

Jaypee Rewa Cement Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-28-1994

Reported in : (1994)(73)ELT91TriDel

Appellant : Jaypee Rewa Cement

Respondent : Collector of Central Excise

Judgement :

1. This is an appeal against the order dated 28-11-1992 passed by the Collector of Central Excise, Raipur. Briefly stated the facts of the case are that the appellants are engaged in the crushing of limestone for use in civil construction works. On the grounds that crushed limestone is the commodity specified under Heading 2505 of the Central Excise Tariff the Department was of the view that the appellants had been engaged in the activity of manufacturing crushed limestone without obtaining Central Excise Licence and without payment of Central Excise duty. The appellants were, therefore, served with a Show Cause Notice dated 22/25-5-1992 alleging that during the period November, 1988 to 6-12-1991, they had manufactured 1,34,117.11 MT crushed limestone and cleared it without discharging duty liability to the tune of Rs. 17,20,467.32. The appellants denied the allegations in the Show Cause Notice on the grounds that in several decisions of the Tribunal and the High Courts the activity of crushing of limestone had been held as not amounting to manufacture. However, relying upon the Tribunal's decision in the case of Century Cement v. CCE, Raipur vide Order No. 264/92-C, dated 10-8-1992 and the case of Ajanta Marble & Chemical Industries v.CCE 1991

(53) E.L.T. 457, in the impugned order the Collector held that the crushing of limestone amounted to manufacture and the appellants had evaded duty as alleged in the Show Cause Notice. He also held that by not declaring the manufacturing activity of crushing of limestone and failing to discharge the duty liability while working under "self-removal procedure" the appellants had indulged in suppression of facts. He, therefore, confirmed the demand by invoking the proviso to Section 11A.2. On behalf of the appellants Shri A.N. Haksar, Ld. Sr. Advocate with Shri Vipin Nair, Advocate appeared before us. Shri Haksar referred to the copy of the judgment of the Madhya Pradesh High Court in Misc.

Petition No. 2522/90 in the case of S.N. Sunderson (Minerals) Ltd. v. The Superintendent (Preventive) Central Excise, Indore, and stated that the question whether the crushing of limestone amounts to manufacture within the meaning of Section 2(f) of the Central Excises and Salt Act, has been settled since the High Court has held that crushing of limestone lumps into chips would attract duty under Chapter 25 of the Central Excise Tariff Act, 1985. He submitted that in view of the judgment of the Hon'ble Madhya Pradesh High Court, he was not contesting the findings of the Collector that crushing of limestone amounts to manufacture. He added that the High Court while arriving at the finding that the crushing of limestone into chips amounted to manufacture, had also held that there was no case for levying penalty on the petitioner since they had acted under the bona fide belief that the activity of crushing of limestone did not amount to manufacture in view of the divergent rulings of the Courts on this subject. He contended that the reasons which weighed with the High Court in the case of Sunderson (Minerals) Ltd. in holding that the petitioner was not liable to penalty on account of bona fide belief that their activity did not amount to manufacture would be equally applicable in the applicants' case. He stated that on account of divergent rulings of the Tribunal and the High Courts, the appellants had entertained the bona fide belief that the activity of the crushing of limestone did not amount to manufacture and on this account it could not be held that they had knowingly suppressed any facts with the intention of evading the duty. He contended that under these circumstances, the invocation of extended period under the proviso to Section 11A for confirmation of the demand has to be held as illegal.

3. On behalf of the respondent Shri Sharad Bhansali, Ltd. SDR stated that the appellants were working under 'Self Removal Procedure' and accordingly they were expected to discharge the duty liability on crushed limestone which was a dutiable item under Heading 2505 of the Central Excise Tariff. He contended that by not declaring the said manufacturing activity and not complying with the Central Excise formalities in respect of the said goods, the appellants had indulged in suppression of facts. He argued that under these circumstances, invocation of extended period under proviso to Section 11A for confirmation of the demand was legal and sustainable. In support of this contention he cited the following case laws :-

4. We have examined the case records and submissions made on behalf of both the sides. In view of the judgment of the Hon'ble Madhya Pradesh High Court in the case of Misc. Petition No. 2522/1990 in the case of S.N. Sunderson (Minerals) Ltd. v. The Superintendent (Preventive), Central Excise, Indore wherein the activity of crushing of limestone lumps into chips has been held as manufacture attracting Central Excise duty under Chapter 25 of Central Excise Tariff Act, 1985 the only question to be decided in this case is whether the Collector's order invoking the extended period under proviso to Section 11A for confirming the demand is sustainable. It has been submitted on behalf of the appellant that in the case of S.N. Sunderson (Minerals) Ltd. v. Superintendent (Prev.) Central Excise, Indore, the Hon'ble High Court has arrived at the finding that the petitioners were not liable to penalty since they had entertained the bona fide belief that the activity of crushing of limestone into chips did not amount to manufacture on account of divergent rulings of the Courts giving rise to the bona fide doubts in the minds of petitioner regarding the question whether crushing of limestone to obtain limestone chips amounted to manufacture consequently attracting Central Excise duty under the Act. It has been contended that the reasoning which weighed with the Hon'ble High Court of Madhya Pradesh in arriving at the finding that the petitioner were liable for penalty would equally apply in the appellants' case and accordingly the Collector's findings in regard to the suppression of facts with the intent to evade duty would not be sustainable. On these grounds it has been argued that the impugned order confirming the demand by invoking the extended period under proviso to Section 11A is not sustainable.

