

Auto Industries Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-24-1994

Reported in : (1995)(76)ELT325TriDel

Appellant : Auto Industries

Respondent : Collector of Central Excise

Judgement :

1. M/s. Auto Industries have filed this appeal being aggrieved by the order of the Collector of Central Excise. The Collector of Central Excise in his order had held :- "I impose a penalty of Rs. 24,900/- on M/s. Auto Industries under Rule 173-Q of Central Excise Rules, 1944. I also demand a sum of Rs. 83,033.28 being the duty for the clearance of tread rubber cleared in excess of the exemption limit of Rs. 7.5 lakhs during the year 1983-84 from M/s. Auto Industries under the extended time limit under Rule 9(2) of the Central Excise Rules, 1944. Since the party is within the exemption limit during the year 1984-85, no duty is payable by them." 2. Briefly stated the facts of the case are that on a visit on 8-3-1985 Central Excise Officers found M/s. Auto Industries in addition to another unit by the name of M/s. Rubber Industries was existing in premises No. 29A. In the premises of M/s. Auto Industries the officers found some raw-material, comprising reclaimed rubber, raw-rubber. They also found in the premises of M/s. Auto Rubber Industries stock of tread rubber, raw rubber, reclaimed rubber, carbon black, French Chalk powder and fine Tar oil. On inquiries it was found that M/s. Auto Industries was a Partnership Firm of Shri V. Sambasivam and Shri S.Sridharan, whereas M/s. Auto

Rubber Industries was owned by Shri S.Dhandapani S/o Shri V. Sambasivam. Inquiries also revealed that M/s.

Auto Industries started manufacturing of tread rubber from April - May, 1981 and continued to manufacture tread rubber upto December, 1983.

Upto Dec, 1983 there were three partners in the Firm in the name and style of M/s. Auto Industries. The three partners were, Shri V.Sambasivam, Shri S. Dhandapani and Shri S. Sridharan. It was also revealed that in December, 1983, Shri S. Dhandapani was released from the Partnership in the firm known as M/s. Auto Industries who started his own factory in the name and style of M/s. Auto Rubber Indus, from January, 1984 with machineries namely Mixing Mill, Extruder Machine and Calendering machine which was given to him as per the agreement of separation from the partnership firm. It was also observed that M/s.

Auto Rubber Industries had Mixing Mill, Extruder Machine and Calendering Machine. Some of the facilities were common. It was also revealed that M/s. Auto Industries used to send rubber compound to M/s.

Auto Rubber Industries for extrusion on job work basis. It was also found that brand name Auto used by M/s. Auto Industries so far as also used by M/s. Auto Rubber Industries when it started working. It was also noticed that in the declaration filed for 1983-84 it was mentioned that M/s. Auto Industries existed at No. 29 Trichy High Road. However, in the declaration filed on 1-2-1984 it was stated by M/s. Auto Industries located at door No. 29 Trichy High Road was a new factory.

It was also stated that machineries as stated above with building at 29A, Trichy High Road were handed over to Shri S. Dhandapani who started manufacturing operation in the name of M/s. Auto Rubber Industries from April, 1984. It was also found that premises No. 29 & 29A at Trichy Trunk Road belonged to M/s. Auto Industries. It was also stated that machines were installed at No. 29A and Tread Rubber was used in the retreading plant at 29 Trichy Road for captive consumption.

It was also stated that M/s. Auto Industries have been sending Rubber compound for extrusion and return as tread rubber to M/s. Auto Rubber Industries for which no document is maintained and no amount was paid.

