Collector of C. Excise Vs. Triveni Sheet Glass Works

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-13-1994

Reported in : (1994)LC74Tri(Delhi)

Appellant : Collector of C. Excise

Respondent : Triveni Sheet Glass Works

Judgement :

1. The brief facts of the case are that the respondents herein preferred a refund claim for Rs. l,30,902.43p on account of Central Excise duty paid on Sodium Sulphate under Tariff Item No. 68, used in the manufacture of Glass sheets falling under Tariff Item 23-A as they could not avail of the set off as per Notification No. 178/77, dated 18-6-1977. The claim filed on 7-11-1979 relating to the period 18-6-1977 to 30-6-1979 was rejected by the Assistant Collector on the ground that the respondents had not satisfied the conditions stipulated in the notification (as amended by Notification No. 295/77, dated 28-9-1977) of furnishing to the proper officer a statement showing the quantity of inputs used in the manufacture of every unit of Sheet glass. The lower Appellate Authority allowed the appeal of the respondents, holding that the finding of the Adjudicating Authority that Notification No. 178/77 did not permit accumulation of the amount to be set off is erroneous. The Collector (Appeals) held as follows - "If the substance of the notification i.e. inputs having paid duty under Item 68 have been utilised in the excisable goods manufactured and cleared from the factory, is satisfied, the assessee would be entitled to the benefit of the said notification. Since there is no dispute about it in

the instant case and the appellant having claimed the benefit of the notification as early as July, 1977 and then purused it with all diligence with the department, the question of the claim being time-barred, therefore, not arising, the appellant should be given the consequential refund, quantum of refund being subject to check and verification of the records by the adjudicating authority." 2. The appeal was originally heard by a Bench consisting of Hon'ble Member (Judicial) Shri G.P. Agarwal and Hon'ble Member (Technical) (as he then was) Shri N.K. Bajpai. The learned Member (Judicial) opined that there were conflicting judgments on the issue and in particular, he was of the view that there was a conflict between the decision in the case of Andhra Pradesh Lightings Ltd. v. Collector of Central Excise, Bangalore reported in 1988 (33) E.L.T. 627, wherein it was held that taking together the two notifications i.e. Notification No. 178/77 and 295/77, it is very clear that the furnishing of the statement is not a procedural formality but a vital condition before relief could be granted under the exemption notification, and the decision of the Tribunal in the case of Grindwell Norton Ltd. v. Collector of Central Excise reported in 1989 (43) E.L.T. 472, wherein it was held that non-furnishing of the input/output statement in terms of Notification No. 295/77 due to practical difficulties cannot be a ground to deny the benefit of Notification No. 178/77, if the other substantive conditions namely that inputs are duty paid and duly utilised in the manufacture of excisable finished products, are satisfied. He, therefore, was of the view that the papers may be placed before the Hon'ble President for constituting a Larger Bench to resolve the conflict.

3. The learned Member (Technical) Shri N.K. Bajpai was however, of the view that there is no conflict between the two decisions above mentioned and he proposed that the appeal of the department be allowed since the respondents had not fulfilled the material condition of the notification. Due to difference in opinion between the Hon'ble Members, the following point was referred in terms of Section 35-D(1) of the Central Excises and Salt Act, 1944 read with Section 129(5) of the Customs Act, 1962 : "Whether in the facts and circumstances of the case, the papers be placed before the Hon'ble President for constituting a Larger Bench to resolve the conflict as proposed by the Member (Judicial) or appeal be allowed as proposed by the Member (Technical)?" 4. The point of difference was referred to Shri S. Kalyanam, Member (Judicial), who by his order dated 23-1-1992, referred

