Gammon Far Chems Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-19-1994

Reported in : (1994)(71)ELT59TriDel

Appellant : Gammon Far Chems Ltd.

Respondent : Collector of Central Excise

Judgement :

1. Since the issues involved in these appeals are similar, they are therefore disposed of by this common order.

2. Appeal No. 899/88-C arises out of Order-in Original No.103/87 dated 9-11-1987 passed by the Collector of Central Excise, Bangalore withdrawing exemption availed of by the appellants M/s. Gammon Far Chems under Notification No. 85/85 during 1985-86 on the grounds that the values of clearances of excisable goods from appellants' factory and from M/s. Freyssinet Prestressed Concrete Co. Ltd., Bombay, a subsidiary of M/s. Gammon India Ltd. which were required to be clubbed together had exceeded the limit of Rs. 75 lakhs during the year 1984-85. While demanding appropriate duty on excisable goods in respect of which exemption was availed during the said period the Collector also imposed a penalty of Rs. 1,00,000/- on the appellants.

Appeal No. 475/88-C is directed against Order No. 5/88(B)(D) dated 29-1-1988 passed by the Collector of Central Excise (Appeals), Madras setting aside the order passed by the Assistant Collector that M/s.

Gammon Fer Chems were entitled to avail exemption under Notification No. 175/86 dated 1-3-1986 and discharging the Show Cause Notice dated 31-10-1986 which sought to deny that exemption claimed under the said Notification vide Classification List No. 1/86-87 dated 2-4-1986. The Collector (Appeals) has held that for purposes of ascertaining the applicability of Notification 175/86-C.E., dated 1-3-1986 goods cleared from all the factories of M/s. Gammon India Ltd. and its subsidiary were required to be clubbed.

Appeal No. E/355/89-C is directed against Order-in-Appeal No. 210/88(B) dated 20-7-1988 passed by the Collector of Central Excise (Appeals), Madras upholding the order No. C/V/28/3/112/87 M.P. I dated 25-1-1987 passed by the Assistant Collector wherein based on the Collector of Central Excise Order No. 103/87, dated 9-11-1987 (subject matter of present appeal No. E/899/88-C) he has held that the appellants were not entitled to the exemption under Notification No. 175/86-C.E.E/Appeal No. 360/88-C has been filed on behalf of the Collector of Central Excise, Bangalore against the Orders-in-Appeal No. 210/88(B) dated 20-7-1988 passed by the Collector of Central Excise (Appeals), Madras against the order C. No.V/28/3/112/87 M.P. I dated 23-1-1988 passed by the Assistant Collector's holding that the appellants were not entitled for the exemption under Notification No. 175/86-C.E., dated 1-3-1986 in respect of the excisable goods manufactured between 1-4-1987 and 31-3-1988 and ordering that the classification list shall be deemed as modified accordingly and duty, if any, shall be recovered after quantification. The Assistant Collector had while passing his order taken into account the fact that the Collector of Central Excise Bangalore vide his Order No. 103/87 dated 9-11-1987 (subject matter of present appeal No. E/899/88-C) has withdrawn the exemption granted to the assessee under Notification No. 85/85 dated 17-3-1985 during the financial year 1985-86 and demanded the differential duty. The Collector (Appeals) while upholding the Assistant Collector's finding that the appellants were not entitled to the exemption under Notification 175/86, set aside that part of the order of the Asstt.

Collector which required differential duty for the period 1-4-1988 to 31-3-1988 to be quantified for being recovered. In his appeal, the Collector has contended that the Collector (Appeals) order is not legal since the question of quantifying and

recovering the differential duty can arise only after approval of the Classification List. Since in all the other cases, the order passed by the Collector which is the subject matter of the present appeal No. 899/88-C was relied upon by the Asstt.

Collector, it would suffice if the facts in the case leading to only the appeal No. 899/88-C are recounted.

