Poulose and Mathen

Vs

Collector of Central Excise, and Another

Civil Appeal No. 2344 of 1986

(B. P. Jeevan Reddy, K. S. Paripoornan JJ)

04.02.1997

JUDGMENT

PARIPOORNAN, J.

The appellant is a small-scale industry. It carries on the business of manufacture of liquid Carbon Dioxide (O2) conforming to ISI grades. The factory is situated at Kalamassery in Ernakulam District, Kerala State. The first respondent in this appeal is the Collector of Central Excise, Cochin. The second respondent is the Fertiliser & Chemicals Travancore Limited (FACT). This appeal is filed under Section 35-L(b) of the Central Excises and Salt Act, 1944, against the order dated 18-3-1986 passed by the Central Excise and Gold (Control) Appellate Tribunal, New Delhi substantially modifying the order passed in the appellant's favour by the Appellate Collector of Central Excise, Madras dated 18-6-1982. The Appellate Collector set aside the order of the Assistant Collector rendered on 2-2-1982 holding that the appellant is not entitled to the benefit of Exemption Notification No. 7/65-CE dated 30-1-1965.

2. The facts of this case are in a narrow compass. The appellants manufacture carbon dioxide of ISI specification out of raw carbon dioxide gas received through pipeline from M/s. FACT Ltd., Eloor. The raw carbon dioxide is odorous and has a purity of less than 99% and contains moisture above 0.1% Such raw carbon dioxide is subjected to various processes in order to remove traces of moisture, oxide of sulphur etc. The gas is then dried and fed into Rotary Booster Compressor to boost the pressure to a very high point and then passed through activated carbon to remove final traces of oil and also to deodorise. The pure gas obtained after these processes is liquefied and filled in cylinders and removed therefrom for making further products or for sale.

3. At the relevant time, Carbonic Acid (carbon dioxide) was specified in Entry No. 14-H(iv) of the Ist Schedule to the Central Excises and Salt Act, 1944 and was assessable to duty of excise at the rates in force from time to time. The appellants had taken out L-4 licence for the manufacture of carbon dioxide. They were permitted to remove waste gas generated from M/s. Fertiliser and Chemicals, Travancore Ltd., in view of para 2 of Notification No. 7 of 1965 dated 30-1-1965 after taking out L-6 licence. The licence was granted on 11-3-1977. Under Notification No. 7 of 1965, carbon dioxide falling under Item 14-H of the Central Excise Tariff was exempted from the whole of the duty of excise leviable thereon, provided it was used for any "industrial purpose" and subject to the procedure in Chapter X of the Central Excise Rules and it is common ground that such procedure was followed by the appellant by taking out L-6 licence. The appellants had given an undertaking that they would pay the duty on the carbon dioxide received for processing (raw carbon dioxide - waste gas) in case it was subsequently decided that they were not entitled to receive the said carbon dioxide free of duty under Notification No. 7 of 1965.

4. The appellants were served with a show-cause notice dated 20-11-1978 to explain why L-6 licence granted to them (to receive impure carbon dioxide gas (waste gas) by pipeline from M/s. FACT) and also L-4 licence for the manufacture of carbon dioxide (or liquid carbonic acid) should not be revoked and why duty of Rs. 8,92,695.60 along with SED Rs. 19,823.10 should not be demanded from them for the period from March 1977 to September 1978 under Rule 10 of the Central Excise Rules, 1944.

5. The plea of the Revenue was that the appellant was not entitled to receive CO2 gas (raw carbon dioxide) free of duty under Notification No. 7 of 1965 as they are not using the same for any "industrial purposes" involving any product other than the self-sale of CO2 which was received by them.

6. After hearing the appellant, the Assistant Collector of Central Excise passed an order on 2-2-1982 holding that the appellants are not eligible for the benefit of the Notification No. 7 of 1965 dated 30-1-1965 and in consequence the Superintendent of Central Excise by proceedings dated 4-5-1983 quantified the total duty payable by the appellant in the sum of Rs. 25,20,694.76 for the period from March 1977 to February 1982. Thus duty was levied on raw carbon dioxide (waste gas) obtained from M/s. FACT Ltd. by the appellant.

