

Super Engineering Co. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-17-1995

Reported in : (1996)(82)ELT539TriDel

Appellant : Super Engineering Co.

Respondent : Collector of Central Excise

Judgement :

1. In all these appeals, common questions of law and facts arises, hence they are taken up together for disposal as per law. By common order-in-original dated 28-8-1990, the Collector of Central Excise, Rajkot passed a common order in respect of M/s. Super Engg. Co., Shri Kahan Traders, M/s. Mehta Engineering Works, M/s. Mehta Brothers and M/s. Mehta Industries (i) confirming the duty demand of Rs. 16,85,247.30 against M/s. Super Engineering Co. for heavy manufacture of brass scrap/laddi etc. weighing 510.681 MTs said to have been manufactured and removed clandestinely during the period 3-12-1980 to 16-8-1987 in terms of Rule 9(2) read with proviso to Sub-section (1) of Section 11A of the Central Excises & Salt Act, 1944.

(ii) Confirmed a demand of Rs. 8,28,468.30 against M/s. Mehta Industries in respect of brass scrap/laddi etc. weighing 251.051 Mts. manufactured and said to have been removed clandestinely during 1-1-1985 to 21-1-1987 by M/s. Mehta Industries/Mehta Moulding Works, the latter having clearly admitted to be only a division of M/s.

Mehta Industries, in terms of Rule 9(2) read with proviso to Sub-section (1) of Section 11A of the Central Excises & Salt Act, 1944.

(iii) Confirmed a demand of Rs. 6,58,637.40 against M/s. Mehta Engineering Works in respect of same goods weighing 199.67 MTs manufactured and said to have been cleared clandestinely during the period 14-12-1984 to 29-4-1987 under the said Rule and Section of the said Act.

(iv) Confirmed a demand of Rs. 7,00,814.40 against M/s. Shri Kahan Traders in respect of the same goods weighing 212.368 MTs manufactured and removed clandestinely during 4-4-1985 to 24-8-1987 under the said Rules and Section of the Act.

(v) Confirmed a demand of Rs. 1,08,916.50 against M/s. Mehta Brothers in respect of the same goods weighing 33.005 MTs said to have been manufactured and removed clandestinely during the period 19-10-1985 to 2-12-1985 under the said Rules and Section of the Act.

The Id. Collector has also imposed penalty under Rule 173Q(1) of Central Excise Rules, 1944 in the following manner : Name of the party Penalty (i) M/s. Super Engineering Co.

Rs. 3,00,000 (ii) M/s. Mehta Industries Rs. 1,50,000 (iii) M/s. Mehta Engineering Works Rs. 1,00,000 (iv) M/s. Shri Kahan Traders Rs. 1,00,000 (v) M/s. Mehta Brothers Rs. 15,000 The Id. Collector did not impose any penalty on M/s. Mehta Moulding Works which is, as indicated above, admitted to be a Division of M/s.

Mehta Industries and from whom the duty has been demanded.

2. The Collector of Central Excise, Ahmedabad by his order dated 25-9-1990 has confirmed a duty demand of Rs. 12,38,727.60 under Rule 9(2) read with Section 11A of the Central Excises & Salt Act, 1944. On the allegation that the appellants had manufactured brass scrap without obtaining licence and removed the same clandestinely. He has also imposed a penalty of Rs. 10,00,000/- on M/s. Arat Electro Chemicals Pvt. Ltd. under Section 173Q of Central Excise Rules, 1944 and penalty of Rs. 5,00,000/- on Shri Chandrakant J. Shah of M/s. Arat Electro

Chemicals under Rule 209A of Central Excise Rules, 1944. The facts of the case in both the orders in which the facts appeared to be common are that the 'brass dross/ash' on importation into India was assessed to Customs Duty under Chapter 26 (Heading 26.02/04) of the Customs Tariff Act, 1975, on which no additional duty under the Customs Tariff Act, has been paid by the importers with reference to Central Excise duty leviable under Tariff Item 26A of Central Excise Tariff as it existed prior to 28-2-1986, or thereafter under Chapter 74 of the Central Excise Tariff Act, 1985, as the case may be.

