

Colo Plast Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-12-1994

Reported in : (1995)LC565Tri(Delhi)

Appellant : Colo Plast

Respondent : Collector of Central Excise

Judgement :

1. This appeal arises from the order-in-original passed by the Collector of Central Excise, Vadodara by his order No. 25 / MP/93 dt.

5-10-1993. A show-cause notice dt. 4/5-11-1992 was issued to the appellants asking them to show-cause as to why penalty under Rule 173Q and Rule 226 of CER, 1944 should not be imposed and goods weighing 8054.4 kgs. of LDPE Master Batches should not be confiscated besides demanding a duty of Rs. 324/- in respect of goods removed under GP. 1 No. 70 dt. 13-5-1992 under Section 11A of the Act should not be recovered from them. The allegation is that on the date of the visit of the Officers on 14-5-1992 the assessee had written their R.G.1.

Register only upto 7-5-1992 and the same showed a nil balance of excisable goods while the gate pass book showed that they had made clearances vide GP. 1 No. 66 dt. 9-5-1992, 67, dt. 9-5-1992, 68 dt.

11-5-1992, 69 dt. 13-5-1992 and 70 dt. 13-5-1992. It is alleged that no duty payment had been debited in respect of goods cleared under GP.1 No. 70 dt. 13-

5-1992. It is alleged that a quantity of 8054.4 kgs. of excisable goods (LDPE Master Batches) valued at Rs. 7,67,247.50 which were physically available in the factory of the unit but which were not accounted in the Central Excise statutory records in form RG. 1. Hence, the goods had been seized under the Panchnama dt. 14-5-1992. A statement was recorded from Shri Vinodbhai Patel, Accountant of the Unit on 14-5-1992. Inter alia, he has confirmed the contents of the panchnama dt. 14th May' 92. Another statement from Mr. Prakash. R.Patel, partner of the unit was also recorded on 26-6-1992. Inter alia, he had confirmed that the unit had not followed Central Excise procedure by not properly maintaining the RG. 1 stock register and he also admitted that the goods removed under GP. 1 No. 70 dt. 13-5-1992 were removed without debiting duty thereon. Thus, they had contravened the various provisions of the Excise Rules. The appellant had taken a plea in their defence that LDPE master batches (colour concentrates) had been classified under Chapter 3204.19 and 3206.90 and that the dispute of classification was pending in appeal before the Tribunal.

They had relied on the CBEC letter No. 93/10/92-CX. 3, dated 13-7-1992 and had stated that as per the said letter, colouring of primary forms of plastics under Chapter 39 has not to be taken as a manufacturing process in the Chapter Notes as per Chapter 39. They had also stated that as per the clarification of the Board colouring will not bring into existence any new product with a distinct name, character and use.

In this regard, they had also relied on several rulings of Hon'ble Supreme Court of India.

2. They had pleaded that as per Rule 53, one of the requirements was the entry of the particulars shown in clauses (a) to (g) of the said rule. Though the columns were blank from 8-5-1992 to 13-5-1992, the particulars to be entered in such columns for the period from 8-5-1992 to 13-5-1992 were available on the records i.e. GP No. 66 to 70. They had submitted that 8-5-1992 was a weekly holiday; on 9-5-1992 they produced and packed goods in 33 bags of net weight 825 kgs. and removed them on GP No. 66 to 68; on 10-5-1992 they produced 250 kgs. which were packed in 10 bags and removed under GP No. 58 dt. 11-5-1992; on 11-5-

1992 and 12-5-1992, they produced 1100 kgs. of goods which were packed in 44 bags and cleared on 13-5-1992 under GP No. 69 and 70. On 13-5-1992, they produced 254.4 kgs. and they packed 312 bags but did not remove the same. They had submitted that the quantity of goods lying loose had not been entered in RG-1 because this quantity is not ascertained until after weighing and packing. They had submitted that the non-entering of the particulars in RG-1 was an irregularity and not a contravention and that no penal provision was contained in Rule 53 itself.

3. They had submitted that Rule 53 did not lay down any time limit for entering the particulars in RG-1 register and therefore, Rule 226 had no application to the case. They had submitted that it would have been in order to propose penalty and confiscation under Rule 210. In this context, they contended that after 13-7-1992 their product was not to be treated as manufactured and excisable.

4. They had submitted that the seizure of the goods within the factory was bad in law and relition on the ruling rendered in the case of Collector of Central Excise v. Techno Chem. Engineers as reported in 1990 (48) E.L.T. 401 (T) wherein the Tribunal had relied on the ruling rendered by the Hon'ble High Court of Andhra Pradesh reported in the case of Southern Steels Ltd., Hyderabad v. Union of India 1979 (4) E.L.T. 0 402). They also submitted that there was no express provision for seizure of excisable goods under Central Excises & Salt Act, 1944.

