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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-30-1994

Reported in : (1995)(79)ELT705TriDel

Appellant : Becco Engineering Co. Ltd.

Respondent : Collector, Central Excise

Judgement :

1. M/s. Becco Engg. Co. Ltd. have filed this appeal against the order of Collector, Central Excise (Appeals). The Collector (Appeals) in his order had held :- "it is clear that all the processes contemplated in this Rule, namely, 'remade, refined, recortdftioned, repaired' basically contemplate retention of the original Identiry'of the goods brought in or retained in the factory. HD-50B Model machine is a deafly distinguishable and recognisable product as known in the market different from the model SB-65. Both may be Lathe Machines but the two are distinctly separate and identifiable product marketed by the assessee. Conversion of HD-50B to SB 65 involves activities which change the original character of the goods that was brought in and a new variety goes out. The idea of Rule 173H(1) is that the goods namely, HD-50B Model Machine would have remained on repairing. This is not so here. Reference to CBEC's Circular No. 14/87 is not relevant in the context because the appellant's case has to be examined in the light of the provision of Rule 173-H only. I agree with the. Asstt. Collector that the process involved in this amounts to manufacture and hence benefit of Rule 173H will not be available.

I accordingly confirm the Asstt. Collector's order and reject the appeal. The appeal is disposed of accordingly." "I have gone through the facts of the case, the material evidence on record viz. GP-2 No. 19, dated 29r6-1984. AR-4 No. 3, dated 29-6-1984, Form D-3 No. 33 dated 9-9-1985 and GP-l No. 217, dated 16-11-1985. The party has itself admitted" that the Lathe Machine was converted into another model, viz. SB-65/1000 mm. Rule 173H(I) lays down certain processes for which me goods can be brought back to the factory. The party cannot hold that the goods cleared by them were the same i.e., the party should have cleared the Lathe Machine of a different model having different value. Rule 173H basically provides for clearing the goods in the same form after rectification of defects. In the instantcase, the party has cleared Lathe Machine of a different Model Sand having a higher value. I hold that the party has correctly paid the duty on this Lathe Machine and hence refund is not admissible. I reject the refund claim of the party accordingly." 3. Briefly stated the facts of the case are that M/s. Becco Engg. Co.

Ltd. filed a refund claim of Rs. 45,156/- on 14-4-1986. The refund was claimed by the appellant for duty amounting to Rs. 45156/- on Lathe Machine Model SB-65/1000 mm cleared under GP-1 No. 217, dated 16-11-1985. Lathe Machine Model No. HD-50B/1000 mm falling under erstwhile Tariff Item 68 was exported to Tehran under GP-2 No. 19, AR-4 No. 3, dated 29-6-1984. This machine was re-imported into India on payment of countervailing duty and was received back in the factory on 9-9-1985. This Lathe Machine was re-conditioned and converted into Model No-SB-65/1000 m.m, and cleared for home consumption on payment of Central Excise Duty as stated above. The appellant then claimed refund of this amount as this Lathe Machine could have been cleared without payment of duty under Rule 173H(2).

4. Sh. D.K Tyagi, the ld. Advocate appearing for the appellant submitted that the change of Model of the Lathe Machine from HD-50B to SB-65 does not change the use or character or classification of the Machine; that the Lathe Machine remained a Lathe Machine; that after reconditioning of the Lathe Machine, no new commercial product of a distinct name, use or character came into existence so as to merit classification under a different Tariff Item emerged; that the Lathe Machine was Lathe Machine when it was received in the factory and remained a Lathe

Machine after some technical changes; that the ld.Collector (Appeals) was not correct in holding that condition of Rule 173H was not satisfied since the identity of the machine was changed; that Rule 173H contemplates of those processes which do not amount to manufacture; that duty cannot be charged twice on the same product even if some change in use or character or name has taken place, so long as the product remained under the same Tariff Item or sub-item; that some change in name, character or use in the product does not amount to manufacture; that on the same item duty cannot be charged twice. In support of his contention the ld. Advocate cited and relied on the decision in the case reported in 1983 (13) E.L.T. 1582 (SC) and 1982 (10) E.L.T. 237 (Bom.); that processing of duty paid goods will not amount to manufacture unless they fall under a different Tariff Item.

In support of this the ld. Counsel relied on the ratio of the decision reported in 1979 (4) E.L.T. (J 181); that the processes of re-conditioning and repairing are bound to effect some changes in the processed item and, therefore, it cannot be said that the benefit of Rule 173H(2) will not be admissible to the processed item. In support of his contention the ld. Counsel relied on the Government of India Circular No. 14/87, dated 30-12-1987. It was argued for the appellant that for attracting fresh duty there should be a manufacture of the goods and that manufacture takes place only when a different commercial commodity comes into existence. In support of this contention the ratio of the decision reported in 1976 (37) STC-391 and 1986 (26) E.L.T. 353 and 1986 (23) E.L.T. 217was relied upon. It was also argued that there has been a catena of decisions on the point that there cannot be two manufactures at two different stages- Reliance for this contention was placed on the ratio of the decision in the case reported in 1985 (21) E.L.T. 3 and 1990 (45) E.L.T. 525.