2.1 The importers/traders of 'brass dross/ash' either sold the said material as such, or after subjecting the said material to certain "processing", to traders/actual users/buyers by describing/invoicing as 'Brass dross, refined dross, B.D. Scrap, Pittal Bhangar' etc.

2.2 Such "processed" material viz. refined dross B.D. Scrap, Dross, Pittal Bhangar etc. appear to be of non-duty paid character.

2.3 The Supdt, Central Excise (Preventive) (hereinafter referred to as 'the Central Excise Officers) during enquiry relating to such material, conducted search of premises of the importer/trader, of 'Brass dross/ash' on 31-10-1987 and took possession of records of traders.

2.4 They also conducted search of premises (godown), of the appellant and visited the premises of M/s. Mehta Moulding Works, Jamnagar. It was stated that there is a foundry capable of melting brass and brass scrap as well as other metals, etc. and work of casting (thereof) was in progress. The department officials likewise visited the office premises of traders and statement of various persons were recorded. Shri Kishorbhai Motilal Mehta, Maheshbhai Dolatrai Mehta, Pushpaben Dolatrai Mehta and Jayeshbhai Dolatrai mehta partners of M/s. Mehta Industries inter alia stated that their company was established in 1967 and they were engaged in manufacture and sale of brass parts in addition to sale and purchase of Pittal Bhangar (Brass scrap); that, since last six to seven years, they were importing foreign brass-scrap /brass dross and using (such material) in their business (production) activities; that, in their factory, out of cast (brass) rods, they manufacture and sell brass parts that, the sales of dross to other firms were

handled by his partner Shri Jayeshbhai; that their business records are maintained and kept at M/s. Super Engineering Co. that, the production activities of their company is divided in two parts one of which undertakes casting work and the other attending to production of brass parts is known as M/s. Mehta Industries.

2.5 The statements of Shri Jayeshchandra Dolatrai Mehta (partner of M/s. Mehta Industries; M/s. Super Engineering Co. M/s. Mehta Brothers and administrator of M/s. Mehta Engineering Works and M/s Shri Kahan Traders, all of Jamnagar) were recorded on 29-9-1987, 22-12-1987, 22-4-1988 and 9-5-1988 inter alia they admitted that they have received brass dross/ash (imported) either in powder form or in granule form; and at times either in lumps form or in cake form, that such dross was either subjected to pulverising or manual breaking by hand and dust was removed out of it whereafter the remaining metal granules, if required, were washed by water and the cleaned material sold; that, such cleaned dross was described in bills as "Pittal Bhangar" and sold to customers (Buyers); that the price of such dross is considered at par with the current market rate of brass scrap and price was recovered as of brass scrap; that, such cleaned brass dross is sold in the open market, as also to the industrial buyers who manufacture or get manufactured, brass castings for consumption/use in their production; that during the year 1984-85 a pulveriser machine valued at Rs. 48,776/- was purchased by M/s. Mehta Industries from M/s. D.P. Pulveriser Industries, Bombay as per Bill No. 1080/84, dated 20-12-1984 and from M/s. Vishroliya Brass & Iron Works, Jamnagar; that as per Bill No. 2041/13 of Rs. 2000/- grinding mill for grinding clay was purchased; that in addition to those on 24-1-1985, as per Bill No. 21/41 of Rs. 4,000/- a grinder machine was also purchased from M/s. Panchasara Engineering, Jamnagar; that the pulverising machine was installed in a room (rented to Super Engineering Co., Jamnagar) and remaining two machines i.e. Mill and Grinder were installed in the factory of M/s. Mehta Industries and for which the additional electric connection of 25 to 30 H.P. was taken by them; that M/s. Mehta Industries has neither obtained any licence from Central Excise Department; nor filed any declaration till that date; the brass dross which was imported was brought in Plot No. B-44, and cleaned to separate brass which was sold as Tittal Bhangar' (Brass scrap) in the market; that such brass scrap was sold by them after casting; that the process of separating brass.

