

Collector of Central Excise

Vs

M/s. Kosan Metal Products Ltd.

Civil Appeals Nos. 1571-72 (NM) of 1988

(S. Ranganathan, Sabyasachi Mukharji JJ)

26.10.1988

JUDGMENT

SABYASACHI MUKHARJI, J.-

1. These are appeals under section 35-L (b) of the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act') arising out of the orders dated October 7, 1987 of the Customs Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'the Tribunal'). Revenue is the appellant herein. The respondent-company manufacturers LPGF valves and regulators falling under tariff item 68 of the Central Excise Tariff. The respondent-company was receiving brass rods manufactured by M/s. Bhandary Metal Corporation, Bombay and availed set off of duty as stipulated under Notification No. 178 of 1977 dated June 18, 1977. The brass rods were assessed under TI 68 during the period from July 24, 1978 to March 31, 1979. With effect from April 1, 1979 brass rods manufactured by M/s. Bhandary Metal Corporation, Bombay were assessed under TI 26-A (1) (a), as mentioned in the relevant GP 1 of the manufacturer. It was, however, noticed by the Superintendent of Central Excise Range XV, Surat that the respondent-company had received brass rods, the goods other than falling under tariff item 68 and had availed incorrect set off of duty amounting to Rs. 51,261.88 under the said notification issued under Rule 8 (i) of the Central Excise Rules, 1944 ('Rules' for short) towards payment of duty on excisable goods falling under tariff item 68 and cleared during the period from July 24, 1978 to March 31, 1979. A show cause notice dated January 19, 1980 was issued to the respondent-company by the Superintendent of central Excise Range XV, Surat requiring it to show cause as to why the duty amounting to Rs 51,261.88 should not be recovered from it under Rule 10 of the Rules and as to why the penalty should not be imposed on it under Rule 173-Q. The notice was issued on the ground that the brass rods were classified under TI 26-A (1) (a) of the Tariff and, therefore, the respondent-company was not eligible to set-off of duty under the said notification. In reply, the respondent-company contended that the said notice under Rule 10 had not been issued to it within time and that there had been no fraud, collusion or wilful misstatement or suppression of facts on its part and that it had correctly availed of the set-off of duty.

2. The Assistant Collector of Central Excise, Surat after considering the matter confirmed the demand for duty by his order dated February 9, 1981. The case of the revenue was the respondent company had utilised wrong set-off of duty on the raw materials falling under TI other than TI 68 and the Range Superintendent, Surat had pointed out short payment of duty involving Rs. 38,460.12 on RT-12 returns for the months of April 1979 to August 1979. The demand of Rs. 38,460.12 was confirmed by the Assistant Collector by his order dated February 20, 1981. The appeals against the aforesaid orders filed by the respondent were rejected. The respondent, thereafter, filed two appeals before the Tribunal. The Tribunal referred to the facts of the case set out hereinbefore.

3. The main question that was necessary to be decided in this case was whether proper notice had been issued. On the facts of the case it does not appear that proper notice was issued. Merely on the ground of short entry in RT-12, Rule 10 would not be attracted. The same view appears to have been taken by the Kerala High Court in good Shepherd Rubber Company case. When in such circumstances, a demand is made under the Act for recovery then such demand must be under section 11-A of the Act. The said section provides as follows :

11-A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded 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 made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer", the words "Collector of Central Excise", and for the words "six months", the words "five years" were substituted.

Explanation - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this section -

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means, -

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

(A) where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such return

is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

4. The said section provides that when any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a notice may be served on the concerned person within a period of six months. In the instant case, the time taken for the service of the notice is beyond a period of six months. The Tribunal took the view that the classification lists had been finalised by the Bombay Collectorate and the Assistant collector, Surat had no authority to re-open those assessments. It referred to a decision of it in M/s. Jay Industries, Hyderabad v. Collector of Central Excise, Hyderabad. In the aforesaid view of the matter, the Tribunal allowed the claim of the respondent.

5. We have considered the contentions urged and do not find any ground which supports the allegation that there had been fraud, collusion or any wilful misstatement or suppression of facts on the part of the respondent. Therefore, Section 11-A clearly applies to the facts of the instant case. In that view of the matter, the appeals were correctly allowed by the Tribunal. On careful examination of the facts of the case and the contentions raised, we are of the opinion there is no merit in the appeal before us. The appeals, therefore, fail and are accordingly dismissed. However in view of the facts and the circumstances of the case, there will be no order as to costs.

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