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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-15-1994

Reported in : (1994)(73)ELT366TriDel

Appellant : Jamshri Ranjit Singhji Spg. and

Respondent : C.C.E.

Judgement :

1. M/s. Jamshri Ranjit Singhji Spinning and Weaving Mills Co. Ltd., have filed this appeal against the order of Collector, Central Excise (Appeals), Bombay. The Collector (Appeals) in his order had held :- "I have carefully gone through the appeal petition and considered the points raised therein and also submissions made orally during the course of personal hearing.

As quasi-judicial Authority, the Appellate Authority cannot exercise the powers which have not been specifically empowered on him by the statute, I cannot go beyond the scope of the provisions of Central Excises and Salt Act, 1944 and the rules framed thereunder. For example in Rules 12, 173L and 173H, it is specifically provided to condone delay in genuine cases. Section 35 of the Act also empowers Collector of Central Excise (Appeals) to condone delay in filing appeal for further period of 3 months. Moreover, the sample drawn by the Excise Inspector was in the presence of the authorised representative of the Mills and he (the Mill's representative) had certified that he was satisfied with the matter in which sample was drawn and the composition as declared was correct and true. On the other hand, the sample tested by Bombay Textile Research Association,

Bombay - 400 086 was not drawn in the presence of any Excise Officer. It is not understood as to why the appellants had not applied for retest within 90 days from the date of the receipt of result of the sample by Chemical Examiner.

In view of the above facts, I do not see any reason to interfere with the impugned order passed by the Lower Authority, which is maintainable in law. Appeal is, therefore, rejected." 2. Briefly stated the facts of the case are that the appellant firm had filed a classification list effective from 14-11-1983 for cotton fabrics by declaring the blend of the fabrics as 48% polyster and 52% cotton. The appellant claimed concessional rate of Basic Central Excise duty at the rate of 6.5% ad valorem under Notification No. 54/83, dated 1-3-1983. The classification list was approved provisionally on 3-1-1984. The samples of the fabrics covered by the classification list were required to be drawn at random for verification of the blend. The Range Superintendent accordingly drew the samples on 25-1-1984 and sent it for test to the Deputy Chief Chemist, Bombay. The result of the test was as under :- "The sample is in the form of a fabric. It is composed of Man-made fabric of Non-Cellulosic Origin (Polyster) and Cotton.

Polyster pre-dominates by weight (52.6%). Remnant of sample returned." This test result was communicated by the Range Superintendent to the appellant on 16-2-1985. From this test result, it was observed that the appellant's declaration as regards percentage of polyster and cotton in the fabric was incorrect and that the fabrics contained more than 50 per cent by weight of polyster fibre. On the basis of the test result it was observed that one of the conditions of the said notification in regard to percentage of the content of polyster fibre in the fabrics was not fulfilled and as such concessional rate of duty of 6.5% ad valorem was not available on the fabrics as claimed by the appellant.

Accordingly, a show cause notice was issued.

3. Shri R.B. Maniyar, Legal Advisor, reiterated the pleas taken up in the written submission. In the written submissions forwarded under covering letter dated 20th April and later on followed up by a letter dated 7th June, 1994 broadly the points taken up are :- That the show cause notice directing them to pay differential duty amounting to Rs. 52,793.73 is time-barred on the ground that the classification

lists were approved finally. It has been contended that classification list No. 11/83, dated 23-4-1983 was approved on 16-5-1983; that in the classification list the appellant had clearly stated that the goods consisted of a blend of 48 per cent Polyester and 52 per cent cotton and were assessable to duty as per Notification No. 79/82, dated 28-2-1982; that there was no wilful mis-statement or suppression of facts with the intention to evade payment of duty and, therefore the demand was time-barred; that the appellant relied on the decisions of the Tribunal in the case of Associated Cement Company Ltd. v. CCE, reported in 1992 (57) E.L.T. 178 and another decision in the case of CCE v. Pharmasia (P) Ltd., reported in 1989 (41) E.L.T. 77. That in these two decisions the issue of provisional assessment was discussed; that in the light of these two decisions the show cause notice in the instant case issued on 14-9-1983 to recover duty in respect of clearances effected prior to 14-3-1983 were barred by limitation; that the allegation in the show cause notice that the mill declared the composition of fabrics to be 48 per cent Polyester and 52 per cent Cotton while on chemical analysis the Polyester contents were found to exceed 50 per cent to render the fabrics ineligible for concessional rate of duty was not proved as report given by Textile Research Association was not accepted by the Department.

4. In support of his contention that appellant cannot be charged for mis-declaration and suppression of facts when classification list was filed and department approved the same. In support of his contention the decision of Tribunal in the case of Rainbow Ink and Varnish Mfg.

Co. Ltd. v. CCE, reported in 1992 (59) E.L.T. 593 were cited and relied upon. Similarly, the appellant cited and relied upon the decision of the Tribunal in the case of Collector of Central Excise v. Muzaffarnagar Steels reported in 1989 (44) E.L.T. 552 (T) in which it was held that once the Assistant Collector has approved the classification, the department has to bear consequences thereof and the demand raised beyond a period of six months was time-barred.

