

Beta Naphthol (P) Ltd. Vs. Collr. of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-03-1992

Reported in : (1992)(42)LC508Tri(Delhi)

Judge : J T P.C., S Maruthi, G B Deva

Appellant : Beta Naphthol (P) Ltd.

Respondent : Collr. of Central Excise

Judgement :

1. This appeal arises out of an order-in original No. 04/29/90 of Collector confirming a demand of Rs. 1,23,054/- and Rs. 14,56,112.45/- and imposing a penalty of Rs. 2,50,000/-.

2. The case of the appellants is that they manufacture Beta Naphthol falling under Chapter Sub-heading No. 2907.10. The inputs which are consumed in the manufacture of Beta Naphthol are Naphthalene, caustic soda flakes, Caustic Soda Lye and sulphuric acid. Prior to 1.3.1986, the appellants were availing proforma credit under Section (sic) 56A of the Central Excise Rules. On 4/5th Nov. 1986, the appellants filed a declaration under Rule 56G declaring various inputs used in the manufacture of Beta Naphthol. They also wrote a covering letter dtd.

5th Nov. 1986 requesting the Central Excise Authorities to permit them to avail the benefit of notification No. 432/86 dtd. 6.10.1986 in respect of Naphthalene and sought benefit under Rule 57A in respect of Caustic Soda and sulphuric acid used

in manufacture of Beta Naphthalene. They have also requested by a letter dtd. 4.12.1986 for allowing Modvat credit w.e.f. 4.11.1986. The central excise authorities, in reply, asked the appellants by their letter dtd.

20.2.1987 to submit documentary evidence that the final product i.e., Beta Naphthol is a dye intermediate falling under Chapter 29. The appellants on 3.4.1987 furnished documentary evidence evidencing that Beta Naphthol is a dye intermediate and again requested permission to avail Modvat credit on Caustic Soda and sulphuric acid and credit on Naphthalene under notification 432/86. On 20.7.1987, the Asstt.

Collector directed the appellants to file a declaration under Rule 57(G) and asked them whether they wanted to avail Modvat credit or proforma credit under Rule 56(A) in respect of Naphthalene. By a letter dtd. 23rd July, 1986 they submitted their earlier declaration dtd.

4.11.1986 and informed the Collector that they had been availing Modvat w.e.f. 4.11.1986. Thereafter, in reply, the respondents wrote a letter on 12th July, 1988 pointing out to the respondents (sic) that the Modvat credit is admissible on sulphuric acid and caustic soda lye and flakes only from 30.12.1986. On 28.10.1987, a dispute was raised by a show cause notice dtd. 28.10.1987 as to the date on which the modvat credit was availed and by an order, it was stated that the appellants should have availed Modvat in respect of all the three items.

3. On 2.2.1990, a show cause notice was issued proposing to recover duty on the ground that the appellants wrongly availed the modvat credit from 8.8.1989 to 24.1.1990 and also duty was levied on clearances made at the price below the declared assessable value from 1.7.1989 to 31.12.1989. On receipt of the reply, the demand was confirmed. Hence, the appeal before us.

4. The Collector, on the issue of wrong-availment and mis-utilisation of modvat credit held that Naphthalene has not been specified as an input under notification 177/86 dtd. 1.3.1986 as amended under Rule 57A. He also found that the appellants have availed the Modvat credit in spite of the letter dtd. 12.7.1988 intimating them that Modvat credit was permissible only on sulphuric acid and

caustic soda lye from 30.12.1986. Thus, the appellants availed the Modvat credit to which they were not entitled. As regards the recovery of duty for the period from 1.7.1989 to 31.12.1989, the Collector held that the appellants have admitted to have sold goods at a price lower than the approved price to industrial consumers and wholesale buyers. He rejected the contention of the appellants that there is procedural lapse. The main contention of the appellants is that the Collector has no jurisdiction to issue the order under Section 11A(2). He also submitted that there is a total non-application of mind by the Collector. His next point is that he is availing the Modvat credit with the permission of the respondents and the respondents were posted with the knowledge of the fact that the appellants were availing the Modvat credit. Therefore, the show cause notice in so far as it seeks to recover duty for a period beyond the period of six months is barred by limitation.

