

**Sri Mahadeshwar S.S.K. Ltd. Vs. Collector of C. Excise**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jun-13-1994

**Reported in :** (1995)(75)ELT445TriDel

**Appellant :** Sri Mahadeshwar S.S.K. Ltd.

**Respondent :** Collector of C. Excise

**Judgement :**

1. This appeal arises out of and is directed against the impugned order dated 21-5-1986 passed by the Collector of Central Excise (Appeals), Madras.

2. The appellants are engaged in the manufacture of sugar. The appellants filed a refund claim application on 4-4-1978 for refund of excess duty paid on the levy free sugar cleared during the period from 17-11-1977 to 27-2-1978 amounting to Rs. 14,00,330.50 along with the necessary documents and provisional certificate of eligibility issued by the Chief Director of Sugar, Directorate of Sugar and Vanaspati.

This refund claim was filed in terms of Notification No. 35/76-C.E., dated 25-2-1976 on the ground that they were eligible for certain incentives since their factory was newly set up after 1-4-1974. The appellants are entitled to the concession as prescribed in the Notification No. 35/76-C.E. if sugar factory commencing production for the first time after the first day of April, 1974 subjected to the condition that a certificate is produced from the Chief Director, Directorate of Sugar & Vanaspati regarding the eligibility of the sugar factory to avail of the

exemption under said notification. The Assistant Collector rejected the refund claim on the ground that for want of compliance to the provision of the Notification No. 35/76-C.E. on the part of the manufacturer in as much as refund claim was not supported by a certificate at the time of filing refund claim and the appellants having elected themselves to avail benefit of the Notification No. 210/73-C.E., dated 15-12-1973 and its successor notifications for the sugar cleared by them during the said period benefit in terms of Notification No. 35/76-C.E. cannot be extended to them. This view was upheld by the Collector (Appeals).

3. Shri Daya Sagar learned Consultant appearing for the appellants submitted that the refund claim was filed along with the provisional certificate of eligibility issued by the Chief Director of Sugar, Directorate of Sugar & Vanaspati since final certificate was not issued at that time and as soon as the certificate dated 20-2-1982 was issued by the competent authority in lieu of provisional certificate dated 3-9-1977, the same was filed but not considered by the authorities below while considering the refund claim. Provisional certificate is as valid as final certificate till it is issued and the refund claim cannot be rejected for no fault of the party. As regards denial of benefit on the ground that the appellants were availing the benefit under notification No. 210/73, he submitted that the benefits granted under the Notification No. 35/76-C.E. are substantial compared to the Notification No. 210/73-C.E. and since the unit has been set up after 1-4-1974. It has no option to avail or [pay] duty under any other Notification including Notification No. 210/73-C.E. According to the proviso to Notification No. 35/76-C.E. [nothing contained in Notification No. 210/73-C.E.] shall apply to a sugar factory covered by this Notification and accordingly Notification No. 210/73-C.E. is not applicable. He said that the decision of the Allahabad High Court in the case of Kishan Sahkari Chini Mills Ltd., Rasra v. Union of India and Ors. reported in 1983 (14) E.L.T. 2255 (All.) supports the contention of the appellants that the factory covered by incentive scheme as embodied under Notification No. 35/76-C.E. is entitled to benefit of the Notification No. 35/76-C.E. in respect of levy free quota of sugar and levy sugar (65% of the production) to the exclusion [of] any other Notification including Notification No. 210/73-C.E. and the superseding notifications.

4. Sh. M.K. Jain, learned SDR for the Revenue submitted that apart from non-production of valid certificate at the time of filing refund claim, the appellants are not entitled to claim benefit in terms of Notification No. 35/76-C.E. since they were availing benefit under Notification No. 210/73-C.E. He drew our attention to the proviso to Notification No. 35/76-C.E..

