

Jay Industries Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-17-1983

Reported in : (1984)(16)ELT462TriDel

Appellant : Jay Industries

Respondent : Collector of Central Excise

Judgement :

1. The captioned appeal was initially filed as a Revision Application before the Central Government which, under Section 35-P of the Central Excises & Salt Act, 1944, has come as transferred proceedings to this Tribunal, for disposal as if it were an appeal filed before it.

2. There will be occasion to refer to the facts of this case in some detail in the later part of this order and, therefore, it is proposed to set out at this juncture, only the salient facts. The appellants are manufacturers of Polyurethane Foam (P.U.F.) which is an article falling under Item No. 15A of the Central Excise Tariff Schedule (CET). For manufacture of PUF, they imported certain raw materials, namely, polyesters and polyether. These raw materials used to be assessed by the Bombay Customs authorities to basic customs duty as resins under heading No. 39.01/06 of the Customs Tariff Schedule and countervailing duty as resins under Item No. 15A of the CET. Item No. 15A CET has been one of the items in respect of which the benefit of rule 56A has been extended by the Central Government. Raw materials falling under Item No. 15A on which countervailing duty of customs or excise duty had been paid could be used in the manufacture of other goods

falling under Item No. 15A CET and the countervailing customs duty or excise duty, as the case may be, paid on the raw materials could be utilised towards payment of excise duty payable on the finished product, in this case PUF. The appellants applied for and obtained permission for availing themselves of this facility since October 1972. All of a sudden, the Superintendent, Central Excise, Hyderabad, issued a notice dated 24-2-1978 asking the appellants to show cause why the said facility under rule 56A should not be withdrawn from them and the amounts availed of by them as proforma credit should not be recovered from them. The ground given was that the raw materials, polyesters and polyether, were not resins falling under item No. 15A CET but were chemicals. After holding adjudication proceedings, the Asstt. Collector held that the concession under rule 56A was not admissible to the appellants and he, therefore, withdrew the concession with effect from 7-10-1977. He also ordered that the appellants should re-credit the proforma credit availed of by them after 7-10-1977 for breach of the provisions of rule 56A. The appeal against this order did not meet with success. Hence the present appeal.

3. The appeal was heard on 12-10-1983. Shri Y.G. Ramamoorthy, the learned Counsel for the appellants, submitted that they manufactured, at the material time, Polyurethane Foam (P.U.F.) for which they used imported polyesters and polyether-these imported products were being assessed by the Bombay Customs to countervailing duty (CVD) equal to Central Excise duty under Item 15A, Central Excise Tariff Schedule (CET). Right from 10-10-1972, the appellants were enjoying the facility of proforma credit under Rule 56A of the Central Excise Rules, of the countervailing duty on the imported raw materials towards payment of duty on the finished product, namely, P.U.F. In 1978, a show cause notice was issued by the Central Excise authority stating that the proforma credit facility under Rule 56A was not available to the appellants on the ground that the related raw materials were not resins falling under the purview of Item No. 15A of CET but were chemicals, in accordance with the Chemical Examiner's report at page 47 of the paper book. The Counsel further stated that, from pages 48 to 56 of the paper book, it could be seen that the Appellate Collector of Customs, Madras held that the said raw materials were chemicals. It could thus be seen that Bombay Customs and Madras Customs were following different practices in the matter of

classification and assessment of the said imported raw materials. Therefore, there could be no question of any mala fide intention on the part of the appellants in availing themselves of the proforma credit. The Counsel stated that the Madras Appellate Collector's order-in-appeal holding the raw materials as chemicals was reviewed in 1981 as may be seen from pages 57 to 59 of the paper book. However, the review only resulted in confirmation of the Appellate Collector's order. The Counsel also referred to a tariff advice issued by the Board (2/74 dated 15-2-1974) holding that polyesters and polyether, referred to as "polyols", were not liable to countervailing duty under Item 15A CET. This position continued till 1-9-1978 when an amendment to the terminology employed in chapter 39 of the Customs Tariff Schedule came into effect whereby polyols were brought within the purview of the said chapter. Therefore, at the material time, the raw materials were classifiable under Heading No.39.01/06 as "polyols".

4. Shri Ramamoorthy continued that during the material period, namely, July 1977 to November 1977, the amount of Rs. 3,02,311.91 availed of as proforma credit was, on adjudication, held by the Asstt. Collector as not permissible and available for such credit and, therefore, to be re-credited by the appellants in their proforma credit account. In this connection, the Counsel submitted that while the Asstt. Collector was competent to grant an assessee the permission to avail himself of the facilities under Rule 56A, he was not competent to withdraw the said permission. The power to order such withdrawal was conferred only on the Deputy Collector and that too in 1981 by the Board vide E.L.T. 1981 Vol. 7 S. No. 27 of the Table on page T-68.

5. Shri Ramamoorthy further submitted that Sub-rule 5 was inserted in Rule 56A by Notfn. No. 224/76 dated 14-8-1976. This Sub-rule provided that when credit had been allowed under Sub-rule 2 on account of an error or omission or misconstruction on the part of the officer, the proper officer may, within six months from the date of such credit, serve notice on the manufacturer or the assessee to whom such credit has been allowed, requiring him to show cause why he should not be disallowed to utilise such credit, or an amount equivalent to such credit should not be recovered from him if the credit had already been utilised. The Sub-rule also provided that in a case involving wilful mis-statement, collusion or

suppression of facts on the part of the manufacturer or assessee, the six months period for service of notice was extended to five years. Though this amendment had come into effect prior to the show cause notice dated 24-2-1978, the five years period would not be available to the department. Since there was no wilful mis-statement or suppression of facts on the part of the appellants, the demand, if at all, could survive only for the period from 24-8-1977 to 24-2-1978. This was without prejudice to the contention that the Asstt. Collector's order, being incompetent in part, should be struck down as a whole and not in part.

