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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-30-1991

Reported in : (1992)(59)ELT647TriDel

Appellant : Garware Nylons Ltd.

Respondent : Collector of Customs

Judgement :

1. The stay application has been filed for the waiver of the pre-deposit of an amount of Rs. 7,23,820/- demanded from the applicants herein by the Assistant Collector of Central Excise, Pune II vide order dated 8-3-1989 as confirmed by the order of the Collector of Customs (Appeals), Bombay dated 4-5-1990. The facts, in brief, of the case are as follows: 2. The appellant imported PTA which was warehoused in the private bonded warehouse located in their factory. The appellant effected certain clearances in the month of October and paid duty at the exempted rate which was prevalent upto 30-9-1985. However, on this date a Notification had been issued enhancing the rate of duty from 100% to 150%. Accordingly, the Inspector incharge of the factory wrote a letter to them on 27-12-1985 that they have to pay the differential duty in respect of clearance from 30-9-1985 onwards. In their reply to the Inspector, the appellant drew attention to the decision of the Madras High Court in the case of Asia Tobacco Co. Ltd. to the effect that the effective date for any change in customs duty is the date of publication of such notification in the official gazette and not the date appearing on the Notification. The appellant, further, informed that they had written a letter to the

Controller of Publications on 8-10-1985 and the latter had informed them vide his letter dated 2-1-1986 that the date of publication of this Notification No. 304/85 dated 30-9-1985 was 1-11-1985. The appellant, therefore, informed that they are liable for payment of differential duty from 1-11-1985 onwards only and not prior to this date i.e. from 30-9-1985 to 31-10-1985.

Subsequently, a show cause notice was issued on 16-9-1988 and which was adjudicated by the aforesaid order confirming the demand of duty.

3. The appeal against the Assistant Collector's order was also rejected. The Collector (Appeals) observed after ascertaining the factual position from the jurisdictional Collectors that the decision of the Madras High Court in the case of M/s. Asia Tobacco Co. Ltd. relied upon by the appellant had been taken up by the Department in SLP before the Supreme Court and that the other judgment of the Bombay High Court [GTC Industries v. Union of India dt. 4-11-1987 - [1988 (33) E.L.T. 83 (Bom.) relied upon had been stayed by the Division Bench of the Bombay High Court vide their order dated 7-3-1988 in the Notice of Motion No. 44/88 in Appeal No. 302/1988 in W.P. No. 2413/1985. The Collector (Appeals) found that the letter of the Inspector dated 27-12-1985 had all the ingredients of a notice of demand. He observed further "In fact, the appellant was aware of his additional duty liability much earlier than the Inspector since as early as on 8-10-1985 i.e. within eight days of the issue of the Notification he got in touch with the Director of Publication for ascertaining the date of publication." The Collector (Appeals) rejected the contention that the Inspector of Central Excise is not competent to issue show cause notice demanding differential duty under Sec. 28 of the Customs Act, 1962 by pointing out that since in this case the bond officer is an Inspector, he is competent to demand duty and that he is only debarred from confirming these amounts or adjudicating the offence cases.

4. The Stay and appeal were heard together. Shri Nankani, the Ld.

Counsel for the appellant, submitted that Govt. of India Gazette containing the Notification was made available to the public only on 1-11-1985 as informed to them by the Assistant Controller (Periodicals), Ministry of Works & Housing in his letter dated 2-1-1986 in reply to the letter of the appellant on 8-10-1985. So, the

Notification Nos. 304 & 305/85-C dt. 30-9-1985 having been made available to the public only on 1-11-1985, the appellants were liable to pay the differential duty only on and from that date. The Ld.

Counsel relied upon the decision of Tribunal in the case of M/s. Wirex Metal Works v. Collector of Central Excise Order No. 221-223/90-B dated 30-3-1990 in which the Tribunal had followed the decision of the Cegat in the case of Silibans International v. Collector of Customs reported in 1989 (42) E.L.T. 632. The Tribunal had held that the Notifications in that case were put on sale on 2-12-1988. Therefore, in the Bills of Entry filed on 25-11-1988, the notifications put on sale on 2-12-1988 will not apply although these notifications are dated 25-11-1988. The Ld. Counsel pointed out that the Public Notice of the Bombay Customs House publishing these notifications was even later by the Public Notice dated 2-12-1985. Therefore, he pleaded that the appellants were liable to pay duty only on and from 1-11-1985, when the notifications became available to the public. The Ld. Counsel, further, argued that the show cause notice issued on 16-9-1988 is time-barred because it seeks to recover differential duty beyond six months relating to the period 30-9-1985 to 1-11-1985. The demand under Sec. 28 has to be issued by the proper officer and the notice issued by the Superintendent in this case is invalid as he is not the proper officer.

