

Susumo Engineering Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-21-1995

Reported in : (1995)(78)ELT617TriDel

Appellant : Susumo Engineering

Respondent : Collector of Central Excise

Judgement :

1. This appeal arises out of and is directed against the Order-in-Original No. 34/1993, dated 27-9-1993 passed by the Collector of Central Excise, Nagpur.

2. It was charged that appellants have manufactured and cleared 'Dumpers' falling under sub-heading No. 8704.00 of Central Excise Tariff Act, 1985 without holding a Central Excise Licence and without payment of duty. The origin for booking the case against the appellants is that on 15-1-1992 a dumper bearing brand name Susumo was intercepted by the Preventive Officers, Central Excise Department, Bombay while conducting the transit check and found that dumper cleared without gate pass and without payment of duty belonged to the appellants. Accordingly, the concerned Central Excise Officers were informed about the manufacture of dumpers at Nagpur by the appellants M/s. Susumo Engineering, Nagpur.

On investigation, it was found that 3 dumpers were manufactured and cleared by the appellants without taking a Central Excise licence, without following the Central Excise Procedure and without payment of duty. Show cause notice was issued demanding the duty on 3 dumpers and also proposed for penalty for

contravening the provisions of Central Excise Rules. Reply was duly filed denying the liability on the ground that item manufactured was forklift and not dumper and there was no contravention of provisions of Excise Law since items were delivered through Delivery Challans and declaration was also filed. The Collector who adjudicated the proceedings after considering the reply, submissions and evidence placed on record negated the contentions of the appellants in arriving at the conclusion that the product Susumo Dumper Mahabali 1300 is a light dumper and is correctly classifiable under subheading 8704.00.

3. Shri M.H. Patil, learned Advocate, appearing for the appellants submitted that appellant's unit is a proprietary concern and appellant started assembly of work truck around January. 1991 out of bought out items in a small scale in the garage adjacent to his house with small investment capital as self employed entrepreneur being a qualified Mechanical Engineer. The activity of assembly of Works truck done by the appellant cannot be considered as manufacturing activity nor item can be considered as a motor vehicle since motor vehicles, be they public transport type or vehicles for movement of goods, are manufactured in large scale Industrial Units with investment of hundreds of crores of rupees, as it was observed in the case of Darshan Singh Pavitar Singh and Ors. v. Union of India and Ors. (1988 (34) E.L.T. 63 (P & H) and same was confirmed by the Division Bench as reported in 1990 (47) E.L.T. 532, DB (P&H). He submitted that main point to be considered in this case is whether item in question is to be classified under Heading 87.04 as held by the Department or under Heading 87.09 as claimed by the party or alternatively under Heading 84.27. The relevant tariff entries are as under :-"87.04 8704.00 Motor vehicles for the transport of goods. 87.09 8709.00 Works trucks, self-propelled, not fitted with lifting or handling 84.27 8427.00 Fork-lift trucks; other works trucks fitted with lifting or handling equipment." He said that it is true that item was named as 'Dumper' by the appellant and invoiced as such but mere calling dumper item cannot be classified as dumper since nature, construction, characteristics and end-use of the product are relevant to determine the classification of the product with reference to the Tariff Entry. Referring to the Explanation in H.S.N. with reference to Heading 87.09, he said that these items have to be considered as works trucks since the heading covers self-propelled vehicles used in limited areas and the items in question are fit only for use at site

and not fit to be taken on public road. In fact, at the time of interception goods were being carried in a tempo and that itself indicates that these items cannot be used on highway but limited for carrying goods at short distance indoor whereas Dumper can be used for carrying goods for long distance on the highway and off the highway. He said that Heading 84.27 covers works truck fitted with handling or lifting equipment and H.S.N. clarifies that lifting device fitted with either of fork or bucket and, accordingly it may be classified under 84.27. It is classifiable under Heading 84.27 since lifting device is attached with bucket and if it is held that bucket does not perform the handling function, then the item would fall under Heading 87.09 but not under Heading 87.04. He said that item cannot be used as motor vehicle for transport of goods on highway and even off the highway as item is being used for handling material with bucket to carry material inside factory, warehouse etc. The item is not dumper but works truck having a speed level of minimum 4 K.M. ph. and maximum of 13.5 K.M. ph. He said that Dumper is a self-propelled off the highway equipment having an open cargo body, designed to haul and dump material and loading is done by means of external of the dumper.