2.6 The statement of Shri Kiritbhai Navalchand Bavisi, partner of M/s.

Mehta Brothers, M/s. Mehta Engineering Works, and M/s. Super Engineering Co., all of Jamnagar, was recorded on 22-4-1988 wherein it is stated that other things, that Shri Jayeshchandra Dolatrai Mehta was handling the administration of all the factories and had full knowledge with reference to their books of accounts, sales and purchases, and foundry accounts; that the explanation of Shri Jayeschandra Dolatrai Mehta, according to department, is binding on them.

2.7 In terms of these statements, the department has alleged that the importers subjected such material i.e. brass dross/ash to "processing, viz. pulverising, washing, cleaning, etc. and obtained/separated/segregated (brass) metal granules/lumps, etc. (fit for melting /remelting) and such "processing" viz. pulverising, washing, cleaning, etc. appear to come within the ambit of the provisions of the Section 2(f) read with Section 3 of the Central Excises & Salt Act, 1944, as amended. It was alleged that such 'processed' material i.e. excisable goods described as 'Refined dross, B.D. Scrap, G. Dross, Pittal Bhangar, Bhangar, etc. 'merit classification as 'waste and scrap' of brass/ copper, either under erstwhile T.I. No. 26A(2) of CET, as it existed prior to 28-2-1986, or under sub-heading No. 7402.00 of the Central Excise Tariff Act, 1985 thereafter, inasmuch as the name, character, use, etc. of the above referred "processed" material appear to be distinct and different from that of the brass/ dross/ash classifiable under the erstwhile T.I. No.68 of CET or under Chapter 26 of the Central Excise Tariff Act, 1985.

It is also stated that the explanation under erstwhile T.I. 26A(2) and Chapter Note under Chapter 74 indicates that the term "Waste and Scrap" means waste and scrap metal fit only for recovery of metal by remelting or for use in the manufacture of Chemicals, but does not include [slag], dross, scalings, ash and other cuprouresidues, as the case may be. It is alleged that in the instant case the refined dross, B.D.Scrap, G. Dross, Pittal Bhangar, appeared to be known to be fit for melting/remelting. It is also alleged that the "processed" materials such as refined dross, B.D. Scrap etc. which are clearly recognisable as of non-duty paid character, were not eligible for exemption provided in erstwhile Notification No.

174/84-C.E., dated 1-8-1984 or Notification No. 149/86-C.E., dated 1-3-1986. It is made clear that the appellants appeared to have cleared without payment of duty and either sold such "processed" materials as '[Refunds] Dross, B.D. Scrap, G.Dross, Pittal Bhangar, Bhangar', or melted/remelted, such "processed" materials either exclusively or in admixture with zinc, lead, copper, etc. in foundry of M/s. Mehta Moulding Works, Jamnagar for casting rods, etc. on job work basis as well as for further use in the production of their inter-connected firms/companies.

3. The activities undertaken by them of removal of impurities from the brass dross by a manual or mechanical process does not amount to manufacture since the nature of the goods, chemical composition and physical appearance remains the same and all that happens is that extraneous impurities are cleaned by a process of washing and sieving, they also relied on the rulings rendered by the Tribunal, Hon'ble High Court and Hon'ble Supreme Court.

3.1 They also pleaded that there was a distinction between dross included in Chapter 26 and metal waste and scrap covered by Section Note 6(a) of Section XV. They have also referred to the Explanatory Note on page 210 under Heading 26.20 of the HSN. They submitted that there has been no mechanical working of metal, or scrap which consists of worn-out or broken metal articles to be excluded (Section XIV or XV). They also submitted that waste and scrap referred to only waste, which is derived from the mechanical working of metal scrap, which consisted of worn-out or broken metal articles. Therefore, it was submitted by them that washing and sieving of imported dross are not processes involving either mechanical working of metal or those which result in the generation of scrap within the meaning of the aforesaid explanatory note. Mechanical working of metal would refer to processes, such as, cutting of metal under other processes of machining and not a process of washing and sieving dross. Therefore, they submitted that the process of washing and sieving of imported dross is not a manufacturing process and does not bring into existence any item different in nature, characteristic and use. It has been tested by the Customs laboratory at the time of import and determined to be dross, remains the same even after washing and sieving.