The appellants are engaged in the manufacture of Sulphuric Acid falling under T.I. 14G and Aluminium and Sodium Silico Flouride falling under T.I. 68 of the erstwhile Central Excise Tariff. They are a Division of M/s. Gammon India Ltd., Bombay who also have a subsidiary company, namely, M/s. Freyssinet Prestressed Concrete Co. Ltd. having shareholding of 97.83%. During the relevant period the subsidiary company was engaged in the manufacture of prestressing equipments, neoprene, bearing pad, anchorage cone, hand grout pump, hydraulic jack and sliding bearing falling under T.I. 68. The value of clearances of these goods during the year 1984-85 was Rs. 76, 73, 645. The appellants availed exemption in respect of Sulphuric Acid under Notification No.85/85 for the year 1985-86 on the grounds that the total value of clearances of goods falling under T.I. 14G and T.I. 68 had not exceeded Rs. 75 lakhs during the year 1984-85. However, the appellants were served with a show cause notice requiring them to show cause alleging that the exemption availed by them during the year 1985-86 under Notification No. 85/85 was not admissible since the total value of clearances by them and the subsidiary company of M/s. Gammon India Ltd. had exceeded Rs. 75 lakhs during 1984-85. The appellants were therefore asked to show cause as to why duty should not be recovered from them under Rule 9(2) read with proviso to Section 11A of the Central Excises and Salt Act, 1944 on the excisable goods cleared by them without payment of duty. In the reply to the show cause notice and also during the personal hearing the appellants denied that they had suppressed the fact that they are a Division of M/s. Gammon India Ltd. since in all their letters and correspondence it was clearly mentioned that they were 'an Enterprise' of M/s. Gammon India Ltd. They also pointed out that they had cleared the goods on payment of duty in accordance with the approved classification list, price lists, and they had maintained the prescribed records and also submitted the prescribed returns. They stated that M/s. Freyssinet Prestressed Concrete Co. Ltd.

is a separate legal entity engaged in the manufacturing and marketing of goods on its own account. On these grounds they contended that it would not be legally correct to club the value of the clearances of the two companies and their own clearances being less than Rs. 75 lakhs during 1984-85, they were eligible for exemption under Notification No. 85/85 during the financial year 1985-86. However, in the impugned order No.103/87 dated 9-11-1987 the Collector held that the appellants who are a Division of M/s. Gammon India Ltd. had suppressed and misstated facts by not disclosing to the Department the existence of a subsidiary company of M/s. Gammon India Ltd. i.e. M/s. Freyssinet Prestressed Concrete Co. Ltd. He also held that having regard to the total value of clearances of excisable goods by the appellants and M/s. Freys- sinet Prestressed Concrete Co. Ltd. during the year 1984-85, the appellants were not entitled to the exemption under Notification No. 85/85 during the year 1985-86. He, therefore, ordered the withdrawal of the exemption availed by the appellants and demanded under Rule 9(2) read with the proviso to Section 11A the duty on the excisable goods in respect of which exemption was availed.

4. On behalf of the appellants Shri Ravindra Bhat, the learned Advocate appeared before us. He contended that the Collector had erred in holding that the appellants were not eligible for the exemption under Notification No. 85/85 during the year 1985-86. He stated that the Collector's finding that the clearances during the year 1984-85 by the appellants and M/s. Freyssinet Prestressed Concrete Co. Ltd. were required to be clubbed for purpose of determining the eligibility of the appellants to exemption under Notification 85/85 during the year 1985-86 was not sustainable since M/s. Freyssinet Prestressed Concrete Co. Ltd. was a separate legal entity and could not be deemed as a unit engaged in the clearance of goods on behalf of M/s. Gammon India Ltd. He submitted that the order passed by the Collector was illegal since the amount of duty demanded had not been quantified either in the show cause notice or in the impugned order. He contended that the Collector's order invoking the extended period under the proviso to Section 11A was also illegal since in all their correspondence with the Department they had mentioned that they were 'an enterprise' of M/s.

Gammon India Ltd. and in the classification list there was no column seeking such information. He stated that the appellants had cleared the goods in accordance with the approved classification list and complied with all the procedural requirements. On these grounds he prayed that the impugned order may be set aside. In support of his submissions he cited the following case law :-Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) v. K. Kelukutty, AIRGovernment Ceramic Service Centre, Cannanore v. Collector of Central Excise, Cochin (3) Jaswant Sugar Mills Ltd., Meerut v. Union of India and Ors., 1981 (8) E.L.T. 177.

5. On behalf of the respondents Shri Sharad Bhansali, the learned SDR stated that the appellants are a Division of M/s. Gammon India Ltd. who are also the holding company of M/s Freyssinet Prestressed Concrete Co.

Ltd. on account of their holding of 97.83% shares of that company. He contended that under these circumstances it was correctly held by the Collector that for the purposes of determining the eligibility of the appellants to the exemption under Notification No. 85/85 during the year 1985-86 appellants' own clearances, and the clearances of M/s.

