

Kuli Fireworks Industries

Vs

Collector of Central Excise & Anr.

(S.C. Agarwal, G.T. Nanavati JJ)

12.09.1997

JUDGMENT

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S.C.AGARWAL,J.

1. This appeal is directed against the judgment of the Customs Excise and Gold Control Appellate Tribunal (hereinafter referred to as 'the Tribunal') dated July 2, 1976 in Appeal No. E/SB/1395/91/MAS. The appellant, Kuli Fireworks Industries, manufacturers fireworks which fall under Heading 3604.10 of the Central Excise Tariff. By notification No. 167/86 dated March 1, 1986 exemption from excise duty was granted in respect of various goods including goods falling under Heading 3604.10 provided that no process in or in relation to the manufacturers of the said goods is ordinarily carried on with the aid of power. The appellant claimed exemption in respect of fireworks manufactured by it on the basis of the said notification on the ground that no process in relation to the manufacture of the said goods was ordinarily carried on with the aid of power. On September 2, 1987 the excise authorities detained 6,222 wooden cases of fireworks valued at Rs. 39,83,698.50 and a sum of Rs. 5,97,555/- was demanded as excise duty payable on the said goods on the ground that the goods were not entitled to exemption from excise duty under the said notification. The appellant filed a writ petition in the Madras High Court against the said order for detention of the goods. In the said writ petition the High Court passed an interim order on September 29, 1987 staying the operation of the order of detention of goods dated September 2, 1987 and permitting the appellant to clear the goods for sale without payment of excise duty. In the meanwhile, notification No. 167/86 dated March 1, 1986 was amended by notification No. 222/87 dated September 17, 1987 whereby exemption in respect of fireworks falling under Chapter 36.04 was withdrawn. Since the goods had been permitted to be cleared on the basis of the interim order dated September 29, 1987 passed by the Madras High Court, the Superintendent of Central Excise issued a show cause notice dated February 16, 1988 under Section 11A of the Central Excise Act demanding duty of Rs. 5,97,555/- being the duty on the goods detained on September 2, 1987 valued at Rs. 39,83,698.50 on the ground that the said goods were cleared after September 1, 1987 when the exemption from duty was not available. The appellant submitted their reply to the said show cause notice wherein it was submitted that the goods were detained by detention order dated September 2, 1987 by the department and could be cleared only in pursuance of the interim order dated September 29, 1987 passed by High Court and that no duty was payable in respect of the said goods. The Assistant Collector of Central Excise by order dated December 18, 1990 confirmed the demand of duty of Rs. 5,97,555/- made in the show cause notice dated February 16, 1987 in view of the decision of this Court in Wallace Flour Mill Co. Ltd. Vs. Collector of Central Excise, Bombay Division II, 1989 (4) SCC 592, wherein it was decided that the rate of duty prevalent on the date of removal is only applicable. It was held that since the goods were removed after September 17, 1987 excise duty was payable on the same. The Assistant Collector did not go into the merits of the claim

of the appellant that they were not using power for manufacture of fireworks. The said order of the Assistant Collector of Central Excise was affirmed in appeal by the Collector (Appeals) in his order dated August 1, 1991. Before the Tribunal reliance was placed by the appellant on the decision of the Calcutta High Court in Collector of Customs Vs. Priyanka Overseas (P) Ltd. 1989(41) ELT. 195(Cal.) and it was urged that as the goods were detained illegally by the customs authorities, the appellant could not be penalised for the illegal act of the authorities and that since the goods were manufactured prior to September 17, 1987 and in the normal course the goods would have been put in the market stream much before the withdrawal of the exemption notification, the duty applicable will be at the rate when the goods were detained and not from the date of clearance of the goods. The Tribunal, however, rejected the appeal and held that the decision of the Calcutta High Court Priyanka Overseas (P) Ltd. (supra) could not be invoked in view of the decision of this Court in Wallance Flour Mills Company (supra) and Collector of Central Excise, Hyderabad & Ors. Vs. Vazir Sultan Tobacco Co. Ltd. Hyderabad & Ors. 1996 (3) SCC 434, wherein it has been laid down that the rate of duty applicable will be the one applicable on the date of clearance of the goods. Before the Tribunal the appellant also sought to place reliance on the exemption granted under notification No. 175/86 dated March 1, 1986 on the ground that the appellant is a small scale industry. The said contention was, however, not entertained by the Tribunal on the view that it was not raised before the lower authority and it could not be urged at the appellate stage.

2. Shri S. Murlidhar the learned counsel appearing for the appellant, has urged that the decision of the Calcutta High Court in Priyanka Overseas (P) Ltd. (supra) has upheld by this Court in Priyanka Overseas Pvt. Ltd. & Anr. Vs. Union of India & Ors. 1991 Supp. (1) SCC 102. The appellant in that case had, on December 17, 1987, filed the bills of entry for home consumption as required under Section 68 of the Customs Act with a prayer for debonding the goods of 3935, 364 MT which were stored in a private warehouse. The customs authorities, on that very day, i.e. December 17, 1987, cancelled the license for warehousing the quantity of goods in respect of which the bills of entry were filed by cancelling the bond and deleting the said godown from the relevant licence issued for the quantity of 11,500 MT. The keys of the godown were also handed over to the appellant simultaneously, as a result of which though the goods remained in the said godown but not as a warehouse and the appellant was allowed to remove the goods without payment of any duty, it was not disputed that the remaining goods were also stored in a private warehouse and the appellant had filed bills of entry and complied with all the required formalities for debonding and clearance of the goods on January 28, 1988 and that the appellant was entitled to an order cancelling the licence of the private warehouse enabling it to remove the goods. On these facts this Court observed:-