4. Id. Collector after a careful consideration of their pleas made in their reply, as well as personal hearing rejected their contention and held that such "processes" result in bringing the extense in new product which is classifiable under the said headings relied by the department. The Id. Collector also held that the period of demand for these items from 1986 onwards. The exemption notification do not apply to these items and that larger period is invokable and duty for the said period can be confirmed against them.

5. In respect of M/s. Arat Electro Chemicals (P) Ltd., the allegations against the appellants are also same as in other cases and the findings given by the Id. Collector are also more or less the same, holding that a new product arises from such process and that the appellants had not obtained licence and therefore, they are liable to pay duty for the extended period as per the allegations made by the department in respect of show cause notice.

6. We have heard Id. Sr. Advocate Shri A.N. Haksar for the appellants M/s. Super Engineering Co. and others and Shri Udai Joshi, Id. Advocate for M/s. Arat Electro Chemicals (P) Ltd. The department was represented by Shri K.K. Jha, Id. SDR and Shri Mohan Lal, Id. JDR.7. Id. Sr. Advocate at the outset advanced arguments on the point of limitation and argued that the department had not proved their case pertaining to time bar, inasmuch as the department has not shown that the appellants had attempted to evade duty with wilful intention, by suppression of facts and mis-statement. He referred to the latest judgment of the Hon'ble Supreme Court rendered in the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay as reported in 1995 (75) E.L.T. 721 wherein Hon'ble Supreme Court has laid down that the department should allege the facts of mis-statement or suppression and intention to evade duty. He also referred to another judgment of Hon'ble Supreme Court on this point, as rendered in the case of Pushpam Pharmaceuticals Co. v. Collector of Central Excise, Bombay as reported in 1995 (78) E.L.T. 401. He also referred to an earlier judgment of the Hon'ble Supreme Court in the case of Cement Marketing Co. v. Assistant Sales Tax Commissioner as reported in AIR 1980 (SC) 346 to 348 at para 5, wherein Hon'ble Supreme Court has held that there has to be an act of deliberateness to hold the appellants to be guilty of suppression.

Sr. Advocate submitted that the appellants had not done any Act wilfully, with intention to evade duty. It is his contention that such process of pulverising and cleaning does not amount to manufacture, as it is a process of cleaning and it remains the same item which has been imported by the importers, he relied very strongly on the judgment rendered by the Hon'ble Supreme Court in the case of Hyderabad Industries Ltd. v. Union of India as reported in 1995 (78) E.L.T. 641, pertaining to asbestos fibre separated from the rock in which it is embedded by manual and mechanical means, has been held as not amounting to manufacture. He also relied on the judgment rendered in the case of N.J. International v. Collector of Customs, as reported in 1995 (9) R.L.T. 708. Sr. Advocate submitted that to consider the items as scrap, it has to arise from working of a metal as laid down in Section Note 6(a) of Chapter XV. He further submitted that these processes carried out by them were without the aid of electricity and alternatively to be held as exempted from levy of duty under the relevant Notification, which grants exemption to goods having arisen without the aid of electricity.

8. Ld. DR arguing for the department submitted that such activity for pulverising, washing, cleaning etc. results in manufacture of a new commodity, which has a different characteristic, name and use and therefore, the findings given by the Id. Collector in these regard were sustainable. He submitted that the appellants had admitted the items as brass, dross and in this regard, he relied on the case of Collector of Customs v. Shri Shankar Metal Trading Co. as reported in 1992 (60) E.L.T. 154 (Tribunal). He submitted that pulverising, crushing and sieving of marble has been held to be a process of manufacture in the case of Ajanta Marble & Chemical Industries v. Collector of Central Excise as reported in 1990 (53) E.L.T. 457. He also relied on the judgment rendered in the case of Kher Stone Crusher v. G.M. District Industries Centre as reported in 1992 (61) E.L.T. 586. He submitted that the marketability having been established in the present case, and the item is goods as it has been mentioned in the tariff.

