

Dynamic Packagings and anr. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-19-1993

Reported in : (1994)(52)LC37Tri(Delhi)

Judge : G Agarwal, K T P.K.

Appellant : Dynamic Packagings and anr.

Respondent : Collector of Central Excise

Judgement :

1. These appeals have been filed against the order dated 23.3.1987 passed by the Collector of Central Excise (Appeals) Bombay. Briefly stated the facts of the case are that the appellants filed Classification List * No. Tariff Item 68/9/82-83 dated 9.3.1982 for the product 'Polyethylene and Polypropylene Bags' falling under Item 68 of the erstwhile Central Excise Tariff which was approved. On 22.4.1982 Notification No. 149/82 was issued exempting all articles of plastic except the specified ones, falling under Tariff Item 15A(2) from the whole of the duty of excise leviable thereon. On 11.5.1982 Notification No. 182/82 was issued exempting articles of plastic falling under Tariff Item 68 from the whole of the duty of excise. The appellants filed a revised Classification List No. III/45 dated 22.6.1982 claiming exemption of the goods under Notification No. 182/82 dated 11.5.1982.

Since prior to 11.5.1982 Polyethylene/Polypropylene bags falling under Tariff Item 15A(2) were exempted under Notification 149/82 dated 22.4.1982. On 5.9.1982 the appellants filed a claim for refund of Rs. 79976.37 on account of duty paid on

such bags cleared during the period 22.4.1982 to 16.7.1982. The Assistant Collector by his Order No.55/MP/1983 dated 4.1.1983 approved the revised classification list No.III/45 classifying the product Polyethylene/Polypropylene bags under Tariff Item 68 but did not allow exemption either under Notification 149/82 or 182/82. The Assistant Collector also rejected the appellants refund claim for Rs. 79976.37 by his Order No. 52/MP/1983 dated 4.1.1983. Two separate appeals filed by the appellants against these orders were disposed of by the Collector (Appeals) by his order dated 3.2.1985. Both the appeals were allowed with consequential relief to the appellants. On the basis of the Order-in-Appeal the appellants requested the Assistant Collector to grant them refund amounting to Rs. 79976.37. The Assistant Collector thereafter issued an order dated 1.1.1986 under which refund of Rs. 8931.34 was disallowed. Aggrieved by the order dated 1.1.1986 the appellants filed an appeal before Collector (Appeals). However, by the impugned order dated 23.3.1987 the Collector (Appeals) rejected the appeal on the grounds that for the period 22.4.1982 to 10.5.1982 no refund was due since the appellants had not disputed the classification list which was approved on 9.3.1982 and was in force up to 26.5.1982. In this regard he observed that the appellants had only disputed the subsequent classification list and the effect of order setting aside the approval of that list could only be prospective.

2. On behalf of the appellants, Shri R.K. Jain, the Learned Consultant appeared before us. He stated that the Assistant Collector by his order dated 1.1.1986 had disallowed the refund claim of Rs. 8931.34. He added that by the impugned order the Collector (Appeals) rejected the appeal on the grounds that the assessment during the relevant period was in terms of the approved classification list which had not been disputed.

He contended that Rule 173B and Section 11B being independent of each other in respect of the clearances during the period 22.4.1982 to 10.5.1982 the appellants could not be denied the statutory right to claim refund under Section 11B on the ground that there was an approved classification list. In support of his contentions he cited the following case law: 1. Didwania Import & Export (P) Ltd. v. Collector of Customs Plasmac Machine Manufacturing Co. Pvt. Ltd. v. Collector of Central Excise, BombayCollector of Central Excise, Calcutta v. Stewarts & Lloyds of India

Ltd. Britannia Industries Ltd. v. Collector of Central Excise, Calcutta Triveni Structurals Ltd. v. Collector of Central Excise 7. Collector of Central Excise v. Mysore Acetate & Chemicals Co.

Ltd. The Learned Consultant fairly admitted that in a number of decisions a contrary view has also been taken and mentioned the following cases falling in this category. Collector of Central Excise, Thane v. Indian Dyestuff Industries Ltd. Modi Rayon & Silk Mills v. Collector of Central Excise Meerut 3. Herschel Rubber (Pvt) Ltd. v. Collector of Central Excise, Calcutta Shri Jain further submitted that the order dated 4.2.1985 passed by the Collector (Appeals) allowing the appeals with consequential relief had become final since no appeal was filed by the Department against the said order. He contended that in the order dated 4.2.1985 the Collector (Appeals) held that the appellants were eligible to the benefit of exemption under Notification No. 182/82. He submitted that Notification No. 182/82 was issued only with the intention of continuing the exemption which was available since 1971 under Notification 68/71 and Notification 149/82 when such articles became classifiable under Tariff Item 68 instead of 15A(2). He contended that under these circumstances, in terms of order dated 4.2.1985 passed by the Collector (Appeals) the appellants became entitled to exemption in terms of Notification No. 149/82 even for the period 22.4.1982 to 16.7.1982. He stated that by filing the refund claim the appellants had disputed the approved classification list and reiterated his stand that the assessee could not be denied the statutory right to claim refund.