the matter back to the President of the Tribunal for constituting a Larger Bench under Section 33-D(1) of Central Excises and Salt Act, 1944 read with Section 129(5) of the Customs Act, 1962 in a bid to resolve the difference of opinion by a majority view. The Third Member's view is reproduced below - "I have considered the submissions made before me at the outset by the learned SDR for the Department and by the learned Counsel for the respondent. Hon'ble Member (J) has taken the view that by reason of a conflict between the two rulings of the Tribunal namely Andhra Pradesh Lightings case reported in 1988 (33) E.L.T. 627 and Grindwell Norton Ltd. v. Collector of Central Excise reported in 1989 (43) E.L.T. 472, the conflict has to be resolved by a Larger Bench. Member (T) has taken the view that there is no conflict at all in the views taken by the Tribunal in the said two rulings and has further reiterated that the same Members have considered the same question in ITC case and has taken a view in favour of the assessee as evidenced by the Order No. E/457-461/91-D, dated 2-12-1991. But unfortunately the conclusion of Member(T) is not consistent with the ratio, which he has referred to in paragraph 10 of this order and this would appear to be an error. Be that as it may, sitting as a third Member to resolve a conflict in the views between the two Members and exercising jurisdiction under Section 35D(1) of the Central Excises and Salt Act, 1944 read with Sub-section (5) of Section 129 of Sea Customs Act, 1962, it would not be possible for me to take an independent view, which, as rightly contested before me by both the parties, would not pave for the majority view. On the other hand, if I take a view that in the light of the ruling referred to by learned Member(T) in I.T.C. case, the department's appeal has to be dismissed, then that will be a third opinion. Therefore, there would not be a majority opinion much less a opinion of the Bench, for the appeal to be decided in accordance with law in terms of Section 35D(1) of the Central Excises and Salt Act, 1944, read with Sub-section (5) of Section 129 of Sea Customs Act, 1962. I also take note of the fact that under Rule 31A of the Customs, Excise & Gold (Control) Appellate Tribunal's (Procedure) Rules, 1982, a rectification application, seeking rectification of a mistake apparent from the records, shall be heard by a Bench consisting of the Members who heard the Appeal, giving rise to the application, unless the President directs otherwise. Therefore, in order to avert a judicial stalemate as it were in the above peculiar factual background and for proper exercise of jurisdiction under the Act, the only course open to me is to refer the matter back to the President of the Tribunal for constituting a Larger Bench under Section 33D(1) of the Central Excises and Salt Act, 1944 read with Sub-section (5) of Section 129 of Sea Customs Act, 1962, in a bid to resolve the difference of opinion by a majority view. Ordered accordingly. Pronounced and dictated in open Court." 5. The original Bench then forwarded the matter once again to the President for constituting a Larger Bench to resolve the conflict in accordance with the majority view and accordingly this Larger Bench has been constituted.

6. At the outset, Shri V. Lakshmi Kumaran, learned Counsel appearing on behalf of the respondents, raised a preliminary objection that this Bench has no jurisdiction to hear and decide the appeal itself, as it has been constituted only to determine whether a Larger Bench should be constituted to resolve the conflict of judgments and no majority view has emerged, as the Third Member has not expressed any view in the matter but has merely referred the matter back to the President for constituting a Larger Bench to resolve the difference of opinion.

7. Shri M.K. Jain, learned DR opposing the contention, submits that this Bench is competent to hear the appeal and has indeed been constituted to resolve the difference of opinion by a majority view.

8. We are in agreement with the submission of the learned SDR - this larger Bench is sitting to resolve the conflict and is empowered to hear the appeal. If the learned Counsel's contention is to be accepted, then it would lead to the absurdity that this Bench, if it decides that a larger Bench is required to resolve the conflict, can only return the matter once again to the President for constituting a Larger Bench all over again and this would only lead to a judicial stalemate and needless repetition of the exercise of reference to a Larger Bench.

Accordingly, we overrule the objection and proceed to dispose of the appeal.

9. The issue for determination is the eligibility of the respondents to the benefit of set off of duty paid on Sodium Sulphate used in the manufacture of glass sheet in terms of Notification No. 178/77 as amended by Notification No. 295/77. For a

proper appreciation of the dispute, the notifications are reproduced below - "In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts all excisable goods (hereinafter referred to as the 'said goods') on which the duty of excise is leviable and in the manufacture of which any goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944)) hereinafter referred to as the inputs) have been used, from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs : Provided that where the duty of excise leviable on the said goods is less than the amount of duty of excise paid on the inputs the extent of exemption shall be restricted to the duty of excise leviable on the said goods." "In exercise of the powers confered by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby makes the following amendment in the notification of the Govt. of India in the Department of Revenue and Banking No. 178/77 Central Excises dated the 18th June 1977, namely :- In the said notification, after the words 'as is equivalent to the duty of excise already paid on the inputs', the words, 'subject to the condition that the manufacturer furnishes to the proper officer a statement showing the quantity of the inputs used in the manufacture of every unit of the said goods' shall be inserted." 10. We have perused the relevant correspondence on the subject. The respondents had claimed the benefit of the notification vide their letter dated 16-7-1977. After discussing the issue with the Superintendent, the respondents started submitting D-3 declaration form for receipt of the excisable goods into their factory and sought sanction for availment of the facility granted under Notification No.178/77 by letters dated 23-8-1977 and 12-9-1977. On 26-9-1977, the respondents submitted details of percentage of the raw material fixed for manufacture of sheet glass. The letter reads as follows - "This has reference to your discussion with our representative on Friday the 23rd instant and as desired by you, we give below Sodium Sulphate content in the batch for the manufacture of sheet glass in our factory.

At present one batch of 946.5 kgs (Raw material mix) comprise of the following material ---Name of the Raw Material Quantity per Percentage batch (kg)6. Felspar Powder 18.0 02 ------------------------ The above composition keeps on varying depending upon the quality of the raw materials and tank condition. However, the above ratio can be taken as a standard percentage of raw material mix in our factory for the manufacture of sheet glass.