As regards, the extension of larger period, Id. DR submitted that intention to evade duty is very clear in this case and the appellants had not intimated to the department about production of new goods, which had arisen after the process of pulverising, crushing and sieving. Ld. DR relied on the judgment of Jaishri

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[Ltd.] v. Collector of Central Excise as reported in 1989 (40) E.L.T.214 9. Ld. Sr. Advocate replying to the arguments submitted that the department had not levied CVD in the present case and the department had also not proceeded to claim CVD in the present case as there was no charge of mis-declaration at the time of importation of the goods.

10. We have carefully considered the submissions made by both the sides and have perused the findings given by the respective Collectors. The questions that arise for consideration in these appeals are (i) as to whether the process of pulverising, seiving and cleaning resulted in the production of new goods which is classifiable under Tariff Item 26A and erstwhile under sub-heading 7402.00 in respect of imported brass dross/ash to be refined as dross B.D. Scrap/ Dross, Pittal Bhangar etc.

As regards the first and main charge regarding excisability and levy of duty on the imported 'Brass dross/ash which has been subjected to certain processing like pulverising, cleaning and washing without the aid of power to bring into existence items said to have been sold on invoice, description as refined dross B.D. Scrap. The appellants have contended that such processing of cleaning, the imported Brass dross/ash does not result in a process of manufacture as no new commodity as known in the market arises as the said Brass dross/ash continues to remain as the same article, although they might have referred to the said imported item as brass/scrap/laddi etc. in their invoices. They have also relied on several judgments to contend that there is no change in the nature of the goods in its chemical composition and its physical appearance remains the same and all that happens is that extraneous impurities are cleaned by a process of washing and seiving. In this regard, they also relied on several judgments, wherein it has been held that the terms manufacture means something more and there must be a transformation and a new and different article having a distinct name, character or use, should arise by such a change. The contention raised by the appellants have got lot of force. The Hon'ble Supreme Court in the case of Hyderabad Industries Ltd. v. U.O.I, as reported in 1995 (78) E.L.T. 641, has examined the question of

separating asbestos fibre and rock in which it is embedded by manual and mechanical means and after such consideration has held that such processes does not result in manufacture of a commodity. In this regard, the Hon'ble Supreme Court has also relied on the earlier judgment rendered in the case of Mineral & Metals Trading Corpn. of India v. Union of India & Others as reported in 1983 (13) E.L.T. 1542, wherein separating of Wolfram Ore from the rock to make it usable ore is a process of selective mining and is not a manufacturing process. In this regard Hon'ble Supreme Court has relied on the ratio of the judgments of Moti Laminates Pvt. Ltd. v. C.C.E., Ahmedabad as reported in 1995 (76) E.L.T. 241. The Hon'ble Supreme Court likewise in the case of Union of India v. Indian Aluminium Co. Ltd. as reported in 1995 (77) E.L.T. 268 has held in para 13 of its order as follows : "It is also not possible to accept the contention of the appellants that aluminium dross and skimmings are "goods" or marketable commodity which can be subjected to the levy of excise. Undoubteldy, aluminium dross and skimmings do arise during the process of manufacture. But these are nothing but waste or rubbish which is thrown up in the course of manufacture." "Dross and skimmings may contain some small percentage of metal. But dross and skimmings are not metal in the same class as waste or scrap. It may be possible to recover some metal from such dross and skimmings. They can, therefore, be sold. But this does not make them a marketable commodity. As Id. Single judge of the Bombay High Court has pointed out, even rubbish can be sold. Everything, however, which is sold is not necessarily a marketable commodity as known to commerce and which, it may be worthwhile to trade in. Ld. Single Judge of the Bombay High Court, therefore, rightly came to the conclusion that the proviso to Rule 56A was not applicable as aluminium dross and skimmings are not excisable goods".