M/s. Auto Industries had obtained a licence in October, 1983 and this licence was cancelled in December, 1983. A new licence was issued to M/s. Auto Rubber Industries. Auto Industries was to continue business at 29, Trichy High Road and M/s. Auto Rubber Industries at 29A, Trichy High Road, correspondence showed that Shri Dhandapani continued to be associated with the functioning of M/s. Auto Industries even after his release from its partnership. The records also are alleged to have revealed that Auto Industries continued to exist and manufacture tread rubber using the machinery allegedly belonging to M/s. Auto Rubber Industries. It was alleged that no money was paid to M/s. Auto Rubber Industries towards the extrusion charges. On the basis of the evidence collected, it was alleged that the total Value of clearance made by M/s. Auto Industries during 1983-84 totalled Rs. 10,94,223.80 and total value of clearance during the year 1984-85 was of the order Rs. 7,71,025.05. The appellants were therefore asked to explain as to why duty amounting to Rs. 1,00,671.72 should not be demanded from them and why penalty should not be imposed under 6 of Central Excises and salt Act, 1944. Rule 9(1) read with Rules 173F, 52A, 53, 173G, 173B, 173C and 222 of the Central Excise Rules, 1994 alleging that appellants had manufactured excisable goods without a licence without maintaining statutory Central Excise accounts, without filing classification lists/price lists, without raising gate passes and without payment of duty. It was also alleged that the manufacturing operations were carried on a spilt up piece inter-se, pointed out to the intention on the part of M/s. Auto Industries to evade payment of Central Excise Duty by suppressing the fact of production and clearance by dissolving the existing firm and creating a new firm and thereby attracting the proviso to Section 11A of the Central Excise and salt Act, 1944. The Collector of Central Excise considered their submission and decided the case as indicated above. Against this order-in-original, the appellants have come up before us.

3. Sh. V. Laxmi Kumaran, the Id. Advocate appearing for the appellants submitted that the period in the instant case for which demand had been raised is confined

to the value of clearances during the period 1983-84; that the demand for exceeding the limit of exemption for the period 1984-85 has been dropped by the Id. Collector; that the demand had been confirmed to the tune of Rs. 83,033/- and penalty of Rs. 50,000/- had been imposed. After narrating the facts the Id. Counsel emphatically submitted that the finding of the Collector that premises 29 and 29A are one is beyond the show cause notice, as there was no charge the scope of the show cause notice and thus violated the principles of natural justice; that tread rubber was manufactured by two units; that upto December , 1983 it was manufactured by M/s. Auto Industries who surrendered their licence after dissolution of their partnership in December, 1983; that from 1-1-1984 tread rubber was manufactured by M/s. Auto industries which was a distinct partnership concern and was different from the earlier M/s. Auto industries in as much as the earlier partnership was dissolved and new partnership was created from 1-1-1984, that there were two premises and as Mixing Mill, Extruder Machine and Calendaring Machine were available in one premises, the work of mixing and extrusion was being done on job basis in that premises, that management, staff- Purchase and sale and books of account were different and were being maintained separately for two firms, that the grounds taken in the show cause notice were say A, B & C but the collector while deciding the issue has taken a completely new ground D which was not the subject matter of the show cause notice. The Id. Counsel argued that it was Wrong for the collector to club the clearances of the two units namely M/s. Auto rubber Industries even according to the show cause notice, the premises 29 and 29A were two different premises and the Collector in order-in-original also says that the two premises are separate. If that be so no evidence has been brought on record to show as to why clearances of these two separate units should be clubbed together.

4. It was argued by the appellants that the Collector has contended that manufacturing activities have been conducted in the same premises namely door No. 29 A and hence the clearances effected by or on behalf of one or more manufacturers from door No. 29 A should be clubbed to compute the value of clearances effected under Notification No. 83/83 from door No. 29A. The Id. Counsel submitted that the Id. Collector proceeded to argue that the clearances effected from door No. 29A on behalf of M/s. Auto Rubber Industries as well as the

clearances alleged to have been effected on behalf of M/s. Auto Industries should be clubbed together for the purpose of Notification No. 83/83. It was argued that the above line of argument was not mentioned in the show cause notice and hence there is denial of natural justice to the appellant.

5. It was also argued that in case the Collector found that clearances were effected from door No. 29A, then he should have proceeded against M/s. Auto Rubber Industries who were the owners of the premises at door No. 29A after 1-1-1984 and not against the appellants. It was also argued by the appellants that a new firm in the name and style of M/s.

