Anupam Rubber Industries Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-12-1991

Reported in : (1992)(58)ELT153TriDel

Appellant : Anupam Rubber Industries

Respondent : Collector of Central Excise

Judgement :

1. This appeal is directed against the order No. 1/1986 dated nil passed by the Collector of Central Excise, Aurangabad by which he had demanded a duty of Rs. 8,43,621.36 and had also imposed a penalty of Rs. one lakh on the appellants under Rules 173Q and 9(2) of Central Excise Rules, 1944 and by which he had also ordered confiscation of rubberised cotton hose pipes seized from the appellants premises levying a fine in lieu of confiscation of Rs. 10,000/-. The brief facts are that on information that the appellants manufactured rubberised hose pipes with the aid of power and are clearing them without payment of duty, the Preventive staff of the Collectorate Headquarters visited the appellants' premises on 23-8-1984. Five other units were found working under the same compound, namely, (1) M/s. Patel Industries; (2) M/s. Hose-Pipe Industries; (3) M/s. Parbhani Enterprises; (4) M/s.

Laxmi Industries; and (5) M/s. Maharashtra Pipe Industries. On 24-8-1984, Sh. Nilesh Kumar R. Patel, partner of the appellants, gave a statement saying that cotton hose pipe is supplied by other four units and after rubberising/lining a hose pipe is despatched by them to outside parties as per the directions of grey hose

pipe manufacturers, after charging labour charges for rubberising. He also said that they do not have separate electric connection for working compressor and electric motor and that the power connection is obtained from the premises of M/s. Patel Industries. He, further, stated that since April, 1984, they have installed a small electric motor of 1/8 H.P.which is used for stirrer for mixing rubber compound. He also admitted that he did not inform the Central Excise Department about the manufacture of rubberised/rubber lined cotton hose pipes with the aid of power and had not taken licence. One Sh. B.N. Kulkarni, Manager of M/s. A.P. Patel & Co., in his statement on 12-9-1984, said that he had transferred one compressor with one electric motor to the appellants.

Sh. Mohammed Abdul Najib, Proprietor of M/s. Ruby Agencies, Parbhani on 12-9-1984 stated that he had issued a Credit Bill to the appellants on 10-4-1984 for sale of electric motor of 1/8 H.P. Sh. Raghuvir Patel on 27-10-1984, in his statement, stated that on request of the appellants, his unit had supplied electricity to them through their power meter. On a further scrutiny of their Profit & Loss Account for the year ending 31-3-1984, the Department worked out the total receipt of grey cotton hose pipe and rubberising charges collected by the appellants and proceedings were initiated against the appellants by issue of a show cause notice dated 20-2-1985 for demanding duty of Rs. 8,43,621.36 in terms of Rule 9(2) of Central Excise Rules, 1944 read with Section 11A of the Central Excises & Salt Act, 1944 and also proposing to confiscate the quantity of hose pipes seized from their premises. The Collector's order shows that after furnishing an interim reply seeking time of 8 weeks for submitting detailed reply, the Ld. Counsel for the appellants had asked for extension of time which was also granted and since no detailed reply was forthcoming after further extension, the Collector proceeded to adjudicate the matter ex parte. He held the charges as established, demanded duty, confiscated the seized goods and imposed penalty on the appellants as stated above.

2. Sh. H.C. Jain, Ld. Advocate appearing for the appellants, contended that the Collector has violated the principles of natural justice in this case by adjudicating the case ex parte without giving an opportunity of personal hearing in spite of specific request made by them in their letter to the Collector. He relied upon the

case law reported in 1990 (28) ECR 158 in the case of Chandra Industries v.Collector of Central Excise, wherein the Tribunal held that where no cross-examination was allowed, principles of natural justice have been violated. In this case also, the appellants have specifically asked for such cross-examination, which has not been granted. He also relied upon the case law reported in 1989 (42) ELT 559 (Ker.) in the case of Sunrex Private Ltd v. Union of India in which the High Court held that the right of hearing cannot be denied to the party even if the appellants had not filed the written statement of reply. Therefore, since the appellants had not been given adequate opportunity of defence and cross-examination of witnesses, the Ld. Counsel pleaded that the case should be remanded to afford them such an opportunity. On merits, the Ld. Counsel submitted that only one electric motor was used for stirring operations and the compressor was used only for blowing operations. Therefore, it was contended that there was no process of manufacture carried on with the aid of power. The Collector's order merely follows the grounds set out in the show cause notice. There is no finding on the use of power, electricity consumed and the electricity bills paid by the appellants. The Ld. Counsel contended that even the statement of Nilesh Kumar Patel dated 24-8-1984 would only say that they have started using electric motor from April, 1984.