7. In appeal, the Appellate Collector of Central Excise relied on Trade Notice No. 220 of 1981 dated September (sic), 1981 issued by the Collector of Customs and Central Excise, Cochin-31 in consequence of Tariff Advice No. 83 of 1981 dated 24-8-1981 of the Central Board of Excise and Customs and held thus :

> "The question to be decided in this case is whether the appellants are entitled to avail the benefit of Notification No. 7 of 1965 dated 30-1-1965. The appellants rely on the Trade Notice No. 220 of 1981 issued from file C. No. V/68/30/3/81 C6 by the Collector of Central Excise, Cochin. In this trade notice, it has been informed that the carbon dioxide gas produced in distilleries and fertiliser factories or in any other factory will fall outside the purview of Item 14-H. So long as the gas does not conform to the marketable grade as prescribed in the ISI specifications, such gas will be properly classifiable under Item 68. The appellants were allowed to avail Notification No. 7 of 1965. But the trade notice referred to above is in favour of the assessee and would be binding on the department (Navgujarat Paper Industries v. Supdt. of Central Excise [1977 ELT 67 (Guj)]. Hence the order of the Asstt. Collector making duty retrospectively is not correct.
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> Besides I am of the view that the carbon dioxide gas produced from the fertiliser factory of M/s. FACT will fall outside the purview of Item No. 14-H of Central Excise Tariff so long as the gas does not conform to the marketable grade as prescribed in the ISI specification. Such gas will be properly classifiable under Item 68 of Central Excise Tariff. Hence, necessary action in this regard has to be taken by the Asstt. Collector. The order of the lower authority is set aside with these directions."

8. In further appeal filed by the Revenue, the Appellate Tribunal reversed the aforesaid decision of the Appellate Collector dated 18-6-1982 by its order dated 18-3-1986. The Appellate Tribunal decided that matter on merits on the other aspects as well, though the Appellate Collector rendered his decision substantially on the basis of trade notice. (The Appellate Collector also found that the

carbon dioxide produced by M/s. FACT will fall outside the purview of Item No. 14-H of the Central Excise Tariff, since the gas did not conform to the "marketable grade" as prescribed in the ISI specification). Regarding the applicability of trade notice dated September, 1981, the Appellate Tribunal observed, in para 51 of its order, thus :

> "The trade notice on which the respondents seek to rely was issued nearly 3 years later. In these circumstances the trade notice has no relevance to what happened earlier. Shri Tripathi had filed before us a copy of the Tariff Advice No. 6 of 1985 dated 6-2-85 of the CBEC along with a model trade notice, to the effect that impure carbon dioxide not conforming to ISI specifications produced by distilleries and fertilizer units, was correctly classifiable under Item 14-H. It may be presumed that the Collectorates, or at least some of them duly issued trade notices to this effect in early 1985. If the trade notice of 1981 could be considered as relevant to matters occurring 3 or more years earlier, we see no reason why a trade notice of 1985, to the contrary effect, should not be taken as equally applicable to the transactions in question."

9. We heard the counsel.

10. The appellants' counsel stressed two points :

> (1) The show-cause notice dated 20-11-1978 (p. 79 of the Paper-book) was issued for the period from March 1977 to September 1978 but the levy and demand is for a larger period - March 1977 to February 1982. There was no proper notice and opportunity to explain. This is violative of natural justice and is also unfair;
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> (2) The Appellate Tribunal was totally in error in discarding the Trade Notice No. 220 of 1981 based on Tariff Advice No. 83 of 1981 dated 24-8-1981 of the Central Board of Excise and Customs which was communicated to the appellants for information. (The said trade notice is available at p. 125 of the Paper-book). The Appellate Tribunal failed to understand and give effect to the terms of the above trade notice, and the reasons to discard the trade notice relied on by the Appellant Collector are unsustainable. A larger contention on the merits to the effect that "waste gas" is not a marketable commodity and is not exigible to duty, was also raised relying on the decision in Union of India v. Indian Aluminium Co. Ltd. [1995 Supp (2) SCC 465 : (1995) 77 ELT 268].