5. Summing up the ld. Counsel submitted that in view of the legal and factual position and in view of the well settled case law on the point that re-conditioning of the goods and especially of the Lathe Machine in the present case did not amount to manufacture and, therefore, the benefit of Rule 173H was admissible to the appellant, the ld. Counsel therefore prayed that the impugned order may be set aside and consequential relief may be granted to them.

6. Sh. B.D. Bhagat, the ld. JDR reading from the order of the Asstt.

Collector and the order of the Collector (Appeals) submitted that what was brought in the factory was a different machine and what was being taken out was an entirely different Lathe Machine. The processes undertaken were not repairing and re-conditioning but were such as changed the functional qualities of the Machine and, therefore, the processes amounted to manufacture. Distinguishing the case law relied upon by the appellant, the ld. JDR submitted that the facts in the instant case are different from those in the case cited and relied upon by the appellants. Reiterating the findings of the lower authorities, the ld. JDR submitted that the refund claim has rightly been rejected.

7. Heard the submissions of both sides and considered them. A lot of case law has been cited and relied upon by the appellant. Some of the important cases cited and relied upon are discussed as under :-State of Tamil Nadu v. Pyare Lal Malhotra reported in 1983 (13) E.L.T. 1582 (SC). The Hon'ble Supreme Court in Para 13 had held :- "It is true that the question whether goods to be taxed have been subjected to a manufacturing process so as to produce a new marketable commodity, is the decisive test in determining whether an excise duty is leviable or not on certain goods. No doubt, in the law dealing with the sales tax, the taxable event is the sale and not the manufacture of goods. Nevertheless, if the question is whether a new commercial commodity has come into existence or not, so that its sale is a new taxable event, in the sales tax law, it may also become necessary to consider whether a manufacturing process, which has altered the identity of the commercial commodity, has taken place. The law of sales tax is also concerned with 'goods' of various descriptions. It, therefore, becomes necessary to determine when they ceased to be goods of one taxable description and become those of a commercially different category and description." In this case the Hon'ble Supreme Court had examined the question of taxability of a commodity and had held that, it may also become necessary to consider whether a manufacturing process which has altered the identity of the commercial commodity has taken place.

9. Now examining the facts of the present case it has been admitted by the appellant that the machine was converted from Model HD-50B/1000 m.m. to SB-

65/1000 m.m. which resulted in some technical changes in its range of operations, and this change of model was obtained by way of removing/detaching, threading attachment and tail stock from the machine and by increasing the centre height from 50 to 65 by way of inserting the height pads below the head stock. These operations cannot be treated as repairing, reconditioning or re-making operations. On careful examination of these facts we find that these operations brought into existence a completely new Model capable of performing some other functions and different functions from the functions or operations that could not have been performed by the old Lathe Machine.

Thus this process does not remain the process of re-conditioning, remaking or reprocessing and can be termed to amount as manufacture.

1. Except as hereinafter provided, excisable goods or parts thereof on which duty has been paid shall be brought into, or retained in a factory or a warehouse.

2. An assessee may, subject to such conditions as may be specified by the Collector, retain in, if such goods or parts thereof need to be re-made, refined, reconditioned, repaired or subjected to any similar process in the factory.

"3. The goods or parts thereof retained in, or brought into a factory or a warehouse in accordance with the provisions of Sub-rule (2) may, if not subjected to any process amounting to manufacture, be removed from the factory or warehouse without payment of duty subject to such conditions as may be specified by the Collector." Thus it would be seen that goods can be brought into the factory for remaking, refining, repairing, and re-conditioning provided the processes to which the goods are subjected do not amount to manufacture. Now in the instant case, we find that Lathe Machine was subjected to such process as can legitimately be termed as manufacturing process.

11. In the case of Swadeshi Mills Co. Ltd. v. U.O.I. and Ors. reported in 1982 (10) E.L.T. 237, the Hon'ble Bombay High Court held that, "the commodity which is the subject matter of excise duty should be something different from the raw material from which the same has been manufactured, therefore, if the raw-material and the finished product are subjected to excise duty under the same sub-tariff Item,

then it will amount to double taxation." In the instant case we find that the facts are different. Here it is not a question of the raw-material and the finished product being subjected to excise duty. Here, the question is whether the processes undertaken by the appellant for conversion of the Model of Lathe Machine into another Model under the provision of Rule 173H amount to manufacture or not and thus the facts in the two cases are different and therefore, distinguishable.