Auto Industries (with 2 partners) came into existence w.e.f. 1-1-1984 at door No. 29 and new machines were purchased by them, that no evidence has been brought on record that the appellant has interest in door No. 29A and that the activities are carried out by the appellants at door No. 29A which does not belong to them. It was also argued that sometimes tread rubber was sent by the appellants for further processing to M/s. Auto Rubber Industries but even after this further processing the goods remained tread rubber and hence no process of manufacture was involved as per Section 2(f) of the Central Excises and Salt Act, 1944, case law contained in report 1977 (1) E.L.T. (J199) (SC), 1978 (2) E.L.T. (J336) (SC) was cited and relied upon by the appellants.

6. On the question of valuation, the Id. Counsel submitted that the Collector was wrong in ordering inclusion of packing cost for all clearances including clearances in respect of goods used captively is involved. That duty has not been correctly computed as the sale price ...[sic] have not been treated as cum-duty price; that Rule 9(2) cannot be invoked as the goods were removed with the consent and knowledge of Deptt.

7. The Id. Counsel summing up his arguments on various points as pleaded above, submitted that the Collector's findings are erroneous in law and therefore, prayed that the order may be set aside and consequential relief may be granted.

8. On the question of invoking longer period under the proviso of Section 11A of the Central Excises and Salt Act, 1944, the Id. Counsel submitted that whatever

stand is taken about the premises, longer period cannot be invoked in as much as all their affairs namely manufacture of tread rubber by the appellant, dissolution of partnership, surrendering of licence of M/s. Auto Industries, application and sanction of new licence for M/s. Auto Rubber Industries were known to the Department and, therefore, there is no question of any suppression, mis-statement or contravention of any rule with the intention to evade payment of duty; that the Department has not brought on record any evidence to show that any information was suppressed or anything was held back or hidden from the Department by the appellant and, therefore, the demand is simply time barred.

9. Sh. Sharad Bhansali, the Id. SDR appearing for the Respondent submitted that M/s. Auto Industries with three partners before its dissolution were utilising premises No. 29 and 29A; that retreading service unit was demarcated in premises 29 and tread rubber unit was demarcated in premises 29A; that a licence was granted to M/s. Auto Industries in October, 1983 when presumably they were likely to exceeding clearance of goods valued at Rs. 6.00 lakhs; that within two months there was dissolution of partnership, surrender of licence by M/s. Auto Industries with 3 partners and creation of proprietorship concern in the name and style of M/s. Auto Rubber Industries by one of the erstwhile partners of M/s. Auto Industries; that all these operations were not done innocently but they were undertaken in a very planned manner with the conscious knowledge of the partners and deliberate intention that they '.. were likely to exceed the exemption limit of Rs. 7.5 lakhs during the year 1983-84. Therefore, the Id. SDR submitted that the intention of the appellant was very clear in as much as the partnership was dissolved with the intention to evade payment of Central Excise duty; that this deliberate attempt clearly attract proviso to Section 11A and therefore, the extended period has rightly been invoked.

10. On merits the Id. SDR submitted that though Sh. Dhandapani created a new firm from 1-1-1984 in the name and style as M/s. Auto Rubber Industries as he get rubber mixing mill, rubber extruder and calendering machine as his share from the dissolution of the partnership in M/s. Auto Industries, but actual manufacturing in the factory started only from April 1984 and we are concerned with the value of clearances for the year 1983-84. Therefore the role of M/s.

Auto Rubber Industries is not very important. The Id. SDR submitted that the basic issue for decision before the Tribunal is whether the value of clearances effected by M/s. Auto Industries (with 3 partners) for the period 1-4-1983 to 31-12-1983 can be clubbed with the value of clearances by M/s. Auto Industries (with 2 partners) for the period 1-1-1984 to 31-3-1984. On this aspect the Id. SDR submitted that the Collector had examined the proviso of Notification No. 83/83 and passed a well reasoned ruling that the clearances can be clubbed together as the manufacture upto 31-12-1983 and from 1-1-1984 to 31-3-1984 was in the same factory at premises No. 29A, where the tread rubber unit was located.

11. On the point of the inclusion of cost of packing material in the assessable value, the Id. SDR submitted that cost of packing in the instant case was the cost of ordinary non-returnable packing and hence it was rightly included in the assessable value. On the question that goods captively consumed no packing was resorted to and hence in respect of these goods the cost of packing should have been abated, the Id. SDR submitted that as the price to independent wholesale buyers was available, there was no question of finding a different value for the same goods if captively consumed; that after this change also M/s. Auto Industries was sending rubber compound to premises No. 29A which was now occupied by M/s. Auto Rubber Industries.

