnished by their customers. The Central Excise authorties had taken the view that the processes carried out by the petitioners could not be considered as job work for the purpose of Notification No.119/75. The High Court however held that the processes should be considered as job work covered by the notification. Shri D'Souza also cited the judgment of the Calcutta High Court in the case of Madura Coats Ltd., v. The Collector of Central Excise, West Bengal, reported in 1980 E.L.T. 582 (Cal.). It is not necessary to go into the details of this case since the process considered therein is not materially different from the Department's own conception of job work.

10. Shri D'Souza also made the point that the demands for duty had been worked out with reference to the value at which finished transformers were sold by IMP. He submitted that this was illogical. If duty was to be assessed on the transformers as excisable goods when they left the premises of the appellants, it could be based only on their value at that stage and not on their value after they had undergone further processes.

11. At this stage the Bench enquired from Shri D'Souza whether any duty had been levied on the finished transformers at the stage of their clearance by IMP for sale to Electricity Boards. Shri D'Souza stated positively that duty had been levied at that stage, on the full value of the goods.

12. On the question of time bar, Shri D'Souza pointed out that whatever had been done by the appellants had been with the full knowledge of the Department, which in fact had given them permission in terms of Notification No. 119/75. Accordingly, there could be no question of any fraud, suppression, etc., and only the normal time limit under Rule 10 (which at the relevant time was six months) could be invoked. If this time limit were applied, two out of the four demands would be fully time-barred, while one would be partly time-barred and only one would be within time.

13. For the Department, Shri Tayal argued that the appellants were definitely manufacturing transformers. He referred to Clause 6 of the contract, in which it was provided that the appellants should register the premises allotted to them as their factory under the Factories Act, 1948 and should obtain in their own name all permits and licences required under the law for carrying on the activity of fabricating the transformers. He also referred to Clause 9 of the contract in which it was laid down that all servants, workmen and other employees employed by the appellants should be employed by them on their own account and should be deemed to be the employees of the appellants. IMP were to be indemnified against any claims, demands, etc., from the employees of the appellants.

14. Shri Tayal therefore submitted that the contract was only intended to protect the trade name of IMP, by ensuring the quality of the product which was to be marketed by them. It did not mean that the appellants were not manufacturers. As regards the Supreme Court decisions relied upon by Shri D'Souza regarding the meaning of the words "employee" and "employed", Shri Tayal submitted that these related to a different legislation in a different context and could not be followed with reference to the definition of the term "manufacturer" in the Central Excises and Salt Act. In this context he relied on the judgment of the Allahabad High Court in the case of Ganga Dhar Ram Chandra v. The Collector of Central Excise, Allahabad reported in 1979 ELT (J 597), wherein it had been held that by merely supplying raw material, a customer did not become a manufacturer. He also referred to the judgment of the Andhra Pradesh High court in the case of Andhra Pradesh Rerolling Works, Hyderabad, where again a similar conclusion was reached. He also cited the decision of the Allahabad High Court in the case of Philips India Ltd. and Ors. v. Union of India and Ors., reported in 1980 ELT 263 (All). In that case it had been held that if a person simply places an order with a company for getting certain goods manufactured according to his specifications, details and trade mark, without incurring any financial involvement needed for manufacturing or producing the goods or without having any control or supervision over the manufacturing process, such a person could not be treated as a manufacturer of those goods. (In this context the High Court had also observed that if a buyer was also to be treated as a manufacturer, the same would result in making two persons as manufacturer of the same commodity whereas under the

law there cannot be more than one).

15. On the argument of Shri D'Souza that the transformers had to undergo painting, testing, etc., before they were sold,. Shri Tayal submitted that these processes did not materially change the nature of the article and therefore they were not relevant to the issue.

16. On the argument of Shri D'Souza that what was done by the appellants amounted to job work, Shri Tayal submitted that this expression would cover only cases where articles received for carrying out some process were returned, and not a case like the present where the entire work of fabrication and assembling was done, resulting in the production of a quite different article. He also submitted that the case of Madura Coats Ltd., cited by Shri D'Souza was not on all fours with the present case.

17. As regards Shri D'Souza's submission that duty was sought to be demanded on the basis of the value at which the transformers were sold by IMP after further processing, and on the point that duty was again charged on the transformers at the stage of clearance by IMP, Shri Tayal submitted that there was nothing on record to substantiate these contentions. (As will be mentioned later, there are definite indications in the orders of the authorities below regarding the latter point).

18. Shri Tayal also contested the argument of Shri D'Souza that the demands were wholly or partly time barred. For reasons which will appear later, his arguments on this aspect need not be referred to in detail.

19. We have carefully considered the arguments advanced on both sides.

We observe that in this case the appellants contend that they are not independent manufacturers, but only 'hired labour'. As against this, the terms of the contract between the appellants and IMP show that IMP had a financial involvement as well as close supervision and control over the fabrication of the transformers, and thus it can prima facie be said that the appellants were manufacturers. Nor, considering that what they fabricated was transformers in practically completed form, could it be said that what they did was not "manufacture".