We hope the above information will meet with your requirements in granting permission under Notification No. 178/77 -C.E., dated 18-6-1977".

11. Subsequently, on 19-1-1978, the respondents submitted particulars of excisable goods manufactured during the accounting period 1976-77 and particulars of raw materials used in the manufacture of excisable goods and its proportion to the total quantity of inputs is as follows - 12. The respondents were called upon to submit a revised classification list which was furnished on 15th March, 1978. In August, 1978, the department once again called for a revised classification list showing the amount of duty claimed as set off per unit on the input used. In response to this direction, the respondents replied that they had been purchasing sodium sulphate from more than one manufacturer and therefore, the prices charged and duty involved would vary and also that the raw material supplied by different manufacturers would differ in chemical composition and hence it would not be technically possible to use the Sodium Sulphate consigment-wise. The respondents drew the attention of the department to the inconvenience likely to be caused by insistence on submission of classification list showing amount of duty claimed as set off per unit of input. In view of the practical difficulties expressed by them, the respondents suggested the following procedure for grant of set off of duty - (a) the amount of duty per unit of input may be calculated at the end of an accounting year or financial year whichever is convenient; (b) the amount of set off may be granted on an yearly basis after satisfaction from the accounts and records of the factory; (c) the amount of average of duty per unit on input may be calculated on the basis of first in-first out method.

Further reminders regarding grant of set off benefit were issued by the respondents, who were called upon by the letter of the Superintendent dated 7-6-1979 to explain the possibility of storing/consignment of Sodium Sulphate received by the factory separately in order to carry out proper verification and ascertainment of duty input on each batch of manufacture. By their reply dated 8th June 1979, the respondents confirmed the possibility of the same but reiterated the impossibility of use of Sodium Sulphate consignment-wise due to variation of its chemical composition.

13. It is clear from the above that the respondents have fulfilled the condition stipulated in the notification of furnishing of statement of quantity of inputs used in the manufacture of every unit of the batch product. Our view finds support in the Board's Circular No. 18/77 -CX.6, dated 29-9-1977 which is to the following effect - Attention is invited to Notification No. 178/77-C.E., dated 18-6-1977 under which all excisable goods on which duty is leviable and in the manufacture of which any goods falling under Item No. 68 have been used, have been exempted from so much of the duty leviable thereon as is equivalent to the duty of excise already paid on the "inputs". A question has arisen as to how this exemption should be availed of by the manufacturers. The Board has considered the matter and it has been decided that the quantum of duty paid on the "inputs" falling under Tariff Item 68, would require to be determined on the basis of quantity of "inputs" going into the manufacture of a particular unit of an excisable commodity liable to payment of duty. Thus there has to be a calculation in respect of each product, determining the quantity of "inputs" having paid duty under Item 68, which have gone into the production of one unit of finished goods. This determination has to be carried out once for all in respect of each excisable product liable to the benefit of Notification No. 178/77, dated 18-6-1977 manufactured by each factory. After having determined the quantity of various "inputs" duty paid on those "inputs" under Tariff Item 68 can be calculated with reference to the value shown in the invoices/delivery challans on which the 'input' was received. In this way, the total amount of duty required to be set-off from the final duty payable on the finished excisable product can be arrived at. Amount allowed to be set off shall be subject to the ceiling mentioned in the proviso to the Notification 178/77, dated 18-6-1977.

2. To give effect to the foregoing Notification No. 178/77-C.E., dated 18-6-1977 has been amended vide Notification No. 295/77-C.E., dated 28-9-1977. For purposes of this notification the "proper officer" shall be the Superintendent of Central Excise (Range).

3. Since the calculation in certain cases may involve detailed exercises, the declaration given by the manufacturers duly certified by a chartered or cost accountant, wherever possible may be accepted subject to a reasonable percentage test check, as considered appropriate by you of these declarations. In order to guard against declaring high quantity of "inputs" going into manufacture of one unit of finished excisable product it would be useful to compare declarations of different manufacturers in respect of similar finished product. Wide variations would call for further probing.

C.B.E. & C. F. No. 210/14-M/77-CX. 6, dated 29-9-1977 (Circular No. 18/77-CX.6) The requirement of filing a revised classification list showing amount of duty claimed as set off does not stem from the notifications and non-filing of the same will not, to our minds, disentitle the respondents to the benefit under the notifications as we have already held that the respondents have satisfied the condition prescribed therein.