In such a case, the duty demanded for an earlier period is questionable. It was also urged that the compressor acquired by the appellants was a condemned one and not serviceable and the electric motor was also old. It was also submitted that if the goods are classified under Item 16A of the CET, they will be eligible for duty exemption under Notification 18/74. The further submission was that the demand is time-barred because the show cause notice had been issued on 20-2-1985 covering the period from 1-4-1983 to 23-8-1984 without any allegation of suppression of facts. It was, further, submitted that the Rubber Technician, Sh. V.K. Jangli, in his statement on 23-11-1984, had said that only since April, 1984, 1/8 H.P. motor was fixed for stirring because of occasional shortage of labour and that the motor had been removed permanently at the end of August, 1984. He had also said that the compressor was also removed in August, 1984 because it was found unsuitable. It was, therefore, pleaded that the appellants should be given a fair opportunity of stating their case before the Collector for the purpose the case

may be remanded.

3. Sh. Jayaraman, the Ld. S.D.R., contended that there has been no violation of principles of natural justice. The show cause notice was issued on 20-2-1985 for which interim reply was sent by the appellants on 23-4-1985 in which the circumstances seeking time was only that the Ld. Counsel needed time. The Collector has given them ample opportunities and has ultimately passed the adjudication order much later in the year 1986 November. With reference to the case law, in this regard, the Ld. S.D.R. pointed out that on facts, in none of them there was such a long time interval between the show cause notice and the adjudication as in the present case. In the case of Chandra Industries, cited by the appellants, there was a specific agreement by the Department to offer cross-examination which was not adhered to whereas here even, in spite of further extension of time, the appellants had not come forward with their detailed reply. On merits, the Ld. S.D.R. pointed out that the Collector's order is passed on the statement of Sh. Nilesh Kumar Patel, partner of the appellants, who has clearly admitted the use of power. On limitation also, a full perusal of the show cause notice would indicate that suppression is alleged and the demand is under Rule 9(2) read with Section 11A with a detailed annexure on facts leading to the demand. The Ld. S.D.R. pointed out that the case was detected as a result of preventive check on the appellants' premises. The appellants had not disclosed the use of electric motor and compressor.

4. Submissions made by the Ld. Counsel and the Ld. S.D.R. have been carefully considered. The first point, in this case, is whether there is any scope for remand of the case to the Collector on the ground that the appellants had not been given adequate opportunity of defence. The records show that there is only one interim reply dated 23-4-1985 to the show cause notice given by the appellants, in which they have stated that they had desired a personal hearing and cross-examination of all the witnesses such as Panchas, Seizing and Investigating Officers and others on whose evidence reliance may be placed in adjudicating the case. It is, further, stated in that letter that they denied the charges and that the detailed reply, if found necessary, will be filed within the extension of time requested in that letter.

The records also show that the Collector had given them time as requested and further extension. The Collector's observation, in this regard, are as follows: "No reply was received from the party. The consultant of the party, Sh. H.C. Jain furnished an interim reply and requested for granting time of about 8 weeks, for submitting a detailed reply to the show cause notice. As per the request of the consultant, extension of time was granted to reply to the show cause notice and he was informed on 2-5-1985 that the reply in the matter should reach this office on or before 30-6-1985. Then the Advocate Sh. H.C. Jain, was granted further time as communicated to him on 29-10-1985, 13-12-1985, 12-3-1986, and 29-4-1986 to file his reply." 5. From the above, it is clearly seen that the Collector had considered the requests for extension of time which had been accordingly granted and further extensions have also been given to the appellants.

Ultimately, the adjudication of the case was done in 1986 November, on the show cause notice which had been, admittedly, issued in 1985 February. Therefore, the appellants have had sufficiently long and reasonable time to really come to grips with the charges against them in the show cause notice and furnish a detailed reply. They had not chosen to reply in detail on any of the charges apart from a bold denial of all charges in the Show Cause Notice in their interim reply in spite of the factual details of the basis of the charges available in the Show Cause Notice and its Annexure. It is difficult to accept the plea that they would have been in a position to give a reply to Show Cause Notice ONLY after cross-examination of the witnesses, given the details already available in the Show Cause Notice and the quasi-judicial nature of the adjudication proceedings. Therefore, it cannot be said, in the circumstances, that the Collector had arbitrarily denied them the opportunity of personal hearing. As regards cross-examination, the appellants requested that they require cross-examination of all the witnesses such as Panchas, Seizing and Investigating Officers and others on whose evidence reliance may be placed in adjudicating the case. This is very vague. They should have been specific as to whom they want to cross-examine and should have indicated the reason thereto. The factual background of the Kerala High Court decision, relied upon by the appellants, was different. In that case, the appellants had been offered the opportunity of hearing and also time for filing a detailed reply to the show cause notice issued under the Customs Act, but the appellants, therein, did not choose to