They had also contended that Rule 173Q(1) was not applicable for the purpose of imposition of penalty and confiscation in view of the said Andhra Pradesh High Court's judgment. They had also submitted with regard to the removal of the covered goods by GP. 1 No. 70 dt.

13-5-1992 and also with regard to contravention of Rule 9(1) and Rule 173F was misplaced because Rule 9(1) was not applicable to the goods notified for self removal procedure contained in Chapter VII-A of Central Excise Rules, 1944 and also because duty payable on the goods covered by the said gate pass should have been allowed to be debited by them vide entry No. 88 dt. 13-5-1992 on 14-5-1992 before withdrawal of RG-23A Part II register by the officer. They also submitted that Rule 57G and Rule 57F do not stipulate that the duty shown as

payable on the gate pass issued for removal of goods should be entered prior to removal of goods or before detaching original copy of gate pass from the gate pass book. The inference that non-debiting of credit in RG-23A Part-II register prior to removal of goods is to be treated as non-payment of duty is not correct. Therefore, they submitted that the question of recovery of Rs. 324/- for the goods removed under GP. 1 No.70 under Section 11A of the Act did not arise at all as non-entering debit entry in RG. 23A Part-II does not attract the provisions of Section 11 A. They also submitted that they had a balance of credit amounting to Rs. 1,90,759.19 in the RG-23A Part-II register which was far in excess of even the duty of Rs. 44,116.74 on the goods seized inside the factory. In support of their plea for [non-imposition] of penalty they relied on the ruling rendered in the case of Jewellery House v. Collector of Central Excise as reported in 1987 (27) E.L.T.497 (T) wherein it has been held that technical or venial breach of the provisions justified non-imposition of penalty. They also relied on the ruling rendered in the case of Dass Photo Electronics v. Collector of Central Excise as reported in 1987 (30) E.L.T. 988 (T) wherein it has been held that if time interval between the date of seizure and the time of production is nominal then penalty is not imposable. They also relied on the ruling rendered in the case of Superintendent of Central Excise v. Donfom as reported in 1984 (18) E.L.T. 233 (All.) wherein it has been held that when gate pass was made out but duty not debited, it is a case of minor irregularity and not evasion of duty.

5. The Id. Collector after going through the case of the appellants did not agree with the contentions and proceeded to impose the penalty of Rs. 5 lakhs under Rule 173Q(1) of the Central Excise Rules, 1944. He also ordered recovery of Rs. 324/- in respect of goods removed under GP. 1 No. 70 dt. 13-5-1992 under Section 11A. He also ordered for confiscation of 8054.4 kgs. of LDPE Master Batches under Rule 173Q(1) of the Central Excise Rules, 1944. However, he gave the option to redeem the said goods on payment of a fine of Rs. 2 lakhs in lieu of confiscation.

Ld. Collector has held that the classification list had been approved in respect of LDPE Master Batches under Chapter Heading 3204.19 and 3206.90 and that there was no dispute regarding classification list or its approval at the relevant time

and that the party had not filed appeal against the approval of the said classification list. Therefore, on this ground, he rejected the plea raised by the appellants on the question of classification and dispute is pending before the Tribunal.

In this regard, he had also relied on the statement of Shri PR. Patel, Partner of the assessee's company and also the statement of Shri Vinodbhai Patel, Accountant of the appellant company. Id. Collector has also considered the technical details available in Me Graw Hill Dictionary of Scientific and Technical Terms (page 908) and that of the Condensed Chemical Dictionary (10th edition of G.G. Hawley). As regards the plea of the assessee that one of the requirements under Rule 53 was the entry of the particulars shown in clauses (a) to (g) thereof.

Further plea that though the columns were blank from 8-5-1992 to 13-5-1992, the particulars to be entered in such columns from 8-5-1992 to 13-5-1992 were available in GP. 1 No. 66 to 70. On this plea, the Id. Collector has held that Rule 53 prescribed daily entries and the heading of the Rule also mentions 'daily stock account'. In this regard, the Id. Collector has relied on the ruling rendered in the case of Collector of Central Excise, Madras v. Ultra Marine & Pigments Ltd. as reported in 1985 (22) E.L.T. 413 (T) wherein it has been held that excisable goods have to be accounted for in RG. 1 according to the prescribed procedure, and if the goods are not so accounted, Rule 173Q (b) would be attracted.