5. Shri Jain, appearing for the Department submitted that Rule 57I empowered the proper officer to initiate proceedings under which the proper officer is the Collector. Therefore, the Collector has jurisdiction to initiate the proceedings. Therefore, he is competent to issue show cause notice. He also pointed out that in spite of pointing out that Naphthalene is not one of the inputs in respect of which Modvat credit is available, the appellants have wrongly availed the same and therefore, the Department is justified in recovering the mis-utilised credit.

6. As regards the issue that the appellants have short-paid the duty by selling the goods at a price lower than the price. Admittedly, there are price lists which are approved at higher price. The appellants cannot sell the goods at a lower rate than the price approved.

Therefore, the Department is justified in recovering the duty short paid by the appellants. We see no reason to interfere with this finding of the Collector.

7. The allegation in the show cause notice with regard to the mis-utilisation of Modvat credit is that they have wrongly utilised the same amounting to Rs. 4,56,112.45 from 8.8.1989 to 24.1.1990 as Naphthalene has not been specified as input under notification No.177/86 dtd. 1.3.1986, despite the fact that they have been intimated by the office letter dtd. 12.7.1988 that Modvat credit is permissible on sulphuric acid and caustic soda lye and caustic soda flakes from 30.12.1982

(sic).

8. Admittedly, the respondents have intimated the appellants on 12.7.1988 that Modvat credit is not available in respect of Naphthalene. In spite of that, the appellants seem to have availed the modvat credit on the ground that earlier to that letter they have intimated to the Department and which is in the knowledge of the Department they were availing the Modvat. The fact that they were availing the credit prior to 12.7.1988 is not a ground for availing the same after they were specifically informed by the Department by their letter dtd. 12.7.1988 that Modvat credit is not permissible in respect of Naphthalene. Therefore, there is justification for recovering the duty mis-utilised by the appellants as credit. The department is entitled to recover the duty for the entire period, as there is violation of rules, in the sense that though they are not entitled to the modvat credit they have wrongly utilised the same including the direction issued by the department.

9. As regards the competency of the Collector to issue the show cause notice under Rule 57I of the Central Excise Rules. The relevant rule reads as follows: Rule 57I. Recovery of credit wrongly availed or utilised in an irregular manner: (1)(i) Where credit of duty paid on inputs has been taken on account of an error, omission or misconception, on the part of an officer or a manufacturer or an assessee, the proper officer may, within six months from the date of such credit, serve notice on the manufacturer or the assessee who has taken such credit requiring him to show cause why he should not be disallowed to such credit and where the credit has already been utilised, why the amount equivalent to such credit should not be recovered from him: Provided that where such credit has been taken on account of wilful misstatement, collusion or suppression of facts on the part of a manufacturer or an assessee, the provisions of this clause shall have effect as if for the words "six months" the words "five years" were substituted, A reading of the proviso to Rule 57-I makes it clear that the authority competent to issue the show cause notice is "the proper officer". The expression proper officer is defined under Rule 2(xi) according to which the proper officer means the officer in whose jurisdiction the land or premises of the producer of any excisable goods, or of any person engaged in any process of production of, or trade in, such goods or containers thereof whether as a grower, curer, wholesale dealer, broker or

commission agent or manufacturer, or intended grower, curer, wholesale dealer, broker, commission agent or manufacturer are situated.

10. Rule 2 confers powers on a proper officer by virtue of the situation of the land or premises of the producer of any excisable goods. In other words if the premises or the land or the producer of excisable goods is situated within the jurisdiction of the proper officer, he gets the jurisdiction to issue a show cause notice.

Similarly, a person is engaged in the process of production of goods is situated within the jurisdiction of the proper officer, he gets jurisdiction to issue demand notices under Rule 57-I. The jurisdiction is not conferred on a proper officer by virtue of his status as Asstt.

Collector or Collector but by virtue of the situation of the land or production of goods within the jurisdiction of the proper officer. The status of the officer is not relevant. The proper officer may be either Asstt. Collector or Collector. It is not disputed that the appellants' land or premises is within the jurisdiction of the Collector.