Freyssinet Prestressed Concrete Co. Ltd. during the year 1984-85 were required to be clubbed. He submitted that there is no force in the appellants' claim that the extended period under the proviso to Section 11A was not invokable since in the letters addressed by them to the Department there was no indication that they were a Division of M/s Gammon India Ltd. He stated that there is no infirmity in the Collector's order invoking the extended period since the appellants had suppressed the fact that M/s Freyssinet Prestressed Concrete Co. Ltd. was a subsidiary of M/s. Gammon India Ltd. in which the latter had held 97.83% of the equity. He reiterated his stand that on account of the appellants being a Division of M/s. Gammon India Ltd. who were also a holding company of M/s. Freyssinet Prestressed Concrete Co. Ltd. the goods manufactured by the two factories were to be treated as having been manufactured for and on behalf of M/s. Gammon India Ltd. In support of his submissions he placed reliance on the following case law :-Gwalior Potteries v. Collector of Central Excise 6. We have examined the

records of the case and considered the submissions made on behalf of both sides. It is seen that the only question that arises for consideration in these cases is whether for the purpose of determining the eligibility of the appellants to exemption under Notification No. 85/85 or under Notification 175/86 the goods cleared for home consumption by the appellants who are a Division of M/s. Gammon India Ltd. and M/s. Freyssinet Prestressed Concrete Co.

Ltd of which M/s. Gammon India Ltd. hold 97.83% shares, have to be clubbed together and treated as goods cleared for and on behalf of M/s.

Gammon India Ltd. 7. The appellants' case is that M/s. Freyssinet Prestressed Concrete Co. Ltd. being a Public Limited Company having its Board of Directors for the conduct of its affairs it has to be deemed as a separate legal entity and for this reason it cannot be deemed to be manufacturing goods on behalf of M/s. Gammon India Ltd. In this regard it has been stated that M/s. Gammon India Ltd. do not undertake marketing of goods manufactured by M/s. Freyssinet Prestressed Concrete Co. Ltd. which are entirely different from the goods manufactured by the appellants. It has been claimed that M/s. Gammon India Ltd. are only entitled to the Profit/Loss of the latter company in accordance with the shareholding in that company. The Learned Counsel for the appellants has also relied upon the Delhi High Court judgment in the case of Jaswant Sugar Mills Ltd. v. Union of India, reported in 1981 (8) E.L.T. 177 in which it was observed that the partnership firm concerned would be a person distinct from the petitioner which was a Public Limited Company. In support of his contention the Learned Counsel on behalf of the appellants has also placed reliance on the judgment of the Hon'ble Supreme Court in the case of Deputy Commissioner of Sales Tax (Law) v. K. Kelukutty, AIR 1985 SC 1143 in which it was held that each partnership is a distinct relationship.

8. The judgments cited by the Learned Counsel for the appellants are not relevant to the issue before us since they deal with either the question of relationship between two partnership firm or between a partnership firm and a Public Limited Company.

9. In the case before us, since appellants are a Division or Unit of M/s. Gammon India Ltd. the question that arises for consideration is whether the aggregate value of clearances of two public limited companies, namely, M/s. Gammon India Ltd. and M/s. Freyssinet Prestressed Concrete Co. Ltd. have to be clubbed for the purpose of determining the eligibility of the appellants for the exemption under Notification No. 85/85-C.E., dated 17-3-1985. In support of the contention that these two companies have to be treated as separate legal entities, the appellants have also placed reliance on the decision of the Tribunal in the case of Government Ceramic Service Centre, Cannanore v. Collector of Central Excise, Cochin - 1983 (13) E.L.T. 1215, wherein it was held that the two units being public limited companies, they have to be treated as separate legal entities and the fact that they were owned by the Government of Kerala cannot make them one unit. In this regard it is seen that it is well settled that two companies, being separate juristic person have to be treated independent of each other unless there is evidence regarding financial flow back among them or one of them is controlled by the other in a manner so as to be only a facade for availing the exemption. The finding in the case of Vivomed Labs. (P) Ltd. v. Collector of Central Excise, reported in 1991 (53) E.L.T. 152 [Para 6] being relevant is reproduced below: 10. It is an admitted fact that M/s. Gammon India Ltd. hold 97.83% of the shares in M/s. Freyssinet Prestressed Concrete Co. Ltd. It is also seen from para 4 of the Stay Order No. 125/1988 passed by the South Regional Bench of the Tribunal on the application which was filed by the appellants for dispensing with the demand of duty in this case that the annual report of M/s. Freyssinet Prestressed Concrete Co. for the year ending 31-7-1987 showed that out of 1,04,000 equity shares of the company, 1,01,744 were held by the holding company M/s. Gammon India Ltd. The annual report also disclosed that a long term loan of Rs. 18,50,000 was taken from the holding company and another sum of Rs. 1,25,000 was also advanced by the Holding Company. It is evident that on account of their holding of 97.83% shares of M/s. Freyssinet Prestressed Concrete Co. Ltd., M/s. Gammon India Ltd. were in a position to exercise complete control over the policy and business operations of their subsidiary. On this account and also on account of the flow of funds from the Holding Company to the subsidiary, we are inclined to hold that the latter was only a facade and the goods produced by the subsidiary company were