6. As regards the assessee's plea that on 8-5-1992, it was a weekly holiday and on 9-5-1992 they produced and packed the goods in 33 bags weighing 825 kgs. net and removed them on GP. 1 No. 66 and 67 and rest of the such pleas which have already been recorded supra and their plea that non-entering of the particulars in RG.1 was irregularity and not a contravention and that no penal provisions were contained in Rule 53 itself. The Id. Collector has held that the description of the goods in G.P. 1 Nos. 66 to 70 cannot absolve the party from the lapse of not making the daily entries in R.G. 1 register. The Id. Collector has held that no explanation by them for non-accountal of 7800 kgs. of packed goods (i.e. 312 bags of 25 kgs. each). He has held the explanation that the goods were in loose condition and they were not accounted in R.G.1 because their quantities

were not ascertained until after weighing and packing, is a mere ipse dixit, and is totally unsubstantiated. He has noted that even the R.G. 1 prescribed under Rules 53 and 173G (for assesseees working under self removal procedure) provided for accountal of loose goods also in columns 2,3, 4 and 15 of R.G.1.

As regards the defence plea was that Rule 53 does not lay down any time limit for making entries in RG. 1 and therefore, Rule 226 has no application. Id. Collector has rejected this plea on the basis of Rule 53(1) itself, wherein it is laid down that every manufacturer shall maintain a stock account in the prescribed form and shall enter in such account daily.

As regards the party's plea that the seizure of the goods within the factory was bad in law in terms of the CEGAT's order in the case of Collector of Central Excise v. Techno Chem Engineers (supra) that of the Andhra Pradesh High Court judgment relied by the party; the Id. Collector has held that the facts of these cases are distinguishable and they are not applicable to the present case, as in the present case, the goods had not been accounted in the prescribed records i.e.

R.G. 1 and hence Rule 173Q (1)(b) is directly attracted. The Id. Collector has relied on the ruling rendered in the case of Snack Foods (P) Ltd. v. Collector of Central Excise, Chandigarh as reported in 1987 (31) E.L.T. 231 and larger number of citations. In all these judgments, the view taken by the Tribunal is that non-entry in RG 1 Register is a contravention of the rules and confiscation of the same is sustainable.

In the result, the Collector has passed the impugned order imposing the said penalties and fine as noted above for the said contraventions.

7. We have heard Shri K.A. Sindhi, Id. Advocate for the appellant and Shri Somesh Arora, Id. JDR for the Revenue. As regards the confiscation of the goods in question, the Tribunal has already decided the issue in the case of Kirit Packaging Industries (P) Ltd. v. Collector of Central Excise, Vadodara as reported in 1994 (71) E.L.T. 369. In this case the Tribunal has held that Master Batches are distinct from plain synthetic resin and plastic materials and therefore, has held that it is classified under Heading 3204/32.06 of Central Excise Tariff Act, 1985 and not

under Chapter 39 of the Central Excise Tariff Act, 1985. This ruling has again been followed in the case of Rajasthan Petro Synthetics Ltd. v. Collector of Customs, Bombay as reported in 1994 (72) E.L.T. 603. The Tribunal has held that the goods being essentially concentrated dispersion of colouring matter in the plastic they would be excluded from the purview of Chapter 39 in view of the exclusion clause under General Notes to Chapter 39 of HSN which is accepted as having a persuasive value in classification of goods under the Customs Tariff. The Tribunal has further held that the disputed goods being pigment preparations of organic and inorganic pigments in polypropylene carrier are correctly classifiable under Chapter 32 and their sub-classification was determinable on whether the pigments were organic or inorganic in view of Chapter Note 3 of Chapter 32. The Tribunal has further held that the disputed goods namely, pigmented polypropylene chips are used essentially for imparting colour to the polymer melt obtained by melting grey polypropylene chips before extrusion for production of yarn and thus their use is only for imparting colour to the melted polypropylene or plastic material before it is converted into textile materials, namely yarn. Therefore it has been held that classification under Chapter 32 is appropriate. The Id. Advocate submitted that although the Tribunal in these two rulings has held that the product in question to be classifiable under Chapter 39 yet according to him, the goods are required to be classified under sub-heading 3901.10 as the goods are granules of low density polyethylene and they are rightly classifiable under the sub-heading 3909.10 as Polymers of ethylene in primary forms. In this context, he has submitted that the Tribunal in the case of Kirit Packaging Industries (supra) took the view on the ground that the interpretation of the wording "colouring preparations" contained in Chapter Note (2) of Chapter 32 does not restrict use of primary forms of Polymers in its mixture, therefore, it is submitted that the criteria of essential character of mixture in relation to LDPE Master Batches as required under Rule 3(b) of Rules for the interpretation of the Schedule was not taken into consideration while deciding the classification of the product. In that view of the matter, the Id. Advocate submitted that the case is required to be referred to a Larger Bench for reconsideration. He submitted that the imposition of Rs. 5 lakhs penalty and Rs. 2 lakhs as predemption fine is exorbitant and beyond a reasonable limit for a contravention of a minor and venial in nature.

