Voltas Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-30-1991

Reported in : (1994)(70)ELT385Tri(Mum.)bai

Appellant : Voltas Ltd.

Respondent : Collector of Central Excise

Judgement :

1. This appeal is directed against the Order-in-Appeal No. AMP.974/B.III/493/87 dated 1-3-1988 passed by the Collector of Central Excise (Appeals), Bombay, confirming the order-in-original No.V(68)18.30/86(106) dated 23-2-1987 of the Assistant Collector of Central Excise, Thane Div. II, rejecting the claim for refund of Rs. 12,458.00 filed by the appellants.

2. The appellants, vide their refund claim dated 21-8-1986, claimed refund of Rs. 12,454/- in respect of the duty paid on Voldram Model 257D, and cleared vide GP 1 No. 512/25-3-1986, pleading that initially the same machine was cleared on payment of requisite duty vide GP 1 No.255/9-11-1984, for the purpose of display at the exhibition and was brought back on 6-12-1984, under appropriate D-3 intimation to the department, and was kept in the factory premises, from where the same was sold to a party and hence the same was removed from the factory vide GP 1 No. 512/25-3-1986 on payment of duty of Rs. 12,454.00, and pleaded that it was an excess payment of duty which required to be refunded. A show cause notice dated 16-12-1986, however, came to be served on the appellant, calling upon them to explain why refund claim should not be rejected on the ground that

the refund could be granted only under Rule 173L of the Central Excise Rules, but the appellants had not received back the machine under the said provision, and further, reading the provisions of the said Rule with Section 11B of CESA 1944, the claim for refund of the duty initially paid was barred by limitation. In reply to the same, the appellant, vide their reply dated 5-2-1987, pleaded that as the goods sent for exhibition were returned, provisions of Rule 173H would stand attracted and as they had paid the duty at the first clearance, they were eligible to effect second removal without payment of duty, and that the duty paid second time was an excess payment. In the adjudication that followed, the adjudicating authority held that the re-entry and retention being claimed to be vide Rule 173H of the Rules, they had exceeded the period of such retention, and had also not followed the procedure prescribed vide Rule 173L. He also observed that though the duty initially paid was Rs. 6200/- refund claim filed was for Rs. 12454/-. In his finding, since the procedure provided under Rule 173G was not followed, and time limit prescribed under Rule 173H had expired, the refund was not admissible, and the claim was, therefore, rejected. The Collector (Appeals), while confirming the order of the adjudicating authority, held that the appellants claimed refund attracting provisions of Rule 173H of the Rules, but no provision existed in the said rule for grant of refund and reiterated the finding of the Assistant Collector that procedure of Rule 173L was not followed.

3. Mr. M.S. Sanklecha, the Ld. Adv. for the appellants pleaded that undisputedly, the same item had suffered double duty, and pointed out that there was no dispute as to the identity of the article. He stated that the department had not doubted that the item other than the one received back from exhibition, was removed under the subsequent gate pass, nor was it the case of the appellant, that the item had undergone any repair, remake or any such allied processes. He also admitted that the same was removed after 1 year 3 months, after its return to the factory after being displayed at the exhibition. In his submission, however, Rule 173H of the Rules also may not stand attracted, as it was a case of double payment simplicitor, however if it stood attracted, then the rule provisions did not provide for any period, for subsequent removal. In his submission, the findings of the authority below, that Rule 173H does not contemplate refund, is ex facie not tenable, as the said Rule provided for second removal without payment of duty, and under the

general provisions and basic fundamental, excess duty being unauthorised collection, had to be refunded. He also pleaded that criteria of Rule 173L of the Rules was wrongly attracted.

4. Mr. A.V. Naik, the Ld. JDR, while supporting the order, submitted that the duty paid at the time of second clearance alone was the excise duty paid, and the earlier being not the duty paid on removal on account for sale, could alone be claimed back, and that having not been done, the present claim was not maintainable. He further pleaded that the claim of the appellants could at the best, fall within the purview of clause (e) of Rule 173H(i) of the Rules, but that provision could be applied only when the goods were "returned" and would not cover up the cases of "re-entry". He further submitted that vide Trade Notice 190 MP/Gen/23/1980, time limit of one year is provided for removal of the goods brought back to the factory under Rule 173H, and here, the removal was undisputedly beyond that period. He submitted that plea that Rule 173H may also not stand attracted was entirely a new plea, never raised any time before. He also pleaded that the appellants would not be entitled to refund if the duty amount is already recovered from the customers.