in fact produced for and on behalf of M/s. Gammon India Ltd. 11. The appellants have contended that the impugned orders are not sustainable also on the. ground that the duty demanded had not been quantified. On a plain reading of the operative part of the impugned order No. 103/87 dated 9-11-1987, we find that the Collector after holding that the appellants were not eligible for the exemption under Notification No. 85/85 during 1985-86 had confirmed the demand of duty on amount by which the clearances during 1984-85 of the appellants and M/s. Freyssinet Prestressed Concrete Co. Ltd. Bombay taken together had exceeded Rs. 75 lakhs. Hence the determination of the amount of duty payable by the appellants in terms of the impugned order remained a simple arithmetical calculation. Similarly in the case which is the subject matter of Appeal No. E/360, the Show Cause Notice dated 11-6-1987 sought to deny the exemption claimed by the assessee under Notification No. 175/86 dated 1-3-1986. Hence we are inclined to agree with the appellants in that case that the order passed by the Collector (Appeals) is not sustainable since the question of quantification of the differential duty could arise only after the approval of the Classification List and on the basis of the orders passed by the Assistant Collector. For this reason we do not find any force in the point made by the appellants.

12. The appellants have also challenged the invocation of the extended period for confirmation of the demand under the proviso to Section 11A by the Collector. They have contended that the demand issued on 17-8-1987 in respect of the clearances during the year 1985-86 having been issued was time-barred since they had cleared all goods on the basis of approved classification lists and price lists and complied with all the provisions of the Central Excise Rules, and non-mentioning of the fact by the appellant that M/s. Freyssinet Prestressed Concrete Co. Ltd. was a subsidiary company of M/s. Gammon India Ltd. did not amount to suppression of facts with the intention of evasion of duty.

They have stated that there was no requirement for declaration by an assessee, the names of its subsidiary companies. It is seen that the only ground on which the Collector's finding that the appellants had suppressed facts with the intention of evading duty was that M/s.

Gammon Fer Chems Ltd. had never mentioned that M/s. Freyssinet Prestressed Concrete Co. Ltd. is a subsidiary of M/s. Gammon India Ltd. In this regard we find that the Collector has not pointed out any requirement under the Rules or otherwise under which M/s. Gammon Fer Chems Ltd. who are a Division of M/s. Gammon India Ltd. were required to declare that M/s. Freyssinet Prestressed Concrete Co. Ltd. is a subsidiary of * M/s. Gammon India Ltd. Even otherwise, in view of the generally accepted position that limited companies are separate legal entities, it stands to reason that the appellants must have entertained the bona fide belief that they were not expected to declare the names and other details of the subsidiary companies of M/s. Gammon India Ltd. In the case of Apex Electricals Pvt. Ltd. v. Union of India, reported in 1992 (61) E.L.T. 413 (Guj.), the Hon'ble Gujarat High Court has held that the Department will not be justified in proceeding on the basis that there was suppression of true facts and, therefore, the show cause notice could be issued within the larger period of five years when the only facts not disclosed by the assessee were such which he was not required to disclose and about which he was also not questioned before recording of his statements by the Excise authorities. Para 18 of the judgment being relevant is reproduced below :- On the ratio of the judgment quoted above, we hold that the invocation of the extended period in terms of proviso to Section 11A for the confirmation of the demand by the Collector is not legal and sustainable.

13. In view of the above discussion, we confirm the findings in the impugned orders in Appeal Nos. E/899/88-C, E/475/88-C and E/355/89-C that for the purposes of the exemption under Notification Nos. 85/85 or 175/86 the value of the clearances of excisable goods from the appellants' factory and those from the factory of M/s. Freyssinet Prestressed Concrete Co. Ltd. during the relevant periods were required to be clubbed together. However, in view of the finding that there was no suppression of facts and the extended period under the proviso to Section 11A was not invokable, the differential duty recoverable in each of the cases would be only within the normal period of six months of the date of the Show Cause Notice.