The Learned Counsel also by the decision of the Tribunal in the case of Haryana Plywood Industries v. Collector of Customs reported in 1991 (51) E.L.T. 119 (Tri.) where also the Tribunal held that the date on which the notification is made available for sale to the public is the date from which the rates notified therein can be applied. It was, therefore, pleaded that the stay be granted and appeal be allowed.

5. Sh. M. Jayaraman, the Ld. S.D.R. appearing for the Department, contended that the question of the effective date has to be seen in the context of the documents sought to be interpreted. The Ld. S.D.R. urged that here the matter relates to the exemption notification, which has only the effect of reducing the level of a continuing exemption. It is not the case of imposition of fresh duty where none existed before. The letter of the Inspector dated 27-12-1985 was also valid for

demanding duty because as per Notification 38-Cus., dated 1-2-1963, Inspector of C.E. is a Custom Officer. The letter issued by him has all the ingredients of a demand. The appellants, herein, have also responded to it. In this connection, he drew attention to the detailed reasoning of this aspect by the Collector (Appeals) in his order. The show cause notice, ultimately issued on 16-9-1988, is merely the continuation of the earlier letters asking the appellants to pay differential duty. The question here is, the Ld. S.D.R. pointed, one regarding rate of duty applicable. In this context, the provisions of Sec. 15 of the Customs Act into force according to which in the case of goods cleared from warehouse under Sec. 68, as in the present case, the rate of duty applicable shall be the rate in force on the date on which the goods are actually removed from the warehouse. The appellants, herein, have the licence of private bonded warehouse under the Customs Act and are bound to pay the differential duty in terms of the Bond.

6. The submissions made by both the parties, herein, have been carefully considered. The appellants have resisted the demand for differential duty primarily relying upon the communication of the Assistant Controller (Periodicals), Ministry of Works & Housing informing that the Gazette of India Extraordinary Part II containing Notifications 304 & 305/85 dated 30-9-1985 was made available for public sale on 1-11-1985. This letter from the Assistant Controller, it is observed, however, is in response to the appellants' letter dated 8-10-1985 in which they raised a query as follows: "Please let us know as to when the Gazette of India Extraordinary Part II, Section 3, Sub-Section (i) containing Notifications Nos.

304/85-Customs and 305/85-Customs purported to have been issued by the Finance Ministry on 30th September, 1985 were made available to the public or are likely to be made available." The reason why they sent such a letter to the Controller of Publication is stated in their appeal as follows: "The appellants say that in or about the first week of October, 1985, the Appellants learnt that two Notifications bearing No. 304/85 Cus. and 305/85-Cus. both dated 30-9-1985 (hereinafter referred to as "the said Notifications") were issued rescinding the said Notification No. 35/83-Cus. However, as the copies of the said two Notifications were not made available to the Appellants, the Appellants, by their letter dated 8-10-1985 addressed to the Assistant Controller (Periodicals), Government of India,

Ministry of Works and Housing, Department of Publication, New Delhi, enquired as to when the Gazette of India containing the said two Notifications was made available to the Public or is likely to be made available." 7. The above would show that the appellants were aware on 8-10-1985 of the issue of Notifications 304 & 305/85 and the effect thereof, yet it is significant that the appellants continued to pay duty throughout October under unamended notification and when ultimately the Department asked for the differential duty by way of Inspector's letter dated 27-12-1985, their prompt action was to cite and rely on the Asia Tobacco decision of the Madras High Court [1984 (18) E.L.T. 152 (Mad.)] as they were already armed with the letter from the Assistant Controller (Periodicals) about the date on which the notifications were made available to the public. Thereafter, the appellants were carrying on multilateral correspondence with the Assistant Collector as well as Inspector of Central Excise taking an extremely legalistic view to resist the demand for differential duty, and ultimately the formal show cause notice dated 16-9-1988 was issued by the Superintendent. It is evident that this show cause notice was, itself, not only in continuation of the on going correspondence which the appellants had launched, but also, as required by them, vide para 5 of their letter dated 4-1-1987/9-2-1987 to the Assistant Collector, in which they say that in spite of what has been submitted by them if the Assistant Collector still felt that the revised differential duty for the period 30-9-1985 to 31-10-1985 is payable by the appellants, they would request the Assistant Collector to issue proper show cause notice without which, the appellants pointed out, no demand of duty can be made. In response to the Department's reply to this letter of theirs, the appellants, further, urged in their letter of 11-1-1988 that the demand for differential duty under Sec. 28 has not so far been raised and had already become time-barred in the absence of a show cause notice served on them within the stipulated period of six months. They again in this context drew attention to para 5 of their letter dated 4-1-1987/9-2-1987 cited supra. The show cause notice dated 16-9-1988 was the result. It clearly shows that it was the culmination of a continuing correspondence as indicated by the para in the notice which reads as under: "AND WHEREAS M/s. Garware Nylons Ltd. have not paid this differential customs duty to the extent of Rs. 7,23,820/- + Interest Rs. 39.94 even though demanded from them vide Supdt. C. Ex. Garware Nylons Range, Pimpri Pune - 18 in letter - F. No.