11. The relevant trade notice relied on by the Appellate Collector is available at p. 125 of the Paper-book. It is as follows :

> #"Trade Notice No. 220 of 1981 dt. .... 9-1981TI 68 A.C.C. Nes. No. 42/81Sub : GASES - Carbon Dioxide gas emanating from distillery portion of Sugar factories and Fertiliser factories whether classifiable under TI 14-H or TI 68 - question regarding. ----------##

It is considered that carbon dioxide gas produced in distilleries and fertiliser factories or in any other factory will fall outside the purview of Item 14-H of Central Excise Tariff. So long as the gas does not conform to the marketable grade as prescribed in the ISI specifications such gas will be properly classifiable under Item 68 of CET.

(Issued from file C. No. V/68/30/5/81CX-6)

Sd/- M. Suresh Asst. Collector (Tech). For Collector.To,As per DE Nos. I and IISpace 15.Forwarded to M/s. Poulose and Mathen, Eloor for information. Sd/- Superintendent Central Excise Range Alwaye."It is based on Tariff Advice No. 83 of 1981. It reads as follows : "TARIFF ADVICE NO. 83/81 F. NO. 105/2/81-CX.3 GOVERNMENT OF INDIA CENTRAL BOARD OF EXCISE AND CUSTOMS, NEW DELHI 24th August, 1981.To, All Collectors of Central Excise, All Collector of Customs, All Appellate Collectors of Customs and Central Excise, All Deputy Collector of Central Excise.Sub : GASES - Carbon Dioxide gas emanating from distillery portion of Sugar factories and Fertiliser factories - Whether classifiable under TI 14-H or TI 68 - Question regarding.##

Sir,

I am directed to say that a question has been raised whether raw carbon dioxide gas emanating from distilleries attached to sugar factories is classifiable under Item 14-H or Item 68 of CET.

2. The matter was discussed in the 15th South Zone Tariff-cum-General Conference held on the 19-5-1981/20-5-1981 at Bangalore.

3. The conference noted that certain gases arise in distilleries. These are described as raw carbon dioxide, or waste gases and are similar to kiln gas generated in sugar factories. Such waste gases have carbon dioxide only to the extent of about 50%. However, insofar as fertiliser factories are concerned, it was noted that the purity of carbon dioxide gas produced in the factories is more than 70%. In both the types of cases the CO2 in question does not conform to the marketable standard. Also, in both the cases, it was not possible to quantify the production of carbon dioxide.

4. After a detailed discussion, the Conference reached the conclusion that the purity of carbon dioxide gas produced in distilleries is even below 50%. It should not, therefore, be considered as carbon dioxide and, further, as such a mixture of waste gases does not conform to any specifications of carbon dioxide as such and it should be outside the purview of Item 14-H on the analogy of kiln gas. Similarly, the carbon dioxide gas generated in the fertiliser factories is also impure and does not conform to the marketable grade and hence it will also fall outside the purview of Item 14-H.

5. The Board has accepted the recommendations of the Conference that carbon dioxide produced in distilleries as well as in the fertiliser factories will fall outside the purview of Item 14-H and will be properly classifiable under Item 68. The Borad is also of the view that carbon dioxide gas generated by any other factory will also fall outside the purview of Item 14-H so long as it does not conform to the marketable standard of the carbon dioxide as prescribed in the ISI specifications.

6. The above position may please be brought to the notice of the field formations for their information and guidance. The trade interests may also be informed as in the Model Trade Notice.

7. Receipt of this letter may please be acknowledged.

Sd/- G. N. Bhagchandani Under-SecretaryCopy forwarded to : As per list attached. MODEL TRADE NOTICESub : GASES - Carbon Dioxide gas emanating from distillery portion of sugar factories and from fertiliser factories whether classifiable under TI 14-H or TI 68 - Question regarding.##

It is considered that carbon dioxide gas produced in distilleries and fertiliser factories or in any other factory will fall outside the purview of Item 14-H or CET so long as the gas does not conform to the marketable grade as prescribed in the ISI specifications. Such gas will be properly classifiable under Item 68 CET."