12. Another decision in the case of Empire Dyeing and Manufacturing Co.

Ltd. v. V.P. Bhide and Ors. -1977 (1) E.L.T. (J 34) (Bom.), which was cited and relied upon by the appellant, the relevant portion of the judgment of the Hon'ble High Court is reproduced below :- "The manufacturing of Cotton fabrics was complete when the goods were released to and sold in the market after duty was levied and collected from the manufacturers. Subsequent processing of these goods cannot amount to manufacturing of any new excisable goods as the goods are the same as were originally manufactured, except that they are processed. Goods which have already borne excise duty and do not fall under a different tariff item, duty cannot once again be levied and recovered as law does not permit collection of duty twice over." Comparing the facts of this case with the facts of the case before us we find that the Lathe Machine was brought to the factory for different processes permitted under Rule 173H wherein the condition was that the process undertaken should not amount to manufacture. The facts in the case relied upon by the appellant are different and therefore the case is easily distinguishable. The appellant also cited and relied on the case of Nerol Abendaly v. U.O.I. reported in 1979 (4) E.L.T. (J 181) decided by the Hon'ble Gujarat High Court in which again the question of levy of duty on processing of Fabrics was considered. The distinguishing feature of the case before us and the one relied upon by the appellant is that we are considering the limited issue under Rule 173H and not levy of excise duty or classification of goods for levy of excise duty and, therefore the facts under the two cases are easily distinguishable. The appellant also relied on the decision of the Tribunal in the case of Shri Ram Refrigeration Industries Ltd. v.C.C.E. In "When the Govt. of India amended Rule 173H on 26-6-1976 simultaneously by their letter dated 2-7-1976, the Govt. clarified that remaking, refining, reconditioning or subjecting the goods to any other similar

process not amount to manufacture if the goods are subsequently cleared after rectification of defect in the same form in which they were retained or brought in the factory. The above clarification was made public by the Collector through a Trade Notice dated 20-7-1976. Reading the Supreme Court judgments on 'manufacture' as applied to the Central Excises Act and the Clarification, it amounted to saying that if the process of rectification of defects did not result in bringing into existence of commercially distinct goods and the goods were cleared in the same form in which they had been brought into the factory, the process would be of repair and not of manufacture." repair/reconditioning/remaking should not amount to manufacture was specifically put in Sub-rule (2) of Rule 173-H w.e.f. 26-6-1976, the said stipulation was implied even earlier when Rule 173H is read together with the changing provision in Section 3 of the Act and the two are interpreted harmoniously. Therefore, all along Rule 173-H permitted only repair/reconditioning/remaking provided the process employed did not amount to manufacture." Examining the facts of the case before us in the light of the decision of the Tribunal cited supra we find that the basic condition in the above judgment is that goods subsequently cleared after rectification of the defect are in the same form in which they were retained or brought in the factory. However, we find that in the case before us the Lathe Machine of different Model performing different functions was brought into the factory but another Lathe Machine of a different Model performing some different functions was cleared and hence the goods were not in the same form and therefore the facts in the two cases are clearly distinguishable.

13. Reliance was also placed on Circular No. 14/87, dated 30-12-1987 wherein the Government had clarified that conversion of old buses into lorries by certain modification like removal of seats, closing of windows, opening and removing the glass in [rear] portion and replacing them with tyres will not amount to manufacture and resultant goods will not be liable to duty. However, if a complete new body is made on the old chassis it will amount to manufacture. Examining the facts in the case before us, we find that the Board had clarified the position in respect of a particular commodity namely, bus bodies and it does not in general terms lay down the law. Rule 173H of the Central Excise Rules is very clear and the conversion of a Lathe Machine brought into the factory in a different Model

performing some different func-tions/operations is entirely different and distinguishable.

14. Reliance also was placed by the appellants on the ratio of the decision of the Tribunal in the case of Swastik Packaging, Bombay v .C.C,E reported in 1986 (23) E.L.T. 217. In support of their contention that a change in identity or name of the commodity does not attract fresh levy. In this case, the Tribunal had held:- "A comparison of sub-item (c) of Item 27 covering aluminium foil with Item 16B dealing with Plywood is relevant as the words used in both are similar. The main provision in Item 16B indicates that plywood is liable to excise duty whether in Sheets, Blocks, Boards or the like and that no further duty is to be levied on circles made out of the plywood blocks or panels. Examined in this light, the intention of the sub-item (c) of Item 27 seems to be to charge duty once on foils, whether or not they be in any of the stages mentioned in the sub-item, i.e. whether or not embossed, cut to shape, perforated, coated, printed or backed with paper or other reinforcing material, but otherwise fulfilling the condition of thickness set out therein. It is also significant that Section 2(f)(viii) of the Central Excises and Salt Act, 1944, as amended in 1980 in relation to aluminium, refers to laquering or printing of plain containers but not foils. Thus viewed, aluminium in foils when, printed would not attract duty again at the printing stage if duty had already been paid at the stage when foils were first produced." Examining the facts of the case before us in the light of the ratio of the decision relied upon by the appellant we find that they are not dealing with the subject of multi-stage duty. We are dealing with the provisions of Rule 173H and hence the facts in the two cases are different.

15. On careful consideration of all the facts, circumstances and the case law cited and relied upon by the appellant we hold that the processes undertaken by the appellant in converting Lathe Machine Model HD-50B/1000 m.m. to Lathe Machine Model SB-65/1000 m.m. by undertaking certain processes amounted to manufacture.

16. In this view of the matter, the impugned order is upheld and the appeal is rejected.

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