GNR/Cus/Misc./85 dated 27-12-1985 & 09-01-1987." The Superintendent had issued this notice, but the notice asked the appellants to show cause only to the Assistant Collector. The Superintendent was not going to adjudicate the case. The notice as issued by the Superintendent is only an intimation of a proceeding without involving any judicial determination. See in this connection Hon. Calcutta High Court judgment in the case of Tarek Nath Sen v.Union of India - AIR 1975 Cal. 337. The appellants are relying upon a Bombay Cus. House Public Notice to say that the Supdt. Cx. is not empowered to issue notice under Sec. 28 C.A. '62 whereas they should produce relevant notification under Sec. 2(34) C.A. '62 issued by the jurisdictional Collector of Central Excise, Pune which they have failed to do. Nor can the notice be considered, for the reasons already given supra, to be one issued alleging suppression and invoking the longer period under Sec. 28 C.A. '62. Therefore, there is no force in the agruments that the Superintendent was incompetent to issue show cause notice. Another aspect, which is of same relevance, is that the Asia Tobacco decision of the Madras High Court, on being confirmed by the Division Bench of that High Court, has been challenged before the Supreme Court by way of SLP by the Department with an application for stay, although there is no information so far about the result of the stay application nor of the SLP. The Collector has also observed that another Bombay High Court judgment dated 4-11-1987 in the case of GTC Industries v. UOI - 1988 (33) E.L.T. 83 (Bom.) has been stayed by the Division Bench by their order dated 7-3-1988. It may be noted that the Bombay High Court had followed Madras High Court decision. In the context of appellants' awareness of the issue of notification even in October, it is useful to refer to the decision of this Tribunal in the case of Jaya Bharat International Ltd. v. Collector of Customs reported in 1991 (52) E.L.T. 104 where the Tribunal had held after noting the ratio of the Asia Tobacco Co. decision of Madras High Court that date of publication or availability of Gazette is not relevant when such withdrawal of exemption is otherwise proved to be known to the assessee. The ratio of this decision would apply to the facts of the present case.

8. The facts were different in the Haryana Plywood Industries case decided by the Tribunal and relied upon by the appellants. There on demand being raised for short levy, the appellants therein at the appellate stage before Collector (Appeals)

obtained information that the Notification dated 6-10-1986 was made available to the public in Calcutta only on 29-1-1987. The Tribunal on calling for information from the Department of Publication, found that the notification was published in Gazette of India made available for sale to public on 13-10-1986. The assessment of the related Bill of Entry in that case had been completed and duty paid on 8-10-1986. Clearly, therefore, it was not a case where the appellants paid duty at lower rate even when they were aware of the issue of the amending notification, as is the case in the present appeal. In the other decision of the Tribunal in the case of Silibans International v. Collector of Customs relied upon by the appellants, the Tribunal had followed the ratio of Asia Tobacco decision of the Madras High Court and the GTC Industries decision of the Bombay High Court and had held that the date on which the appellants therein became aware of the issue of ITC Public Notice through brief report in the newspaper, will be the date from which it could be given effect to. In the present case it is apparent that the appellants were aware of the issue of the notification, on 8-10-1985, itself, when they sought information from the Controller of Publication regarding the date on which the Gazette was made available to the public. But the fact remains as noted above that the appellants were aware of the issue of the notification and its effect of rescinding a pre-existing notification. Therefore the duty is held to be valid from 8-10-1985.

9. The validity of the Inspector demanding the differential duty has been questioned. However, even according to the appellants, the Inspector is the proper Bonding Officer in respect of their bonded warehouse. Admittedly, he is the Officer granting the clearances of the goods and it is he who has certified payment of duty on the ex-bond Bills of Entry. In such a situation, the intimation of the Inspector as the proper Bonding Officer for paying the differential duty does not suffer from infirmity. In this context, it is also noteworthy that the appellants in response to his letter had partially complied with it treating it as an intimation through proper channel from the jurisdictional Assistant Collector as the Chief Bond Officer, and they had calculated and paid the differential duty for the period 1-11-1985 to 26-11-1985. This letter of 23-1-1986 was addressed to the Assistant Collector as a reply to the Inspector's letter of 27-12-1985 treating it as a letter from the Assistant Collector as is evident from the first para of that letter. There is also substance in the submissions made in this regard by the Ld. SDR that the appellants as

licensee of Private Bonded Warehouse are bound to pay the differential duty on receipt of a notice in terms of Sec. 59 C.A. '62. In the result, therefore, there is no reason to interfere with the order passed by the lower authorities and in this view of the matter, the appeal is rejected and the stay is also disposed of as the issue in the appeal, itself, has been taken up and decided as above. The appellants are liable to pay the differential duty from 8-10-1985.

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