12. Heard the submissions of both sides. On careful consideration, we observe that there are three issues involved in the case for determination. The issue No. 1 is whether the clearance made by M/s.

Auto Industries at premises No. 29 and 29 A run by three partners from 1-4-1983 to 31-12-1983 should be clubbed with clearances effected by M/s. Auto Industries with two partners at premises No. 29 from 1-1-1984 to 31-3-1984.

13. The issue No. 2 is determination of having regard to cost of packing in respect of the same goods being partly captively consumed and whether the sale price should be treated as the cum duty price.

15. On the first issue whether the clearance should be clubbed, we find that the entire period from 1-4-1983 to 31-3-1984 can be divided into two parts. The first

part will start from 1-4-1983 and end on 31-12-1983, when there were three partners in M/s. Auto Industries and they were operating in premises 29 and 29A. The second period shall be from 1-4-1983 to 31-4-1984 when M/s. Auto Industries had two partners and was working at premises No. 29. For examining the issue let us reproduce the Notification which reads as : "in exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 and in suppression of the Notification of the Government of India under the Ministry of Finance (Department of Revenue) 80/80-Central Excise, dt. 19-6-1980 the Central Government hereby exempts the excisable goods of the description specified in Column (k) of the table hereto annexed (hereinafter referred to as the specified goods) and falling in such Item No. of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) as is specified in the corresponding entry in Col. (2) of the said table and cleared for home consumption on or after 1st day of April in any financial year by or on behalf of the manufacturer from one or more factories :- (a) In the case of first clearance of the specified goods upto the aggregate value not exceeding Rs. 7.5 lakhs from the whole of duty of excise leviable therein under Section 3 of the said Act.

Provided that the aggregate value of the clearance of specified goods from any factory by or on behalf of one or more manufacturers in any financial year shall not exceed Rs. 7.5 lakhs and 17.05 lakhs respectively in terms of Clauses (a) and (b) of this para.

16. We observe that the proviso to Clauses (a) and (b) of the Notn.

stipulates the conditions to enjoy exemption that the aggregate value of clearances of the specified goods from any factory by or on behalf of one or more manufacturers in any financial year shall not exceed Rs. 7.5 lakhs. The Collector has rendered a finding that even before bifurcation that is when there were three partners in the firm and after bifurcation when there were only two partners in the firm and one partner had been given premises at door No. 29A, the manufacture of tread rubber continued for the entire period from 1-4-1983 to 31-3-1984 at premises at door No. 29A and hence the clearances should be clubbed.

Examining this finding of the Collector in the light of the evidence and arguments of both sides we observe that though premises at door No.29A were given to M/s. Auto Rubber Industries from 1-1-1984, however actual manufacturing for M/s. Auto Rubber Industries started only in April 1984 and hence the factory premises at door No. 29A continued to be used by M/s. Auto Industries (with 2 partners) for the period 1-1-1984 to 31-3-1984. The important point here will be whether the premises can be equated with a factory as clubbing under provisos (a) and (b) of Notification No. 83/83 will be permissible only if the factory is the same. Now examining the peculiar position in the instant case, we find that premises demarcated for tread rubber unit were at door No. 29A, this premises according to partnership dissolution deed were given to M/s. Auto Rubber Industries w.e.f. 1-1-1984; actual manufacture of tread rubber by M/s. Auto Rubber Industries started only from April 1984, machines for mixing, extruding and calendering were installed in premises 29A. Hence we are of the firm view that premises 29A was the factory and even after 1-1-1984 M/s. Auto Industries utilized these machines fitted in the factory in the premises at door No. 29A even during the period 1-1-1984 to 31-3-1984 in view of the peculiar circumstances of the case in as much as no production was recorded by M/s. Auto Rubber Industries during the period 1-1-1984 to 31-3-1984. We, therefore, agree with the findings of the Id. Collector on this issue.