20. There is, however, a graat difficulty in the Department's way which does not seem to have been properly appreciated by the authorities below. As we observed earlier, it has been positively stated by the appellants that duty on the finished transformers was levied at the stage of clearance by IMP (who were a sister concern of the appellants). A reference to this appears in the Order-in-Original dated 22-2-80 of the Assistant Collector, wherein he has observed "during the course of personal hearing Shri R. Noronha, representative of Messrs.

Advance Transformers Pvt. Ltd., appeared before me and stated that the full excise duty was already paid by their sister concern, that is Messrs. Industrial Meters, and submitted invoices". With reference to this submission the Assistant Collector in his findings has observed as follows; - "The duty liability has to be discharged on the total cost of raw material and labour charges at the stage when the goods in semifinished conditions are returned by M/s. Advance Transformers to M/s. Industrial Meters P. Ltd. The goods so received undergo further processes which help to the completion of the said products. Having made the goods in marketable conditions, further duty liability will again has (sic) to be discharged at the time of actual clearances of the goods from M/s. Industrial Meters P. Ltd. and M/s. Advance Transformers." 21. The Appellate Collector's order contains the following observations :- "As discussed earlier, since the appellants and the IMP are two separate legal entities, two separate manufacturers of excisable goods, having two separate factories, they are not entitled to duty free clearances of the impugned goods manufactured by them. To avoid double payment of duty, the IMP can avail of the provisions of present Notification No. 201/79-C.E., dated 4-6-1979 and for the earlier period, the provisions of Notfn. No. 178/77-C.E. dated 18-6-1977 as amended." 22. From the above it seems clear that the Department had been recovering duty on the transformers at the stage of clearance by IMP after testing, painting and packing. The Department is also seeking to recover full duty from the appellants before these processes are carried out. It has nowhere been contended that what the appellants fabricate and what IMP sell are different commodities. In this connection the following extract from the Appellate Collector's order would be relevant:- "Here, however, the appellants have argued that that they do not manufacture transformers in complete form inasmuch as the process of testing, finishing and painting, etc. is done by the IMP. No doubt, the later

processes are incidental or ancillary to the completion of manufacture of excisable goods i.e. transformers but nevertheless it cannot be said that transformers as much (sic) were not manufactured by the appellants. It is only that some further processes are to be carried by the IMP." Thus, according to the Appellate Collector what the appellants were held to have manufactured were transformers. The 'completed' goods after further processing are also called transformers. The Department does not appear to have seen any incongruity in seeking to recover duty twice over on what are substantially the same goods and going under the same description. It is true that the Tariff Item under consideration is Item 68, but the particular goods being dealt with are transformers.

It is not as if one article is an input for another article going by a different commodity description.

23. We do not find in the orders of the authorities below any detailed discussion regarding the nature and importance; of the further processes of testing, painting and packing, etc., carried out by IMP.As mentioned above, the Assistant Collector has observed that the goods so received undergo further processes which help to the completion of the said products. The Appellate Collector has only remarked that "no doubt the later processes are incidental or ancillary to the completion of manufacture of excisable goods, i.e. transformers." 24. In the judgment of the Allahabad High Court in the case of Philips India Ltd., referred to in para 14 above, an observation had been made that if a buyer is also treated as a manufacturer, the same would result in making two persons as manufacturers of the same commodity whereas the re cannot be more than one. In the present case, the stand of the Department amounts to saying that the goods in question should be assessed to duty as constituting the commodity of transformers at the stage they left the appellants and once again as the same commodity at the stage they left IMP. As we have observed above, there is no sufficient material before us, particularly on the question of the importance of testing and certification, for us to come to a definite conclusion whether the transformers in the condition in which they left the premises of the appellants could be considered as marketable and excisable, or not. However, it appears clear to us that the Department had to take a view on this question and decide it one way or the other.

If the articles were transformers as known to the market at the time they left the premises of the appellants, they were no doubt rightly chargeable to duty at that stage, but there can then be no question of charging them to duty again as transformers when they left the premises of IMP. Similarly, if they become transformers as known to the market only after the further processes had been carried out by IMP, they could not have been charged to duty as transformers at the earlier stage.

25. As we have already observed, all the facts are not before us but it has been positively stated by the learned counsel for the appellants (who are a sister concern of IMP, that the latter had paid duty on the transformers in their finished form. This is also borne out to a large extent by the observations of the Assistant Collector. In these cirumstances we consider that it was not open to the Department to seek to recover duty again on the articles under the description of transformers at the stage when they left the premises of the appellants. The two orders of the Assistant Collector dated 22-2-1980 and 16-6-1980, demanding duty on this ground, and the Appellate Collector's order in so far as it relates to these two orders, cannot therefore be sustained We, therefore, allow the appeals before us relating to the above mentioned two orders of the Appellate Collector and dealt with in File Nos. 2118/83 and 2119/83. The third appeal, arising out of the Assistant Collector's order dated 16-9-1978, as upheld by the Appellate Collector, is dismissed as withdrawn.