5. Considering the submissions made, it is an undisputed position that the item has suffered duty twice, and the amount recovered being admittedly more than legitimately recoverable, the excess amount recovered has to be refunded.

6. There is also no dispute over the issue that where the machine was initially removed for display at an exhibition, full duty at the then prevailing rate was paid and clearance was under proper documents and there is also no challenge over the issue that the same machine was brought back under a valid D-3 declaration, and the same machine in the same condition, was again sent out.

7. The transaction as also the claim for refund being prior to 1990, the pre-amended Rule 173H of the Rules has to be considered, and the said rule, as it then existed read thus : "Retention or re-entry of duty paid goods in the factory or warehouse:- (1) The assessee may, subject to such conditions as may be specified by the Collector, retain in, or bring into, his factory or warehouse the goods on which duty has been paid, if such goods - (a) are required for use in the

manufacture of other goods in the factory; or (aa) are required in the factory for construction or repairs or for use as fittings or equipment or for any other purpose for which such goods are normally consumed; or (b) need to be re-made, refined, reconditioned, repaired or subjected to any similar process in the factory; or (c) cannot be transported due to circumstances beyond the assessee's control such as the suspension of booking on railways, non-availability of railway wagons or the break down of carriers; or (d) are required for test or for studying designs or method of construction; or (e) are required to be stored in the factory premises for retail sale or for issue as complimentary gifts or for repacking into packages so as to suit the requirements of individual customers.

(2) The goods retained in, or brought into, a factory or warehouse in accordance with the provisions of Sub-rule (1) (may, if not subjected to any process amounting to manufacture be removed) from the factory or warehouse without payment of duty subject to such conditions as may be specified by the Collector." Considering the provisions of clause (e) therein, the same appears to have been also providing for the cases where the duty paid goods are received for storage for retail sale, and the said provision has to be taken also for covering the cases where the items are received after display in exhibition. There is also a Trade Notice issued by the Nagpur Collectorate in this regard. To read the said provision as covering only the retained goods and not returned goods, would mean adding up some words which do not exist and also overlooking the words which exist. The phraseology of Sub-rule (1) clearly indicates that all provisions are made applicable to the goods "returned" in or brought to the factory and no indication is available to hold that same clause is applicable in case of one of the two exigencies.

8. A plea is raised that vide some Trade Notice issued, the goods so brought were required to be cleared within the period of one year.

Though the Rule itself provides that the Collector is empowered to lay down condition, but the condition to be laid down have to be in relation to the procedural aspect. Providing a time limit, could tantamount to restrict the entitlement of the benefit thereof, which would mean depriving the party of the right made available, in the Rule. Significantly the amended Rule 173H itself lays down certain time

limit. When the rule, as applicable to the refund claim under consideration, did not provide for any time limit, providing any time limit under a Trade Notice, could be construed as the Collector having assumed the legislative power. Such a Trade Notice, therefore, cannot be taken as affecting the right of the party claiming benefit under the said rule.

9. Collector (Appeals) has held that Rule 173H does not contemplate grant of refund. It however provides for second removal without payment of duty. No qualifying clause exists to provide for exigencies where the rate of duty may have altered before second clearance. Thus, the manufacturer is not required to pay any duty on the second removal, where once the duty has been paid at the time of first removal. The duty paid second time has to be taken as excess duty paid, and claim for refund thereof, has to be entertained as an ordinary claim for refund. No specific provision is required to be made in Rule 173H to meet with the exigency of double payment, where provision therefor already exists elsewhere.

10. The Ld. JDR raised a doubt that the appellants may have recovered duty from the party. Here however is not the case for refund of duty amount. The duty is already paid at the first removal, and that was the correct stage for payment of duty. The amount paid as duty at the second removal stage was actually on excess payment, and the doctrine of unjust enrichment, even assuming to be applicable to the refunds granted under the Excise Act, could not stand attracted here.

11. Taking all the factors into consideration, the case of the appellants would fall within the purview of Rule 173H, so far as receipt and retention of the machine in the premises is concerned. As per the said provision, the appellants could have removed the same without payment of duty and as such duty paid second time has to be taken as the excess duty liable to be refunded as per the general provisions. The claim filed is within six months from the date of payment.

12. The appeal is therefore allowed. The order rejecting the claim is set aside, and the refund claimed is directed to be paid.