17. It is thus very clear from the above facts which are not controverted by the appellants, that the goods were being manufactured from the same factory premises, first by M/s. Auto Industries with three partners from 1-4-1983 to 31-12-1983 and subsequently from the same factory by M/s. Auto Industries with two partners from 1-1-1984 to 31-3-1984. We, therefore, held that the clearances effected by M/s.

Auto Industries with three partners from 1-4-1983 to 31-12-1983 and again by M/s. Auto Industries with two partners from 1-1-1984 to 31-3-1984 have rightly been clubbed for purpose of levy of duty read with exemption under Notification No. 83/83.

18. Coming to the second issue whether the demand was time barred, we find that though the premises in the factory remained the same, however, dissolution of the partnership with three partners was done with a view to evade payment of duty. This intention becomes clear in as much as M/s. Auto Industries with three partners had applied for a licence in the month of October, 1983 and surrendered the same in the month of December 1983. They dissolved partnership, surrendered the licence obtained earlier. Though family circumstances have been adduced as a ground for dissolution of the partnership, this ground is not convincing. The convincing ground appears to be an intention of evading payment of duty. This is to be read with the additional facts that though M/s. Auto Rubber Industries were created on 1-1-1984, no manufacture was recorded by this new unit during the period 1-1-1984 to 31-3-1984. Having regard to these facts and special circumstances of the case we hold that the rules have been contravened and the contravention was with the intention to evade payment of duty and, therefore proviso to Section 11A of Central Excises and Salt Act, 1944 has rightly been invoked and is accordingly held.¹⁹ The third issue is about elements of costs to be excluded from the sale value of the goods for the determination of the assessable value.

The first contention of the appellant was that the sale price should be treated as cum-duty price on the ground that they had not collected anything over and above the sale price from the customers. For the purpose of determination of the assessable value Section 4 of the Central Excises and Salt Act, 1944 is relevant. Let us have a look at the Section. Under Section 4(4)(d)(ii) it has been provided that, "value in relation to any excisable goods does not include the amount of duty of excise, sales tax and other taxes, if any, payable on such goods, and, subject to such rules as may be made, the trade discount (such discount not being leviable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale." Thus it would be seen that assessable value does not include the amount of duty of excise. In the instant case, the goods were cleared as exempted goods, no duty was being collected and paid therefore there is no question of deduction of Central Excise duty from the sale value declared by the appellants. In this view of the matter we do not find any infirmity in the order of the Collector in

this regard.

20. Another contention vehemently put forward by the appellant was that Rule 9(2) cannot be invoked in as much as the goods were manufactured and cleared under the bonafide impression that they were exempted goods and the clearances were effected with the knowledge of the department but not clandestinely. For this contention they have cited and relied upon the ratio of the decision of the Hon'ble Supreme Court in the case of the Elphinstone Spinning and Weaving Mills Co. Ltd., reported in 1978 (2) E.L.T. Q399). A lot of emphasis was laid that it was the bonafide belief of the appellant that the goods were exempted. However, we find that we have already examined the evidence on record in this regard and have come to the conclusion that the licence was surrendered only with a view to evade payment of duty and, therefore, the appellant cannot claim innocence that there was a bonafide belief that the goods were exempted. We therefore, hold that the goods were removed without payment of duty deliberately with the intention to evade payment of duty and, therefore, the provision of Rule 9(2) shall be applicable in the instant case. Other cases were also cited and relied upon by the appellant in support of their contention that there was no clandestine removal. Clandestine removal is based on provision of Rule 9(2) which lays down that, "If any excisable goods are, in contravention of Sub-rule (1), deposited in or removed from, any place specified therein, the producer or manufacturer demand made within the period specified in Section 11A of the Act by the proper officer, whether such demand is delivered personally to him or is left at his dwelling house and shall also be liable to penalty which may extend to Rs. 2,000/- and such goods shall be liable to confiscation." 21. Examining the facts and evidence on record in the light of the above provisions, we find that no duty was paid on the goods removed.

The question of bona fide belief does not arise as we have already held that the entire operation was manipulated with a view to evade payment of duty and, therefore, the Collector has correctly confirmed the demand for duty under Rule 9(2) of the Central Excise Rules, 1944.

22. In view of the above findings, the impugned order is upheld and the appeal is rejected.

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