Therefore, the Collector gets the jurisdiction to issue the show cause notice. We may also point out, though the time limit mentioned under Section UA has been incorporated under the proviso to Rule 57-1 but the words Asstt. Collector and Collector or contravention of any of the provisions of the Act or of this rule with intention to evade etc. have not been incorporated under the proviso to Rule 57-I.11. The next question for consideration is whether the appellants are liable to pay the duty. The case of the appellants in the reply to the show cause notice is that they are entitled to set off under notification No. 432/86. The relevant portions of the reply are extracted below: The company sought the guidance of the Department along with the declaration as well as through letter dated 4.11.1986 by inadvertently referring to notification No. 432/86 as MODVAT, since the MODVAT is also another way of taking set off of the input duty, further again we sought the guidance of the Department by letter dated 4.12.1986.

The Department instead of guiding the procedure for availing credit of input as per notification No. 432/86, required the submission of the documentary evidence that

our final product i.e., Beta Naphthol is a dye intermediate falling under Chapter 29 in the context of notification No. 432/86 vide the letter from the Superintendent (T) No. IV(16) 30-35/86/MOD/117 dtd. 20.2.1987.

In this letter we sincerely requested for permitting us MODVAT on Caustic Soda and Sulphuric and Credit Facility on Naphthalene under Central Excise Notification No; 432/86 dtd. 6.10.1986.

"A letter No. CNo. IV(16)/30-35/86/MOD/5783 dtd. 20.7.1987 from the office of the Asstt. Collector, Central Excise Division brought to light the confusion in the Department about the nature of exemption/set off of duty admissible under notification No. 432/86-CE dtd. 6.10.1986.

NOTEWORTHY TO MENTION HERE IS THAT THIS LETTER MARKED THE TURNING POINT AS HEREINAFTER THE COMPANY'S CLAIM TO EXEMPTION/SET OFF OF NOTIFICATION No. 432/86-CE, DATED 6.10.1986 WAS EXAMINED AND DEALT WITH AS CLAIM FOR MODVAT CREDIT, SINCE THERE IS NO PROCEDURE PRESCRIBED UNDER NOTIFICATION No. 432/86 OF 6.10.1986. ON HOW TO AVAIL CREDIT OF INPUT NAPHTHALENE FOR OF FINAL PRODUCT BETA NAPHTHOL.

In the light of the above facts, it may be appreciated that though Naphthalene does not come under any of the inputs as specified in Notification No. 117/86 dtd. 1.3.1986. We were still entitled to get inputs duty set off under notification No. 432/86 dtd. 6.10.1986 cited above. Hence the net effect of our taking credit and all the three major inputs mentioned above will remain the same in respect of clearances of final products made by us from 8.8.1989 to 24.1.1990 during which we can avail of MODVAT Credit under Rule 57A for Sulphuric Acid and Caustic Soda, and set off can be allowed under Notification No. 432/86. Thus the total net demand of excise duty remain the same.

Whatever credit is not allowable according to law under MODVAT scheme can be debited in RG-23 A register Part II and the same amount can be given to us on credit under notification No. 432/86.

However, we undertake to correct the procedure for availing credit on Naphthalene as per notification No. 432/86 in consultation with the Department.

12. In other words, the claim of the appellants is that they are entitled to set off of duty paid on Naphthalene from duty payable on dye intermediate i.e., the final product manufactured by them under notification No. 432/86. If the appellants are entitled to the set off of duty payable on Naphthalene under notification No. 432/86 the duty mis-utilised under MODVAT Credit Scheme can be adjusted under notification No. 432/86. However, the Collector has not considered the claim of the appellant for set off of duty paid on Naphthalene under Notification No. 432/86 from duty payable on dye intermediate which is the final product. We, therefore, remand the matter to the Collector to consider whether the appellants are entitled to the set off of duty under notification No. 432/86 and whether the duty mis-utilised under the modvat credit scheme can be adjusted under notification No. 432/86.

The appeal is disposed of accordingly.

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