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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-22-1995

Reported in : (1995)LC72Tri(Delhi)

Appellant : C.C.E. and Customs

Respondent : Agarshakti Paper Mills (P) Ltd.

Judgement :

1. The respondents herein who are engaged in the manufacture of paper and Paper Boards falling under Tariff Item 17 of the Schedule to the erstwhile Central Excise Tariff, availed the benefit of exemption under Notification No. 128/77, dated 18-6-1977 at the rate of 75% of the duty leviable, declaring their installed capacity as not exceeding 2000 MT per year. The Classification lists claiming this exemption were duly approved by the Proper Officer. The Range Superintendent found that the unit had produced 165.389 MT during February, 1981 for the year 1980-81. Similarly, it was found that the unit had produced 180.126 Mt.

during August 1981 for the year 1981-82 and 281.651 MT during August 1982 for the year 1982-83. Calculating the installed capacity on the basis of the above production, it was found that the production had exceeded 2000 MT per annum and hence a show cause notice for recovery of differential duty of Rs. 13,75,764.67 P. covering a period August 1982 to March 1983 was issued on 16-9-1983. The demand was confirmed by the Assistant Collector holding as follow :-
"I however find that during the year 1980-81, the maximum production of M/s. Agarshakti Paper Mills Pvt. Ltd. Vapi was 165.389 MT during February 1981.

Similarly there was a maximum production of 180.126 MT during August 1981 i.e. during 1981-82 and 281.615 MT during August 1982 i.e. 1982-83. I further find that the production of paper during the following months was as under :- M.T. Considering the figures of actual production of various months as stated above, it reveals that the production capacity of M/s.

Agarshakti Paper Mills was more than 2000 MT per annum. The production capacity of the unit cannot be less than the installed capacity. Thus, it is evident that the installed capacity of the unit was more than 2000 MT per annum. M/s. Agarshakti Paper mills Pvt. Ltd. are therefore, entitled to avail exemption as per Sl. No. 2 of the Table appended to Notification No. 126/77, dated 18-6-1977 as amended i.e. sixty percent of the duty leviable. M/s Agarshakti Paper Mills have therefore wrongly availed the exemption as per Sl No. 1 of the Table appended to the aforesaid Notification." 2. The lower Appellate Authority however, held that the installed capacity cannot be determined on the basis of working capacity relying upon the decision of the Tribunal in the case of Aurangabad Paper Mills v. C.C.E., Bombay 1984 (17) E.L.T. 554 and upon the Registration Certificate dated 25-5-1979 issued by the DGTD certifying the annual installed capacity of their Mill as 1800 MT and copy of the Certificate from M/s. Ruby Machinery & Consultants, suppliers of plant and machinery, certifying that the factory was designed for a total capacity of 6TN per day i.e. 1800 MT per annum based on 300 working days. He therefore, held that the "order of the Assistant Collector that the production capacity of the appellants unit was more than 2000 MT per annum based on maximum production during any month or months during 1981-82 and 1982-83 is not sustainable. The Assistant Collector has proceeded on a theoretical calculation based on certain assumptions and surmises ignoring the installed capacity as registered with DGTD as well as the machinery manufacturer's certificate, without giving any cogent reasons for the same." He also held that the demand was barred by limitation in terms of Section 11A as no allegation of fraud, collusion or mis-statement or suppression of facts was made out in the show cause notice. Hence this appeal by the Revenue.

3. We have heard Shri Sharad Bhansali, learned SDR and S/Shri Rajiv Tyagi and U.A. Rane, learned Advocates. Notification No. 128/77, dated 18-6-1977 as

amended exempts paper other than Paper Board, Cigarette tissues, glassine Paper, grease-proof paper, Coated paper etc.

manufactured and cleared from a Paper Mill of the type described in the Table below, from so much of the duty of excise leviable thereon as is specified in the corresponding entry in Column (3) of the said table.--Sl. Description of the Paper Mill Extent of ex-No. emption--1. Paper Mill whose annual installed Seventy five per- capacity in respect of all varieties of cent of the duty paper and paper boards does not exceed leviable 2000 tonnes2. Paper Mill whose annual installed Sixty percent of capacity in respect of all varieties of the duty leviable paper and paper boards exceeds 20003. Paper Mill whose annual installed Fifty percent of capacity in respect of all varieties of the duty levi- paper and paper boards exceeds 5000 able.

The expression 'Annual installed capacity' has not been defined in the Central Excises and Salt Act or the Central Excise Rules. Further the Notification does not also spell out as to how the annual installed capacity is to be arrived at. The respondents have referred to Circular No. 8/84, dated 30-1-1984 issued by the All India Small Paper Mills Organisation which referred to the clarification issued by the Central Excise Department in 1979 which reads as follows : "The installed capacity of a mill is the capacity of production of the equipment installed in the mill. Normally it should be taken as equivalent to the capacity recognised by Govt. by way of industrial licence or registration. The actual production may however, be lower or higher than the installed capacity. The Directorate General of Technical Development would be able to certify the installed capacity of the paper mill particularly in cases where there is any doubt, if there is any difficulty with regard to any individual unit a reference could be made to DGTD'.

Further the Central Board of Excise & Customs clarified in their letter F. No. 61/50/80-CX.II, dated 17-2-1981 addressed to the Collector of Central Excise, Chandigarh (copy endorsed to the All India Small Paper Mills Association) where it was suggested that exemption under the Notification may be given on the basis of installed capacity as recorded by the Government department concerned and not to take the actual production as the installed capacity in case production was higher than the installed capacity.

4. The learned DR has not been able to substantiate his contention that production capacity is to be equated to installed capacity. Further we find that in the case of Aurangabad Paper Mills (supra), the Government has clarified that a mill has two capacities viz. installed or rated capacity and working capacity and that the installed capacity of a machine cannot be equated to the working capacity, and that the installed capacity is normally the designed capacity of the machinery installed by production on a sustained basis.

5. In these circumstances, we see no reason to interfere with the finding of the lower Appellate Authority that the order of the Assistant Collector that production capacity of the respondents unit was more than 2000 MT per year based on maximum production during any particular month or months is not sustainable. Accordingly, we uphold the impugned order and reject the appeal of the revenue.