5. We have considered the submissions made by both sides with reference to the facts and perused the records. The Notification No. 35/76-C.E. referred to by both sides in support of their respective contention is as under :- G.S.R. In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, read with Sub-section (3) of Section 3 of the Addl. Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) the Central Government hereby exempts sugar, falling under sub-item (1) of Item No. 1 of the First Schedule to the Central Excises & Salt Act, 1944, (1 of 1944) and produced by a sugar factory, which commences production on the first time on or after the 1st duty of April, 1974, and which is in excess of thirty five per cent of its production in a sugar year from so much of the duty of excise and the additional duty of excise leviable thereon as is in excess of the duty calculated at fifteen per cent and five per cent respectively, on the basis of the price determined by the Central Government, from time to time, under subsection (3C) of Section 3 of the Essential Commodities Act, 1955 (10 of 1955) for levy sugar subject to the condition that a certificate is produced from the Chief Director, Directorate of Sugar & Vanaspati, regarding the eligibility of the sugar factory to avail of the exemption under this Notification.

Provided that nothing contained in the notification of the Government of India in the Ministry of Finance (Department of Revenue & Insurance) No. 210/73 Central Excises, dated the 15th December, 1973, shall apply to a sugar factory covered by this Notification.

(a) "Levy Sugar" means sugar required by the Central Government to be sold under an order made under clause (f) of Sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (10 of 1955).

(b) "Sugar Year" means the period of twelve months commencing on the 1st day of October and ending with the 30th day of September next following".

6. On going through the Notification, we find that the Notification prescribed following conditions :- I. The sugar factory should have commenced production for the first time on or after the 1st day of April, 1974; II. The sugar factory should produce a certificate from the Director, Directorate of Sugar & Vanaspati regarding the eligibility of the sugar factory to avail of the exemption under Notification No. 35/76-C.E., dated 25-2-1976; III. Provided that nothing contained in the Notification No. 210/73-C.E., dated 15-12-1973 shall apply to a sugar factory covered by this Notification.

7. In the instant case, we find that the sugar factory has commenced its production after 1-4-1974. It is not correct on the part of the Assistant Collector to deny the benefit of the exemption under Notification No. 35/76-C.E. on the ground that the refund application was not accompanied by a proper certificate since the refund application was accompanied by provisional certificate and furthermore it was validated by issuing a final certificate in lieu of the provisional certificate and the same was specified in the certificate issued by the competent Authority. Next question arises whether they were entitled to get the benefit under Notification No. 35/76-C.E. since they were availing the benefit under Notification No. 210/73-C.E.. According to the proviso to Notification nothing contained in the Notification No. 210/73-C.E. is applicable to a sugar factory if it is covered by this Notification. Since the factory has been set up after 1-4-1974 it is covered by the Notification No. 35/76-C.E. and not under the Notification No. 210/73-C.E. as it was argued by the appellants' Counsel by taking support from the Kishan Sahakari Chini Mills Ltd., (supra). There is some force in the argument advanced by him since the benefits granted under this notification are substantial and the same cannot be denied on the ground that they were availing the benefit under Notification No. 210/73-C.E. since they were compelled to take the benefit under peculiar circumstances. We find that the wordings under these two notifications are almost similar and it is clear that they are not entitled to get the benefit under both the notifications and since the Notification No. 35/76-C.E. is more beneficial to the party and taking into consideration that the factory was set up after 1-4-1974 the benefit under Notification No. 35/76-C.E. cannot be denied if they are otherwise eligible subject to the fulfilment of the conditions specified therein.

8. In the facts and circumstances of the case the concession availed under Notification No. 210/73-C.E. is required to be reversed by demanding the same and refund claim with reference to the Notification No. 35/76-C.E. has to be reconsidered by the Adjudicating Authority.

Accordingly we are remanding the matter to the concerned Assistant Collector to reconsider the issue afresh in the light of the above observations and to pass an appropriate order in accordance with law after hearing the party. Thus this appeal is allowed by way of remand.

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