He submitted that the goods had not attained the RG.1 Stage, as per the Chandigarh Collectorate Trade Notice No. 80/84 dt. 26-12-1984, which laid down the R.G. 1 Stage in respect of paints, Pigments and Varnishes following under the respective chapter headings. The Trade Notices had stated that the R.G. 1 Stage will be- "when they have been packed into unit containers (bags in the case of certain pigments and collours). The book balance shown in R.G. 1 would include all the packed goods whether lying within or without the bonded store-room".

Further reliance is placed on New Delhi Trade Notice No. 10-CE (Misc.

10)/94, dt. 4-4-1994 wherein the R.G. 1 Stage is also laid down as noted above. The Id. Advocate submitted that Rule 173Q cannot be invoked for the purpose of confiscation of goods which had not reached the R.G. 1 Stage and therefore, the extent of fine imposed for removal of goods by single gate pass where the duty liability is Rs. 324/- is beyond any comprehension. He submitted that the East Region Bench in an identical case has held that in such cases Rule 226 be more appropriate and not Rule 173Q for imposition of penalty and hence the penalty imposed in the case under 173Q for Rs. 50,000/- was scaled down to Rs. 2,000/- in accordance with Rule 226. This ruling is rendered in the case of Indian Steel & Wire Products Ltd. v. C.C.E., Jamshedpur as reported in 1994 (23) E.T.R. 783. Id. Advocate submitted that this ruling should be applied and not those rulings relied by the Id. Collector, as in those cases, there was a clear clandestine removal and evasion of duty and in peculiar facts of each case, the Tribunal had found the assessee guilty of evasion of duty and hence upheld the imposition of penalty under Rule 173Q but however, the Tribunal had also reduced the penalty. It is his case that the appellant is a small scale industry and that they had no intention to evade the duty and it was not the allegation of the department also that the removal of goods under gate passes without entry in registers had been done with a mala fide intention to evade any duty. It is also his plea that there had been no case against the assessee of any such contravention till date.

8. Id. JDR submitted that the Id. Collector had clearly brought out that out of 8200 kgs, 7,800 had reached R.G. 1 stage. Therefore, the Collector was justified in imposing exemplary penalty of Rs. 5 lakhs and also imposing Rs. 2 lakhs

redemption fine for non-entry in the R.G.1 register in respect of goods which had reached R.G. 1 stage. He has submitted that there was 5 days delay in entering these details and there was every possibility that the assessee had done this with a view to dear goods more than [once] on the same gate passes, without detection to evade payment of duty.

9. We have carefully considered the pleas made by both the sides and have perused the allegations in the show-cause notice as well as the order passed by the Id. Collector in this case. The appellants have made out two issues, one is with regard to the reference of the case to the Larger Bench for reconsideration of decision rendered in Kirit Packaging and Rajasthan Petro Synthetics (supra). On this issue, we are not impressed with the grounds raised by the Id. Advocate for reference to Larger Bench. The Tribunal [has] given the detailed findings in both the cases and the grounds raised before us [have] been dealt with by the Bench by a reasoned and convincing judgment. There is no need to differ from the said rulings. Applying the ratio of the said rulings, we hold that the impugned goods are classifiable under sub-heading 3204.19 and 3206.90 depending as whether they are organic or inorganic.

10. As regards the imposition of exemplary penalty of Rs. 5 lakhs for non-entry of daily register and confiscation of goods in respect of which entry had not been done in RG 1 Register and in consequence imposition of fine of Rs. 2 lakhs, we are clearly of the view that the imposition of this high penalty and fine is not in consonance with the charge made out by the department in the show-cause notice. Although we uphold the reasoning given by the Id. Collector with regard to the attraction of Rules 53 and 173Q (1)(b) with regard to the charges made out. However, we are not in a position to appreciate the imposition of such high penalty and fine in the present case. The reason being that it is not the case of the Revenue that there had been a clandestine removal or an attempt made for clandestine removal or the assessee had adopted a modus operandi to mis-use the gate passes for removal of goods. Although there is a dear admission with regard to non-entry and non-maintenance for a couple of days. However, the said action has been explained. However much the explanation may be weak yet it deserves to be scrutinised and if the explanation is plausible and acceptable, the