The dumpers being referred to under Heading 87.04 are the items which carry the material behind the back of driver and dump material rear side whereas item in question is just a works truck fitted with handling equipment in front of the Driver and front end loaders are not capable of being used as machines of transportation except for a short distance and is not classifiable as such under 87.04. He contended that these are not dumpers and mere fact that H.S.N. differentiates heavy dumpers and light dumpers, these cannot be classified as light dumpers and taking into consideration of the construction, function and end-use of the product, it is just a works truck fitted with handling equipment and, accordingly, classifiable under sub-heading 8427.00 or under 87.09. He said that Collector erred in relying upon the Notification for deciding the issue of classification and it is settled that notification cannot be used as a weapon in classifying the item. He stated that certificates were given by the Traders/Users that works trucks like Susumo Mahabali 1300 are used to handle and shift materials for short distance inside sites like forklifts and they are totally different from dumpers and these certificates were not considered by the Authority in classifying the item. He said that much was made out on advertisement in determining the classification but

advertisement is only an invitation to attract customers and same cannot be used in deciding the issue of classification. In support of his contentions that classification of goods has to be determined with reference to the wordings of headings, functional character/end-use is relevant in determining the classification, specific heading to be preferred to general heading, catalogue, advertisement and literature cannot be the sole basis for classification and with reference to other issues, he cited a series of judgments and filed a compilation of judgments in respect of each and every proposition. He also contended that demand was barred by time since declaration was filed by the appellant on 5-2-1992 since the show cause notice was issued on 21-2-1992 for the period March, 1991 to August 1991.

4. While countering the arguments it was submitted by Shri Somesh Arora, learned JDR that demand was not barred by time as no classification list was filed nor having taken licence and there was no evidence placed on record for having filed declaration as it was observed by the Collector in his impugned order. On merits, he said that appellants themselves called the product as Dumper and in fact it is a dumper in view of the construction and further this is substantiated as the product is described as dumper in the catalogue which is the best trade evidence in determining the classification. He said that catalogue is not an advertisement but a technical literature in respect of the product manufactured by them and in the catalogue it is mentioned that "Susumo Dumper Mahabali 1300 is gravity type 1.3 tons dumper can work on rough road, on construction site and mine. Use it at foundries, Sugar Factory, Mineral Factory, General Engineering Industries, etc. Its bucket when unlocked tips effortlessly by gravity.

It moves where truck cannot move. The pamphlet also shows that it is ruggedly built to tackle bulk material handling task at construction site like tunnels, canals, bridges and buildings, etc." Referring to the Explanatory Notes in H.S.N. under three headings, to classify under Heading 87.09 it should not be fitted with lifting or handling equipment and must be used in specified areas therein but in the instant case item in question is fitted with shape of bucket and can be used at construction site and mines and, accordingly, Heading 87.09 is ruled out. Similarly to classify under Heading 84.27, item should have an elevating carriage sliding on

a vertical mast and lifting device should be powered by motor power and these features are absent in the impugned goods. Hence, 84.07 is the appropriate entry which covers dumpers and Explanatory Notes in H.S.N. clarify that these dumpers can generally be distinguished from other vehicles for the transport of goods in particular tipping lorries. He contended that in view of the nature and construction of the goods and items sold as dumpers, these are classifiable under 84.07. He also referred to the decision of the High Court of Delhi in the case of Hindustan Motors Ltd. v. Union of India and Ors. - 1980 (6) E.L.T. 423 Del. as well as the decision of the Tribunal in the case of Collector of Central Excise, Bangalore v. Bharat Earth Movers Ltd., Bangalore - 1986 (23) E.L.T. 260 (T) wherein it was held that dumpers were classifiable as Motor Vehicles under Item 34 of erstwhile Central Excise Tariff. He said that notification was referred to but not relied upon in deciding the issue of classification and item was classified with reference to the description in the tariff entry.

5. We have considered the submissions made by both sides with reference to the facts and perused the records. We find from the records that appellant got various parts, components manufactured or fabricated from other manufacturers and the same were assembled in the garage/factory cum-residence. It was contended that no welding or fabrication job was done in the unit and various parts required for item in question are either purchased from open market or got manufactured/fabricated from various Fabricators. Bought out items used in the assembly of item are tyres, gear box, differential break assembly, clutch assembly etc. The fabricated parts are chassis and bucket. On going through the facts, we are not convinced with the arguments advanced on behalf of the appellants that activity carried on by him in assembly of vehicle in question does not amount to manufacture. The case law cited by him in the case of Darsahan Singh Pavitar Singh (supra) is not applicable to the facts of this case as the issue was dealt with therein whether building of bodies for buses and trucks on chassis supplied by customers amounted to manufacture of Motor Vehicles. Hence point to be considered in this case is whether item is to be classified as Motor Vehicle under Heading 87.04 as per Department or works trucks under 87.09 or alternatively as other works trucks fitted with lifting or handling equipment under 84.27 as claimed by the party. Dumpers, as such,, are not mentioned in any of the items either