11. Taking into consideration the ratio of the judgments rendered by the Hon'ble Supreme Court, we have to hold that the process of pulverising, washing and cleaning of brass/ash does not result into emergence of a new marketable commodity with a separate, distinct name having separate physical, chemical composition or characteristic. As the first question answered by us has gone in the favour of the appellants, therefore, we have to hold that the appellants have succeeded on this point itself and the impugned demands are required to be set aside on this ground alone. However, we would like to examine the other points

also in order to answer, all points raised before us.

11(a). The department is relying on the Note 6(a) of Section XV, to classify the items under Chapter 72. The said Note 6(a) reads as follows :- "Metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons." Ld. Sr. Advocate's submission is that the commodity referred to by the Department does not come within the ambit of these definitions, to be classified under Chapter 72 of the Schedule to the C.E.T. Act, 1985. We have examined this contention and we find force in Sr. Ld. Advocate's contention. As can be seen from the definition extracted above, it refers to metal waste arising from manufacture or mechanical working of metals. Waste and scrap which has arisen as "Brass, refined dross B.D.Scrap, Dross, Pittal, Bhangar, laddi" does not arise from the mechanical working of metals. Therefore, even on this count, the classification adopted by the department is not sustainable.

11 (b). As regards the plea of invocation of larger period, the Id. Sr.

Advocate pointed out to the judgment rendered by the Hon'ble Supreme Court in the case of Cosmic Dye Chemical (Supra) and Pushpam Pharmaceuticals Co. (Supra) and argued that the department has to prove the party's intent to evade duty for invoking proviso to Section 11A of the Central Excises and Salt Act, 1944 for extending the larger period of limitation. The judgment rendered by the Cosmic Dye Chemical on this point as rendered in paras 5 to 8 are noted herein below : "5. The main limb of Section 11A provides limitation of six months.

In cases, where the duty is not levied or paid or short-levied or short-paid or erroneously refunded, it can be recovered by the appropriate officer within six months from the relevant date. (The expression "relevant date" is defined in the Section itself). But the said period of six months gets extended to five years where such non-levy, short levy, etc., is "by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this act or of the rules with intent to evade payment of duty..." 6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e. intent to evade duty is built into these very words. So far as mis-statement or

suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11 A. Mis-statement or suppression of fact must be wilful.

7. Now coming to the facts of this case, the appellant's case is that he thought bona fide that he need not include the value of the Rapidogens in his declaration, for the reason that the said product was fully exempt from duty under Notification No. 180/61, dated November 23, 1961. Certain facts are brought to [our] notice in support of this plea. It is also brought to our notice that on the date of filing of his declaration, two High Courts had taken the view that the goods exempted from duty are not includible within the definition of 'excisable goods' as defined in clause (d) of Section 2, No doubt, two other High Courts had taken a contrary view. The appellant's factory is in the state of Maharashtra and the Bombay High Court had not taken a view one way or the other. In all the circumstances, the appellant says, he was under the bona fide impression that he need not mention the value of the Rapidogens manufactured by him in his declarations.

8. In the above circumstances and because the facts establish that the misstatement of facts in the declaration filed by the appellant - or the suppression of facts therein, as the case may be - cannot be called wilful, the appeal is allowed. No order as to costs".

12. On reading of the above paragraphs, it is clear that the department has to prove the ingredients of the proviso to Section 11A. In this case, the department has not shown as to how the appellants resorted to suppression of facts with an intent to evade duty and as to how the department was not aware of sale of brass dross/ash and that there was a manufacture of a different commodity from these items. There is force in Ld. Advocate's contention that if there existed any commodity then the department would have levied C.V. duty. The department not

having levied CVD, therefore, there appears to be a clear understanding that such processes will not result in manufacture of new goods. The department was aware of import of brass/ash by several importers and large quantities over a period of time therefore, it cannot be said that the department was not aware of its use. Therefore, if the department were to allege that the appellants were clandestinely carrying on the manufacture of 'brass dross, refined dross, B.D. Scrap, Pittal, Bhangar, Laddi', then it was for the department to have proved these facts, which they have failed to do so. Therefore, we have to hold that even if there was levy of duty, then the same is barred by limitation.

13. In that view of the matter, the appellant succeeds on all the points raised in these appeals and the impugned orders are set aside and appeals allowed.

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