5. In order to appreciate the point made by the appellants we refer to paras 17 and 18 of the judgments of Madhya Pradesh High Court in the case of S.N. Sunderson (Minerals) Ltd. which being relevant are reproduced below :- "17. Law on the subject, whether the crushing of the limestone is a process of manufacture and resultant goods limestone chips are exciseable item under the Act was not settled in Madhya Pradesh. In a case decided by this Court under the M.P. Central Sales Tax Act, 1959 in Bedaghat Mineral Industries v. Divisional Deputy Commissioner of Sales Tax, decided on 10th April, 1987, a Division Bench of this Court has ruled, while considering Section 2(j) and 2(r)(ii) of the M.P. General Sales Tax Act, 1959 that dolomite lumps broken into chips and powder for convenience in use retain the same characteristics and qualities of dolomite lumps, therefore, there is no manufacture by crushing dolomite lumps into chips or powder. In S.A.I.L. v. Collector of Central Excise, CEGAT has held that crushing of limestone into lime powder does not amount to manufacture as lime powder not known and recognised as a distinct commodity in the market. In Ajanta Marble and Chemical Industries v. Collector of Central Excise, CEGAT, it was held that crushing, grinding and sieving of limestone to obtain limestone chips and powder amounts to Manufacture. Thus, there are divergent views of courts raising bona fide doubt in the mind of the petitioners whether the crushing of limestone lumps to obtain limestone chips will amount to manufacture and consequently excisable under the Act? The statement recorded of the Law Officer of the petitioner company also indicates that as on 31-8-1989 there was a bona fide belief in the mind of the petitioner that the process of crushing does not amount to manufacture. The aforesaid state of affairs clearly indicates that the breach in payment of excise duty flows from a bona fide belief of the company that they are not liable to pay excise duty, as they were not engaged in the manufacture of limestone chips. Conversion of limestone lumps into limestone chips was never taken to be a manufacturing process by the petitioners.

18. The proceeding for imposition of penalty being quasi-criminal in nature, the burden to prove the alleged offence is on the excise department. No facts or circumstances are brought out by the Department nor are considered by the 2nd respondent to show deliberate avoidance of payment of duty. There is nothing in the Excise Act or the Rules framed thereunder to indicate that the authority is

bound to impose penalty, the moment there is default in payment of duty. The petitioners were under a bona fide belief that they were not liable to pay excise duty on the limestone chips. The Collector, Central Excise, while passing orders (Annexures M & N) imposing penalty has not at all taken into consideration this aspect of the case. Therefore, we are of the opinion, that as the petitioners were under a bona fide belief about their liability to pay excise duty, the Collector, Central Excise has acted rather harshly in imposing penalty of Rs. 5,00,000/- and Rs. 50,000/- under Annexures M & N." 6. On a plain reading of the extracts from the judgment of Madhya Pradesh High Court reproduced above, it followed that on account of divergent views expressed by the Tribunal and the Courts on the question whether the crushing of limestone into powder amounted to manufacture within the meaning of Section 2(f) of the Central Excises and Salt Act, 1944 and whether the crushed limestone was liable to duty, it would be reasonable to assume that the appellants entertained the bonafide belief that they were not liable to pay the excise duty.

In this regard, it is also seen that in the case of Padmini Products v. Collector of Central Excise, reported in 1989 (43) E.L.T. 195 (S.C.), the Hon'ble Supreme Court has held that mere failure or negligence on the part of the manufacturer either not to take out the licence or not to pay the duty in case where there was scope for doubt, does not attract the extended limitation unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out the licence. The following extract from para 8 of the judgment being relevant is reproduced below :- "... We are unable to accept this position canvassed on behalf of the revenue. As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there was scope for confusion and the appellants believing that the goods came within the purview of the concept of handicrafts and as such were exempt.

If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licenced, would not attract the penal provisions of Section 11A of the Act." 7. It has been observed by the Hon'ble Madhya Pradesh High Court in the case of S.N. Sunderson (Minerals) Ltd. that on account of the divergent views expressed by the Courts on the question whether the activity of crushing of limestone into powder amounted to manufacture and whether crushed limestone attracted Central Excise duty, there was a bonafide belief in the minds of manufacturers that the process of crushing of limestone did not amount to manufacture. For this reason, and on the ratio of the judgment of the Hon'ble Supreme Court in the case of Padmini Products v. Collector of Central Excise (Supra), we are inclined to agree with the appellants that Collector's order invoking the extended period for confirming the demand in terms of proviso to Section 11A on the grounds of suppression of facts with the intent to evade the duty would not be sustainable.

8. In view of the above discussions, we modify the impugned order to the extent that duty on the goods in question would be recoverable within the normal period of six months of the date of demand/Show Cause Notice.

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