3. On behalf of the respondents, Shri Sharad Bhansali, the Learned SDR stated that during the period 22.4.1982 to 16.7.1982 assessments were made on the basis of the approved classification list. He contended that the appellants' claim for refund of duty in terms of Notification No. 149/82 was obviously not valid since the exemption under the notification was admissible provided the conditions laid down were complied with at the time of clearance of the goods. He argued that under these circumstances refund of duty in terms of the Notification could not be considered after the clearance of the goods. He stated that in the case of Indian Aluminium Company Ltd. v. Thane Municipal Corporation the Supreme Court down that in respect of an exemption or concession, non-observance of even a procedural condition cannot be ignored. He added that in the case of Navasari Oil

Products Ltd. v. Assistant Collector of Central Excise the Gujarat High Court that exemption, dependent on composition or condition of goods, can be claimed only before removal of the goods when their physical verification can be carried out.

4. In his rejoinder, Shri R.K. Jain stated that refund in terms of Section 11B cannot be denied on the grounds of failure to claim exemption at the time of clearance of the goods. In support of his argument he referred to the Tribunal's decision in the case of Collector, Central Excise v. Suburban Engineering Works (Cal.) Pvt.

Ltd. the clarification in the Board's letter F.No. 13/22/83-CXI dated 5.6.1984, the Collector (Appeals) in his order dated 4.2.1985 had held that the appellants were eligible for the benefit of the exemption under Notification 182/82. He contended that in terms of the order of the Collector (Appeals) which was not contested in appeal by the Revenue, the appellants would be entitled to the refund of duty for the entire period.

5. We have examined the records of the case and the submissions made on behalf of both sides. We find that the facts of this case are similar to the facts in the case of X.L. Plastics v. Collector of Central Excise, Baroda, which was decided by Order No. 403/91-CE see 1991 (36) ECR 347 (Cegat SB-C. In that case, the Tribunal has observed that there has not been any uniformity in the decisions of the various Benches of the Tribunal on the question whether an assessee would be barred from claiming of refund of duty under Section 11 when the goods are assessed in terms of an approved classification list. However, having regard to the decision of the Calcutta High Court in the case of ITC Ltd. v. Union of India 1984 (34) ELT 473 : 1988 (17) ECR 148 (Calcutta) and the judgment of the Division Bench of the Allahabad High Court in the case of Triveni Structurals Ltd. v. Collector of Central Excise and also on the ratio of the Supreme Court decision in the case of Elson Machines , the Bench had observed that until there is a specific ruling on the subject by the Supreme Court, the decisions of the High Court, being those of higher judicial body, will have to be followed.

6. It is seen that in the case of M/s X.L. Plastics, even though it was held that the appellant had the right to claim refund in terms of Section 11B even when assessments were made during the relevant period in terms of an approved

classification list, the Tribunal upheld the decision of lower authorities on the reasoning that in order to claim exemption under Notification No. 149/82, the appellants were required to prove that the condition of Notification had been satisfied and there was nothing on record to show they had done so. We refer to the relevant extract from Order No. 403/91-CE, see 1991 (36) ECR 347 (Cegat SB-C) which is reproduced below: I have had the benefit of carefully going through the order of Hon'ble Member (Judicial), Shri S.L. Peeran and I may express the following views: The appellants' claim for refund of duty from 11.5.1982 under Notification 182/82 has already been granted and the dispute is regarding the period prior to it. During that period, even according to the appellants, they had not disputed classification of the goods under Item 68 CET. The appellants' claim for refund for the prior period is on the ground that they are covered by Notification 149/82 dated 22.4.1982. This, the Department has denied taking the view that Notification 149/82 does not envisage exemption from payment of duty on goods falling under Item 68. They have also, in this context, taken the further argument that approved classification list has not been contested in appeal and there could, therefore, be no refund claim. Apart from this, it has to be borne in mind that it is a well-settled principle that the assessee, claiming the exemption, has to show that he fulfills the conditions thereto. The onus is upon him. Notification 149/82 relates to articles made of plastics all sorts falling under 15A(2) and it is further found that this notification is not an unconditional one. It extends exemption to the non-specified plastic goods provided such articles are produced out of artificial resins or plastic materials or cellulose esters and ethers in any form falling under sub-item (1) of the said Item, on which the duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) as the case may be, has already been paid; or such articles are produced out of scrap of plastics. Therefore, the appellants, in order to claim exemption, should also have proved that the condition is satisfied.