same has to be accepted and a lenient view has to be taken in the light of the Supreme Court judgment rendered in the case of Hindustan Steels Ltd. v. State of Orissa as reported in 1978 (2) E.L.T. 159. The Hon'ble Supreme Court has held that penalty should not be imposed on a venial breach of provisions of law. The Id. Collector has relied on large number of judgments and has discussed in very great length to justify the imposition of high penalty in this particular case. In all these judgments noted by him, the Tribunal has taken a view that non-entry in RG 1 Register is a case for confiscation and imposition of fine. In the light of each fact of the case, the Tribunal had upheld the imposition of penalty and fine on the basis of extent of evasion and intention to evade duty by suppression or by clandestine removal or by mis-declaration or by fraud. In the present case, there is no ingredient of suppression, mis-declaration, fraud and it is also not established by Revenue that the appellants had intended to evade duty by not making entries in the RG 1 Register and in the daily register as laid down in Rule 53. Therefore, the appellant's reliance on the ruling rendered in the case of Indian Steel & Wire Products Ltd. is fully justified. The ratio of this judgment clearly applies to the present facts as the facts are identical. In that view of the matter, we modify the imposition of Rs. 5 lakhs penalty and Rs. 2 lakhs redemption fine and applying the ratio of the judgment, we modify the penalty imposed under Rule 173Q and Rule 226, the penalty is reduced to Rs. 5,000/-. As we have held that the confiscation of goods for non-entry in RG 1 register is justified, we reduce the fine to Rs 2,000/-. (Rs. two thousand only).

11. The Id. Collector has relied on the case of Snack Foods (P) Ltd. (supra). In this case the goods had been found loaded in the truck without any entry being made in statutory registers and an attempt was made for clandestine removal of the goods. The Tribunal upheld the imposition of fine in this particular case under Rule 173Q. However, the penalty of Rs. 10,000/- was reduced to Rs. 5,000/- and fine was also reduced from Rs. 10,000/- to Rs. 5,000/-. The Id. Collector has relied on this ruling to impose the penalty but has failed to see the quantum of penalty reduced in this case to Rs. 5,000/- only. In this case, there has been a clear attempt made to remove the goods clandestinely. On the other hand in the present case, the appellants had removed the goods under gate passes and it only required entry in the RG 1 Register and hence the reliance on the Snack Foods

case is mis-led. LML Ltd. v. Collector of Central Excise as reported in 1992 (61) E.L.T. 240 (All.) wherein the Allahabad High Court had refused to accept a reference application under Section 35G against imposition of penalty of Rs. 30,000/- and.

fine of Rs. 25,000/- in respect of confiscation of 603 Scooters. Even in this ruling, the fine and penalty imposed is not exorbitant and Id. Collector has failed to see this point.

The Id. Collector has relied on the ruling of Ultra Marine and Pigments Ltd. (supra) but he has failed to see that for such a serious offence, the Tribunal had reduced the redemption fine of Rs. 18,000/- only and penalty of Rs. 9,000/- only. The Id. Collector has relied on this ruling to justify the applicability of Rule 173Q for confiscation and imposition of penalty but has failed to see the quantum of fine and penalty imposed in these cases is not quite high compared to allegation of serious offence noted therein. The Id. Collector has again relied on the case of Shiva Papers Mills Ltd. 1987 (27) E.L.T. 319 but has failed to see the fine which has been reduced to Rs. 5,000/- only by the Tribunal and also the finding that no penalty should be imposed for the such lapses of non-entry in the register. Thus, we notice that the Id. Collector has followed the ratio of the Tribunal's cases to justify the imposition of fine and penalty under the provisions of law but has failed to notice the quantum of fine and penalty which have been imposed in those cases. It has to be observed that the rulings have to be applied fully and not in part and that to that aspect which favours the Revenue and conveniently not apply the aspect pertaining to redemption of fine and penalty, by taking a lenient view. Therefore, we are of the view that in this particular case, there is no reason for imposing such a high penalty and fine and hence we order for reducing the fine to Rs. 2,000/- and penalty to Rs. 5,000/- only in terms of the ratio of the Tribunal's judgment in the case of Indian Steel 6- Wire Products Ltd. 12. While I am in agreement with the conclusion of my learned colleague, I would like to add the following observation.

13. The gravity of the offence as disclosed in the appeal before us itself does not merit a higher redemption fine and penalty than has been determined by my

learned colleague. I am of the view that there can be no precedent by way of decided cases with regard to the quantum of redemption fine and penalty, except to reiterate that these must be commensurate with the gravity of the offence.

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