12. It is seen that the show-cause notice dated 20-11-1978 was issued for the period from March 1977 to September 1978. But the order of the Assistant Collector given effect to the proceedings of the Superintendent dated 4-5-1983 has levied the duty for a longer period, from March 1977 to February 1982. The show-cause notice served for a shorter period cannot be relied on for the purpose of levy for a much longer period. We should say that the appellant was not served with a proper notice before saddling the liability for a period beyond September 1978. This is unfair and vitiates the proceedings.

13. The Tribunal has stated that the trade notice issued in September 1981 based on Trade Advice of the Board dated 24-8-1981 was issued three years later than the relevant period. The Tribunal refers to Trade Advice No. 6 of 1985 dated 6-2-1985 of the Central Board of Excise and Customs along with "a model trade notice" wherein it seems to have been stated that carbon dioxide not conforming to ISI specifications produced by distilleries and fertiliser units was correctly classifiable under Item 14-H. The Appellate Tribunal was of the view "that it may be presumed" that the Collectors, or "at least some of them" duly issued trade notices to this effect in early 1985, and so a later trade notice could also be taken into account.

14. We hold that the reasoning and conclusion of the Appellate Tribunal is based on surmises and the Tribunal ignored the earlier trade notice of 1981 without proper reasons therefore. Firstly, the Tariff Advice No. 6 of 1985 dated 6-2-1985 which is said to have been accompanied by a "model" trade notice is not part of the record. Its contents are unknown. There is no material on record to show that trade notices were issued by the Collectors in pursuance of the above tariff advice of the Central Board of Excise and Customs. The Tribunal also omitted to notice that the earlier Tariff Advice No. 83 of 1981 was in force at the time when the proceeding was pending before the Assistant Collector and she passed the order on 2-2-1982 and also when the Appellate Collector set aside the above order and gave relief to the assessee by his order dated 18-6-1982. The department concerned understood the legal position then as reflected in the trade advice and trade notice of the year 1981. It was a plausible view of the matter. It was pointedly stated that the carbon dioxide gas generated in the fertilizer factories is also impure and does not conform "to the marketable grade" and hence it will also fall outside the purview of Item 14-H. Whether the later Tariff Advice No. 6 of 1985 adverted to all relevant aspects or deviated from 1981 tariff advice and if so, to what extent, are not detailedly stated in the order of the Tribunal (para 51). The earlier tariff advice and trade notice categorically stated that in the absence of non-conformity to the marketable grade (standard) "impure carbon dioxide not conforming to ISI specifications produced by distilleries and fertilizer units was correctly classifiable under Item 14-H". Was the requirement, that the goods should be of "marketable grade" standard) dispensed with, in the later tariff advice ? This is not adverted to by the Tribunal. The Appellate Tribunal casually referred to a later Tariff Advice No. 6 of 1985, without fully and effectively appreciating its contents, its scope and the impact of the earlier tariff Advice No. 83 of 1981. The above aspect is vital and fundamental to the basis of which the Appellate Collector granted relief to the appellant. We are of the view that the Appellate Tribunal has failed to consider the matter according to law and the order appealed against should be set aside and we hereby do so.

15. One aspect deserves to be noticed in this context. The earlier Tariff Advice No. 83 of 1981 on

the basis of which Trade Notice No. 220 of 1981 was issued by the Collector of Central Excise and Customs is binding on the department. It should be given effect to. There is no material on record to show that this has been rescinded or departed from, and even so, to what extent. Even assuming that the later Tariff Advice No. 6 of 1985 has taken a different view - about which there is no positive material - the facts point out that the department concerned itself was having considerable doubts about the matter. The position was not free from doubt. It was far from clear. In such a case, where two opinions are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to. In the light of the above, it is unnecessary to adjudicate the other points involved in the appeal on the merits.

16. For the reasons stated above, we set aside the order of the Customs, Excise and Gold (Control) Appellate Tribunal dated 18-3-1986 and allow this appeal and restore the order of the Appellate Collector of Central Excise, Madras dated 18-6-1982. There shall be no order as to costs.