There is nothing on record relating to their refund claim which shows that they have done so. Therefore, on merits, the rejection of the claim for the period prior to 11.5.1982 will be justified and on this reasoning there will be no need to interfere with the order passed by the lower authorities. As for the law on the subject, as has been very lucidly brought out by the Hon'ble Member (Judicial), there has

been a diversity of decisions among the Benches of the Tribunal, but the Calcutta High Court decision in the case of ITC Ltd. v. Union of India as confirmed by a Division Bench of that Court (Appeal No. 80 of 1988 ITC v. Union of India decided on 12.10.1988. has specifically held that the view of the Tribunal in Modi Rayon & Silk Milk is wrong and runs counter to the provisions of Section 11B. It is also noted that in another case of Triveni Structurals Ltd. v. Collector of Central Excise Court had to deal with a case of refund claim in respect of duty paid in 1981-82 in accordance with an approved price list. The High Court rejected on the question of limitation. The significance is that the dismissal was not on the ground that there has been no appeal against the order of approval of the price list. Therefore, admittedly, while the decisions of the Tribunal on this issue are not uniform, in view of the High Court decisions, being those of a higher judicial body, in my humble opinion, these High Court decisions may have to be followed until there is a ruling by the Supreme Court in the matter in future. In this context, it may also be recalled that the Supreme Court decision in the Case of Elson Machines in which the Supreme Court observed that the Department was not barred from taking a different view on classification after having approved the classification list, has further been affirmed by the Supreme Court in the case of Plasmac Machines Mfg. Co. v. Collector of Central Excise, Bombay 1991 (32) ECR 1 wherein the Supreme Court observed as follows: The appellants' contention that the department having earlier approved the classification of Tie Bar Nuts under Tariff Item 68 has no justification for its revision is, to our mind, not tenable inasmuch as there could be no estoppel against a statute. If according to law Tie Bar Nuts fall within Tariff Item 52 the fact that the department earlier approved their classification under Tariff Item 68 will not estop it from revising that classification to one under Tariff Item 52. See M/s Elson Machines Pvt. Ltd. v. Collector of Central Excise Therefore, it may not be absolutely essential in the fact of the present case for having a Larger Bench constituted for deciding the issue.

Having regard to the facts and circumstances of the case and on a consideration of the evidence on record since we are agreed that on merits the impugned order is correct in law and is upheld, the appeal is disposed of on the basis of this finding of ours and is accordingly rejected.

7. The appellants case is that during the period 22.4.1982 to 16.7.1982 they were eligible for the exemption under Notification No. 149/82.

8. It is seen that Notification No. 149/82 exempted all articles made of plastic, all sorts, falling under sub-item (2) of Item 15A of the Tariff, except the articles specified in the notification provided they were made out of artificial resins or plastic materials or cellulose esters and ethers in any form falling under sub-item (1) of Item 15A on which duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 had been paid or such articles were produced out of plastic scrap. It is also seen that the expressions 'plastics', 'flexible' and 'rigid' were defined in the Explanation to the Notification. On a plain reading of the notification it is evident that the exemption was subject to fulfilment of certain conditions which were to be fulfilled by assessee at the time of clearance of the goods.

We find that there is no evidence on record to show that the appellants had fulfilled the conditions of the notification. In the case of Navsari Oil Products Ltd. (supra) the Gujarat High Court has held that exemption dependent on composition or condition of the goods can be claimed only before removal of the goods when their physical verification can be carried out since after removal of the goods it would be impossible for the Department to verify as to whether the product is respect of which refund is claimed, satisfied the conditions laid down in the Notification.

9. Having regard to the ratio of the judgment quoted above, and the facts of this case, we see no reason to differ from the decision of the Tribunal in Order No. 403/91 -C in the case of M/s X.L. Plastics v. Collector of Central Excise, Baroda 10. The Learned Consultant has laid a great deal of stress on the point that in terms of the appellants were entitled to refund even for the period between 22.4.1982 and 16.7.1982 since the Department had not filed any appeal against the order dated 4.2.1985 passed by the Collector (Appeals). However, we do not find any merit in this argument in view of the fact that in the order dated 4.2.1985 the Collector (Appeals) had only held that the appellants were entitled to the benefit in terms of Notification No. 182/82 and he had not referred to Notification No. 149/82 which alone was relevant for the goods in question during the period prior to 16.7.1982. Moreover, in the impugned order dated 23.3.1987 the Collector (Appeals) has

clearly held that the effect of earlier order passed by him was only prospective.

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