"Had the customs authorities passed order in accordance with law the same result would have followed as had been done on December 17, 1987.....There is no valid reason as to why the same procedure should not have been followed in respect of the remaining goods in respect of which the bills of entry were filed on January 28, 1988 for debonding and clearance of goods. Merely because the officer failed to discharge his duties by making illegal demand for deposit of redemption fine, the appellant could not be held liable to pay duty. The appellant is therefore entitled to the delivery of goods without paying any duty as on January 28, 1988 no duty was payable on the goods."[p.124]

3. The submission of Shri Murlidhar is that the principle laid down in the aforesaid decision of this Court in Priyanka Overseas Pvt. Ltd. & Anr. Vs. Union of India (supra) is applicable in the facts of this case because the goods had been wrongly and illegally detained by the customs authorities on September 2, 1987 and by the time the goods were released for clearance on the basis of the interim

order passed by the High Court on September 29, 1987, the exemption from duty under notification No. 167/86 had been withdrawn by notification No. 222/87 dated December 17, 1987. He has urged that the appellant cannot be made to suffer on account of illegal act of the excise authorities and that the principle laid down in Wallace Flour Mills Company (supra) and Vazir Sultan Tobacco Co. Ltd. (supra) will have no application in the facts of this case.

4. Shri K.N. Bhat, the learned Additional Solicitor General, does not dispute that in view of the decision Priyanka Overseas Pvt. Ltd. (supra) the appellant could not be made to suffer on account of an illegal act of detention of the goods by the excise authorities and the principle of Wallace Flour Mills Company (supra) and Vazir Sultan Tobacco Co. Ltd. (supra) will have no application in this case. The learned Additional Solicitor General has, however, urged that even on September 2, 1987 the appellant was not entitled to claim exemption from duty in respect of goods which were detained since there was use of power in the manufacture of the goods. In this connection, the learned Additional Solicitor has placed reliance on the decision of this Court in Standard Fireworks Industries & Ors. Vs. Collector of Central Excise, 1987 (28) ELT 56.

5. We are unable to accept the said contention of the learned Additional Solicitor General for the reason that the Assistant Collector of Central Excise had issued a show cause notice dated November 29, 1987 demanding central excise duty of Rs.11,94,122.94 on the fireworks cleared from the factory of the appellant for the period from August 1, 1981 to September 16, 1987 on the ground that certain operations were carried on with the aid of power outside the premises of the factory by outsiders and hence exemption under notification No.167/88 dated March 1, 1986 could not be available. In their reply to the said show cause notice the appellant stated that they had not used power in any of the process in the manufacture of the fireworks in their factories or outside their premises and it was claimed that the chemicals used for such manufacture were hand-pounded. By order dated December 18, 1990, the Assistant Collector held that it is incredible and highly improbable that flour mills which are run by power should under take hand pounding and that the flour mills had undertaken the grinding of chemicals only by using power. It was also held that paper tubes, paper cones were also made by use of power and, therefore, the appellant was not entitled to exemption under notification No. 167/86 dated March 1, 1986. The said order of the Assistant Collector was set aside in appeal by the Collector (Appeals) by order dated August 29, 1991. The Collector (Appeals) held:-

"Although it alleged that appellants purchased papers tubes from Standard Paper Containers, Sivakasi and made paper tubes through Paper Tubes Works, Sivakasi, no evidence confirming the above allegation was cited either in the show cause notice or in the original order". "The appellants denied making any tubes through Paper Tubes Works, Sivakasi. In the absence of any evidence to the appellants version has to be accepted". "The conclusion that the Flour Mills run by power would not have undertake hand-pounding and ignoring the bills produced stating that they have been carefully managed will not prove the department case since it is based on presumption and suspicion".

"In view of the foregoing there is no evidence at all in the available records to the effect that power had been used in or in relation to the manufacture of fireworks by the appellants rendering them ineligible for exemption under notification No. 167/86 dated March 1, 1986".

6. The said order of the Collector (Appeals) was not challenged by the department and has become

final. In view of the order of the Collector (Appeals) dated August 29, 1991, it cannot be said that in respect of goods which were detained on the basis of order dated September 2, 1987 exemption was not available under notification No. 167/86 dated March 1, 1986.

7. The appeal is, therefore, allowed, the impugned judgment of the Tribunal is set aside and the demand raised by the Assistant Collector of Central Excise on the basis of the show cause notice dated February 16, 1988 is quashed. The appellant had paid a sum of Rs. 1,50,000/- towards the impugned demand of excise duty on March 30, 1991 and further sum of Rs. 50,000/- was paid by the appellant in pursuance of the interim order of the Tribunal dated January 27, 1992. In pursuance of the order dated April 25, 1997 passed by this Court the appellant has furnished a bank guarantee of Rs. 1,50,000/-. Since the demand has been quashed, it is directed that the amount of Rs. 2,00,000/- which has been deposited by the appellant be refunded to the appellant with interest @ 12% and the bank guarantee of Rs. 1,50,000/- furnished by the appellant shall stand discharged. No order as to costs.