do so because they had challenged the very same show cause notice issued by the Collector before the Kerala High Court. It was in this background that the observations of the Kerala High Court were made whereas here the appellants have been given an initial extension of time and further extension which also was allowed to run out by the appellants and no detailed reply was filed by them and in such circumstances, it was not unreasonable for the Collector to have proceeded to adjudicate the case without affording them any further opportunity. Therefore, we are unable to agree with the appellants' plea that there has been failure to comply with the principles of natural justice. On merits, the statement of the partner of the appellants, Sh. Nilesh Kumar Patel, is clear to say that since April, 1984, they had installed electric motor of 1/8 H.P. which is used for mixing/stirring the rubber compound. He had also not denied the use of compressor. The statement of Sh. R.M. Patel confirms the supply of the electric power to the appellants from their motor. The acquisition of the compressor and electric motor has also been confirmed by the statements of Sh. B.N. Kulkarni dated 12-9-1984 and Md. A. Najib dated 12-9-1984. The contention of the appellants that the electric motor and the compressor were not used beyond August, 1984, does not help them because the demand in this case is only upto August, 1984. Sh. K.Jangle, the Rubber Technician in his statement on 23-11-1984 had also admitted that since April, 1984, 1/8 H.P. motor was fixed for purposes of mixing/stirring. Regarding compressor also, he has stated that it was installed beyond June, 1983 and the object was for manufacture of Fire Hose (rubberised cotton hose pipes) for which the compressor was used. Therefore, the use of power for the manufacture of the hoses stands established by the statement of the appellants' partner and Rubber Technician and the persons from whom these electric motors and compressors were obtained. There is nothing on record to indicate that any of these statements had been retracted.

6. In respect of the appellants' claim that power was not used in relation to the manufacture of the product, it is seen that it has been admitted in the statement of Sh. Nilesh Kumar Raghuvir Patel, Managing Partner dated 31-1-1985 that they had power connections since April, 1983 and used it in production of rubberised cotton hose pipes, but that they had not manufactured rubberised agricultural cotton hose pipes with aid of power. He had also admitted use of electric motor

mixing rubber compound from April, 1984. Sh. V.K. Jangle, the Rubber Technician, in his statement dated 23-11-1984, had confirmed use of 1/8 H.P. electric motor for mixing/stirring rubber compound which was with the object of continued production even in times of labour shortage although he also said that the compressor installed in 1983 was not used for production of agricultural hose pipes. There is sufficient evidence in these uncontroverted statements that power was used in mixing/stirring of rubber compound and power was used by using the compressor to compress the rubber solution from inside the pipe and to obtain rubber back in the tank by blowing the air (as explained in the statement of Sh. Nilesh Kumar Raghuvir Patel in his statement dated 31-1-1985). Admittedly, therefore, power has been used in the above-said processes which are incidental and ancillary to the completion of the finished product and hence the Collector's conclusions in this regard are well founded. However, the appellants even as per the various statements, had indicated that compressor was not used for rubberising agricultural hose pipes and have said so in their present appeal. There is no specific finding thereon by the Collector. It is felt that it will be reasonable for the Collector to examine this aspect of the case and to ascertain whether such a claim is established by satisfactory evidence and to redetermine duty demand if need be on that basis. This will be for the period April, 1983 (when the appellants by then acquired the compressor) to April, 1984 (when the electric motor for mixing/stirring of rubber compound was used).

7. Another aspect which needs to be looked into and finding by Collector to be given is on the classification of the goods. The Collector has classified them under Item 19-I(b) C.E.T. which covers inter alia cotton fabrics subjected to the process of rubberising.

However, in the appeal before the Tribunal, it has been contended that according to the Test Report of the Dy. Chief Chemist on the product the rubber compound content ranged between 8.25% to 11.49%. Their claim is that the goods are correctly classifiable under Item 16A(3) CET which covers piping and tubing of unhardened vulcanised rubber and they also claim exemption under Notification 18/74 dated 23-2-1974 for the reason that rubber compound content is less than 25% by weight. It is seen that Collector has not given detailed reasoning for

classifying the rubberised/rubber lined cotton hose pipes herein under Item 19-I(b) C.E.T. However, since correct classification of the goods is an essential condition for demanding duty, and in the face of the contention for classification under Item 16A(3) having now been made before us, and in the absence of details on record for the Tribunal to take a view in the matter, it is in the interests of justice that the Collector should consider the issue of classification of the goods as between the competing Tariff Items 19-I(b) and 16A(3) C.E.T. and give his findings thereon.

8. On the question of limitation, the duty is being demanded under Rule 9(2) Central Excise Rules for unauthorised removal of excisable goods without payment of duty from the place of manufacture. It is not the say of the appellants that they had given any declaration to the Department. The narration of facts in Show Cause Notice is clear in this respect. In fact Sh. Nilesh Kumar R. Patel has said in his statement that he did not know that use of power would attract Central Excise duty. Hence it is held that the appellants' arguments on limitation are unacceptable.

9. In the result, therefore, the case is remanded to the Collector for the limited purpose of ascertaining - (1) whether there is any scope for redetermining the duty demanded based on the claim that use of compressor was confined to manufacture of non-agricultural hose pipes for the period April, 1983; and (2) whether the correct classification of the goods will be under Item 19-I(b) or 16A(3) CET with exemption under Notification 17/84. The appeal is disposed of by remand in the above terms.