5. In the written submission it was further contended that the copies of test report was not forwarded to the appellant in spite of several requests for supplying the same; that the Asstt. Collector passed the impugned order which is based on this

test report without affording them an opportunity to rebut it; that the appellant by letter dated 3-6-1985 requested the Superintendent for re-test of the said samples; that the appellant drew the sample and got it tested by the Bombay Textile Research Association wherein it was reported that the sample consisted of blend of 47.9 per cent Polyester and 52.1 per cent Cotton; that the Department has not brought on record any tangible evidence that the appellant's declaration of composition was a deliberate mis-declaration with the intention to evade the higher incidence of duty. In support of this contention the appellant relied on the ratio of the judgment in the case of Collector of Central Excise v. OCM India Ltd., reported in 1991 (53) E.L.T. 138. On the question that before granting approval of the classification list it is for the department to have called for all the information which they may find it necessary for granting approval. Having not done so, the department cannot charge the appellants for mis-declaration. In support of this contention the appellant relied on the ratio of the decision in the case of Krishna International v. CCE, reported in 1994 (70) E.L.T. 135. It was also submitted by the appellant that the classification list can be approved only prospectively from the date of filing thereof. In support of this contention they relied on the ratio of the decision in the case of Hindustan Zinc Ltd. v. CCE, reported in 1990 (45) E.L.T. 115.

6. Shri M.K. Jain, the Id. SDR submitted that the appeal is against the order of the Collector, Central Excise (Appeals); that the Collector (Appeals) has rejected the appeal on two counts namely, that though results of chemical analysis by the Deputy Chief Chemist were communicated to the appellant on 16-2-1985 yet the appellants had not contested this result for more than three months and as the relevant rule provided that the request for re-test can be made within three months and as the request was not made within three months and therefore the request submitted beyond three months was time-barred.

The second issue was that the sample which was tested by the Bombay Textile Research Association was drawn in the absence of the Central Excise Authorities and therefore, cannot be treated as an authorised representative sample and consequently the test results thereof cannot be accepted by the department. The Id. SDR, therefore, submitted that the appellant has not been able to put forward

any convincing arguments against these two grounds and therefore prayed that the impugned order may be upheld.⁷ Heard the submissions of both sides, perused the written submissions and the case law cited and relied upon by both sides and considered them. One of the points raised by the appellant was that a copy of the test report was not forwarded to them therefore there was a denial of natural justice. From the evidence on record we find that though a copy of the test report was not forwarded to the appellant yet the contents of the results of the test were communicated and, therefore, we hold that there was no denial of natural justice on this ground.

8. The second point that was taken up and argued was that sample was drawn and tested by a reputed institution and the result of the test conducted conformed to their declaration, however, the Department for the reasons best known to them did not accept the test results. On this question of the sample being tested by reputed institution we find that for the purpose of sampling, a sample should be drawn in the presence of the parties to a dispute. In the instant case the dispute was between the Department and the appellant. At the time of drawal of the samples no representative of the department was present and therefore the sample cannot be considered authorised and the results thereof cannot be acceptable and binding on the party which was not present at the time of drawing the sample.

9. We observe that the contents of the test results were communicated to the appellant. The appellant if he had felt aggrieved should have immediately taken up the matter with the concerned authorities either for re-test of the remnant samples or taking a sample afresh and getting it tested. However, we find that the appellant did not raise any objection to the test result and made a request for re-test of samples after three months which was not permissible under the law. We, therefore, do not see any reason to disagree with the findings of the Id. Collector (Appeals) on this issue.

10. The main issue on which a lot of emphasis was laid was the contention of the appellant that the demand was time-barred. The contentions of the appellant for raising the issue of limitation are that the classification list was finally approved

that provisional assessment under Rule 9(b) is applicable only to goods under clearances; that before granting approval of classification list it was for the department to have called for all the information which they may find it necessary for according approval; that the classification list can be approved only prospectively to the date of filing thereof.

In support of this contention, the appellant cited and relied on the decisions noted in the preceding paragraphs. As against this the department had alleged that classification list was approved provisionally that the goods were being assessed provisionally and that the test conducted on the samples drawn in the presence of the appellants or their authorised representatives clearly showed that the appellant had filed an incorrect declaration and that incorrect declaration as to blend of the fabrics was filed only to evade payment of duty.

11. We observe that initially the fabrics were classified and approved as man-made fabrics vide their classification list No. 11/83, dated 23-4-1983 which was approved by mistake on 16-5-1983. The appellant came forward to point out the mistake in classification and filed a revised classification under Tariff Item 19 i.e. cotton fabrics declaring the blend of fabrics as 48 per cent of Polyester and 52 per cent cotton. A lot of emphasis was laid by the appellant that classification list No. 11/83, dated 23-4-1983 was finally approved by the appellant whereas from the above contention we find that this classification list was for man-made fabrics whereas the fabrics actually declared by the appellant were cotton fabrics and, therefore a revised classification list No. 21/83, dated 4-11-1983 for cotton fabrics was submitted. From the evidence on record we find that this classification list has been approved provisionally under the Rule 9B therefore even for the material period namely 25-6-1983 to 26-8-1983 this classification list will be applicable. As the classification list was not finally approved which pertained to cotton fabrics declared by them, therefore all the case law cited and relied upon by the appellant are easily distinguishable because only classification list No. 21/83, dated 4-11-1983 will be applicable.

12. After carefully considering all the submissions made by both sides on the issue of limitation we hold that there was mis-statement in so far as blend of the fabrics

is concerned and this mis-statement was with the intention to evade payment of duty, therefore, the extended period of five years is legally applicable in the present case. If we take into account that the classification list was provisional for the material period then there can be no time limit applicable as the assessments during the material period were provisional. In any event the demand for duty in the instant case is not hit by limitation.

13. Having regard to the findings as indicated above, the impugned order is upheld and the appeal is rejected accordingly.

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