under Chapter 84 or under Chapter 87 in the Central Excise Tariff. But we find item Dumpers in H.S.N. under Heading 87.04 Motor Vehicles for the transport of goods and 8704.10 specified that Dumpers designed for off-highway use and further the Heading also covers (1) Dumpers, sturdily built vehicles with a tipping or bottom opening body, designed for the transport of excavated or other materials. These vehicles, which may have a rigid or articulated chassis, are generally fitted with off-the-road wheels and can work over soft ground. Both heavy and light dumpers are included in this group; the latter are sometimes characterised by a two way seat, two seats facing in opposite directions or by two steering wheels, to enable the vehicles to be steered with the driver facing the body for unloading. It was argued on behalf of the appellants that item cannot be identified with the name of the product and mere calling item Dumper it cannot become Dumper and burden lies on the Department to prove classification depending on nature, construction and end-use of the product. Although burden lies on the Department to prove classification since the appellants themselves have named the product as dumpers and invoiced as such, the burden shifts on them to prove that items are not dumpers but otherwise. Shri M. H. Patil strenuously argued that these are not dumpers but only works trucks which can be manufactured without any plant and machinery of the type used by Motor Vehicle manufactured without any Plant and machinery of the type used by Motor Vehicles Manufacturers like Premier, Telco etc. and for manufacture of dumpers referred to in Heading 87.04 it should be compulsorily registered for manufacturing activity under the provisions of I (D & R) Act, 1951 and those provisions are not applicable to the manufacture of the item (Works truck) manufactured by the appellants. He attempted to place photographs of dumpers manufactured by others, photographs of works truck/forklift, technical literature and some documents to substantiate his claim that item manufactured by the appellant was not a Dumper. But they were neither looked into nor taken them on record in view of the serious objections raised by the Departmental Representative that those were not supplied to him in advance and neither they were filed before the original Authority nor filed an application under Rule 23 of CEGAT (Procedure) Rules to be taken them on record. Accordingly, learned counsel for the appellant has chosen to address the arguments urging that material available on record itself is sufficient to hold that

item in question was not a dumper. He said that decisions referred to by the learned Departmental Representative in the case of Hindustan Motors Ltd., as well as Bhamt Earth Movers Ltd., are not applicable to the facts of this case as they were dealt with reference to old tariff and that too in respect of rear dumpers and not with reference to the item in question. The dumpers being referred to under Heading 87.04 are the vehicles which carry the material behind the back of the driver and dump material rear side or trailing edge of the vehicles. The item in question is fitted with lifting device or bucket in front of driver and same cannot be said to be a rear dumper or dumper. Statute clearly differentiates transport into two categories, transport under 87.04 and short distance transport under 87.09 and in view of the use of the item in limited places like factory and warehouses, it is covered under Heading 87.09 and in view of handling function of the bucket it can be classified under Heading 84.27 but not under 87.04. Shri Patil submitted that the appellants have manufactured either forklift or works trucks fitted with lifting device/handling equipment/bucket as per orders of the customers and photographs were placed before the Adjudicating Authority explaining different models or modified form of Forklifts or works trucks attached with buckets were manufactured by the appellants but instead of appreciating the factual position it was misinterpreted and Collector gave a finding that he was misled by the appellant. We find that Collector has observed in his order that appellant has produced forklift subsequent to the issue of show cause notice and produced a photograph to confuse the Adjudicating Authority or even the Appellate Authority in future by showing the photograph of the product which is not under dispute. He should have given a clear finding how the impugned product was different from the product produced subsequent to the issue of show cause notice to treat the item in question as Dumper classifying as Motor Vehicle under Heading 87.04.

It seems Collector classified the item as light dumper based on the pamphlet published by the appellants and in view of the H.S.N. Notes that Heading 87.04 includes heavy and light dumpers. The catalogue and H.S.N. Notes are only of persuasive nature and they themselves are not decisive factors in our view. Item should be classified not by mere name but it should be classified according to nature, construction, characteristics and end-use of the product with reference to the specific headings in the tariff. We find that this issue requires further

examination with reference to the construction, characteristics and actual use of the vehicle and, accordingly, the matter will have to go back for re-examination. The appellants may make use of this opportunity in adducing additional evidence, if any, in support of their contention and to raise issues such as time barring and other issues during the course of readjudication. Thus, the matter is remanded to the concerned Collector for readjudication and to pass an appropriate order in accordance with law after providing an opportunity to the appellants.

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