14. We have carefully perused the case laws cited before us and find that in none of the decisions, has the condition of submitting the statement of input/output ratio been dispensed with. In the case of Andhra Pradesh Lightnings Ltd. Hyderabad v. Collector of Central Excise, Bangalore 1988 (33) E.L.T. 627, it was held that taking Notifications No. 178/77-C.E. and 295/77-C.E. together, it is very clear that the furnishing of a statement is not a mere procedural formality but a vital condition before relief could be granted under the exemption notification. The Tribunal held that the use of the words 'subject to the condition' sufficiently indicates that it was a condition precedent before relief could be granted to the manufacturer and a mere statement that he intends to claim set off will not be enough to grant relief. It was held that since the statements were furnished on 2-6-1979, it was manifest that the appellants did not earn the right of availing the set off prior to that date, however, the department extended the benefit and granted refund w.e.f. a prior date namely 17-5-1979, which is the date on which the appellants were granted written permission by the Superintendents to avail of set off.

15. In the case of Grindwell Norton (supra), the Tribunal allowing crediting of duty paid on inputs received in the appellants factory from 11-7-1977 and utilised in the

manufacture of grinding wheels in the RG-23A account and granted permission to utilise the same for payment of duty on future clearance of grinding wheels although the statement of input/output ratio was furnished only on 30-5-1979 reasoning as follows - "We have carefully considered the pleas advanced by both the sides and have also considered the findings of the lower appellate authority. We are inclined to agree with the pleas of the learned Consultant for the appellant firm that statement of input-output ratio could not be submitted by them due to practical difficulties which had ultimately to be sorted out on the basis of discussion of the departmental officers only on 30-5-1979 approval of which was given on 30-7-1979. Once this statement has been approved, the approval should be deemed to relate back to the date of application for availing the benefit of Notification No. 178/77 i.e. the date of their letter dated 11-7-1977. It is not controverted that the appellants had been receiving duty paid abrasive grains and that these have been utilised in the manufacture of the finished product, namely grinding wheels. They have also been submitting D-3 declarations. Merely because the appellants could not furnish the input-output statement in terms of Notification No. 295/77 due to practical difficulties substantive benefit under Notification No. 178/77 cannot be denied to the appellant firm if the other substantive conditions, namely that the inputs are duty paid and that they were duly utilised in the manufacture of dutiable finished product, namely grinding wheels have been fulfilled. This has been held so in a series of judgment of the Tribunal one of the recent ones being the case of Sundram fasteners Ltd. v. C.C.E. Madras 1987 (29) E.L.T. 275."Hindustan Lever Limited v. Collector of Central Excise 1990 (47) E.L.T. 466, the Tribunal rioted in paragraph 8 of its order that prior to the issue of Notification No. 295/77, there was no condition attached to the exemption notification and no procedure was laid down in the notification itself. Again in para 15 of the order, the Tribunal held that if the appellants could satisfy the department that it had paid duty on the inputs used in the manufacture of excisable final product, then they should not be denied the benefit of exemption by way of paying refund and the appeal was allowed by way of remand by the Adjudicating Authority to re-examine whether the refund claims were proper and in order in respect of the amounts claimed and also to examine the point of limitation.

17. The decision of the Tribunal in the case of Andhra Pradesh Lightnings Ltd. case was considered by the Tribunal in the case of C.C.E., Meerut v. I.T.C. Limited (Order No. E-457 to 461/91-D, dated 2-12-1991) wherein the Bench agreed with the finding of the Collector (Appeals) that it is not a requirement of notification that the benefit therein must be claimed at the time of clearance of the goods alone and cannot be claimed by way of refund of duty subsequently. The Bench was satisfied with the conditions stipulated in the Notification No. 295/77 which had been fulfilled and therefore, upheld the order of the lower Appellate authority and rejected the appeals filed by the Revenue.

Thus, it is seen that preponderant view is that the benefit of notification cannot be denied on the ground that it was not claimed at the time of clearance of goods provided the conditions set out therein are fulfilled by the claimants.Indian Aluminium Co. v. Thane Municipal Corporation 1991 (55) E.L.T. 454 is distinguishable from the facts of the present appeal - in the case before the Supreme court, the appellants did not file the declaration in Form 14 as required under the Maharashtra Municipality (Octroi) Rules, 1968 in respect of imported raw material to be used in the manufacture of the final product, to the effect that the imported goods shall not be used for any other purpose for sale or otherwise. The Supreme Court observed that an incentive was sought to be given to such entrepreneurs by such concession and that being the object, the verification at the relevant time by the Octroi authorities becomes very much necessary before a concession can be given.

19. In the case before us, however, the Notification did not prescribe any particular proforma for the declaration and the respondents have filed the declaration of quantity of input used in the manufacture of every unit of final excisable product.

20. In the light of the above discussion, we hold that the appellants are entitled to the benefit of set off under the two Notifications, uphold the impugned order and dismiss the appeal of the Revenue. The cross objection abates.