6. Concluding, Shri Rarnarnoorthy submitted that assuming that the raw materials would have fallen under Item 68 CET, at the relevant time, the benefit of Central Excise Notfn. No. 178/77 dated 18-6-1977 exempting inputs dutiable under Item 68 and used in the manufacture of other goods would be available for the appellants. He also referred to 1983 E.L.T. page 1157 in which this Tribunal has held that goods could not be classified differently for basic customs duty and countervailing customs duty.

7. Shri Jain, the learned SDR, referred to the decision of the Madras Bench of this Tribunal-1983 ECR 969-D-and submitted that, for the purpose of Rule 56A (5), wilful suppression need not be there.

Non-declaration of the relevant facts was a sufficient cause. The appellants knew that the imported raw materials were not resins and they did not inform the department of the correct position. They were erroneously availing themselves of the credit of the countervailing duty paid on the raw materials as if they were resins. He also submitted that rule 56A(5) was only retroactive and need not be held to be retrospective. As regards the appellant's contrition that the Asstt. Collector was not competent to withdraw the permission to avail of rule 56A, Shri Jain submitted that the authority relied upon by Shri Ramamoorthy was a trade notice issued by the Bombay Collector and could not bind the Hyderabad Collector. (At this juncture, Shri Ramamoorthy stated that the said notification was issued on Board's directions).

Shri Jain further submitted that the correct classification of the imported raw materials at the relevant time for the purpose of countervailing duty was under

Item 68 CET and countervailing duty under Item 68 was not available for proforma credit, vide second proviso to Sub-rule 2 of rule 56A which came into force on 3-3-1979 vide Notification No. 104/79. This amendment was also retroactive in effect.

8. In his reply arguments, Shri Ramamoorthy submitted that no retro-activity could be attached to a rule or notification unless it was specifically or explicitly provided. The show cause notice did not set out the facts constituting the basis for holding that there was wilful suppression of facts on the part of the appellants.

9. We have given careful consideration to the submissions of both sides. Shri Ramamoorthy has made it clear that the appellants were not raising in the present proceedings any classification dispute. The Customs authorities at Bombay has assessed the 2 products in question, namely, polyesters and polyethers, to countervailing duty under Item 15A CET. The appellants had acquiesced in the assessment and had accordingly paid countervailing duty. Though the very same goods, namely, polyesters and polyethers, were held to be chemicals and not resins by the Appellate Collector of Customs, Madras and this view was upheld by the Central Government on revision, it is not clear why the appellants did not bring this matter to the notice of the Bombay Customs authorities and press for classification as chemicals. It may be that the Bombay Customs authorities had assessed the goods to countervailing duty as resins because of the difference in the tariff nomenclatures of the Indian Customs Tariff Schedule of 1975 which came into force in the middle of 1976 (i.e. prior to the import of the present goods) on the one hand and the amendment to Item 15A CET brought about by the Finance Bill (No. 2) of 1977 on the other. Be that as it may, the fact is that the classification and assessment adopted by the Bombay Customs authorities had become final since there is nothing on record to show that the appellants protested against the said assessment or claimed refund. Indeed the appellants are on record as not having claimed refund, but having acquiesced in the said assessment. In the circumstances, we do not see how the Central Excise authorities at Hyderabad could have re-opened the assessment done by the Bombay Customs authorities. If they had any doubts about the correctness of the assessment, they should have moved the proper authority for a review of the assessment. But they had no jurisdiction to re-assess the goods, at it were, and

declare that the goods did not attract countervailing duty as resins. Once this position is accepted, all the consequential steps which they took by way of asking the appellants to re-credit the amount of proforma credit availed of by them were also without jurisdiction. In this view of the matter, we do not consider it necessary to go into the several contentions taken up on both sides.

10. Having regard to the foregoing discussions, we set aside the orders of the lower authorities and direct that the proforma credit availed of by the appellants, and which was ordered to be re-credited, be restored to their proforma credit account. The relief to the appellants on the basis of this order shall be granted by the concerned Central Excise authorities within a period of 4 months from the date of communication of this order.

11. Per H.R. Syiem : I agree with Sankaran's reasonings that the appeal should succeed. I would like to add a few thoughts that occur to me.

12. What the customs and excise did in Hyderabad flies in the face of what it did in Bombay. There is an unwritten law that when a tax collecting authority makes an assessment which is incorrect, it is prohibited from saying to the tax-payer later that he (tax-payer) cannot do anything that may be a consequence of the incorrect assessment made by itself (tax collecting agency). When the polyester and polyether imported by M/s. Jay Industries were assessed under 15A-CET as countervailing duty (when the correct assessment should have been under 68), the customs and excise is forbidden from saying later that the assessee should not take proforma credit for the duty paid under 15A. Such proforma credit was permissible in the case of goods assessed under 15A.

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