(2022) 06 CAL CK 0035

In the Calcutta High Court

Case No : CEXA No. 29 Of 2001

Commissioner Of Central Excise, Bolpur, Commissionerate — APPELLANT

Vs

M/S. Hindustan Cables Limited. — RESPONDENT

Date of Decision : 15-06-2022

Acts Referred:

Central Excise Rules, 1944 — Rule 9(1), 52A, 53, 54, 57A, 57F(2), 57G(1), 173, 173F, 173G(3), 173G(4), 209, 226
Central Excise Act, 1944 — Section 11A, 11A(1), 35H(1)

Citation : (2022) 06 CAL CK 0035

Hon'ble Judges : T.S. Sivagnanam, J;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : K. K. Maiti, Rohit Das, Kishwar Rahman

Final Decision : Dismissed

Judgement

1. This appeal filed by the revenue under Section 35 H (1) of the Central Excise Act, 1944 (the Act for brevity) is directed against the order passed by the Customs Excise and Gold (Control) Appellate Tribunal, Eastern Bench, Calcutta (Tribunal), in Appeal No: E-226/1993 dated 29.09.2000.

2. The revenue has raised the following substantial questions of law for consideration:

(i) Whether permission under Rule 57F (2) of the Excise Rules for reprocessing of inputs was required to be obtained by the respondent from the applicant authorities before removal of various types of scraped cables and lead scraps for reprocessing to the factory of job workers?

(ii) Whether such removal was made in an unauthorized manner?

(iii) Whether the loss which waste and scrape of copper arising during reprocessing has to be returned to the factor or if not within a period of 60 days or extended time the duty leviable thereon has to be paid?

(iv) Whether the demand of the applicant was barred by the laws of limitation when a specific finding about suppression and willful mistake has been made in the Order-In-Original dated 30th March, 1992

3. We have heard Mr. K.K. Maiti, Learned Senior Standing Counsel for the appellant and Mr. Rohit Das, Learned Advocate assisted by Ms. Kiswhar Rahman, learned advocate for the respondent:-

4. The Collector of Central Excise, Bolpur, Commissionerate, issued a show cause notice dated 16.05.1991 calling upon the respondent/assessee to show cause as to why the amount of Rs. 1,32,42,800.02/- should not be recovered from them in terms of Section 11 A of the Act and why penalty should not be imposed under Rule 209 read with Rule 173 of the Central Excise Rules 1944. The allegation in the show cause notice is that during the period from November 1986 to March 1990, the assessee had removed the total quantity of 3587.207 M.T. of various copper scrap and a total quantity of 803.93 M.T. was short received after processing from their re-processers which was required to be returned to their factory. It was alleged that the assessee neither returned the waste and scrap to their factory nor the Central Excise duty at appropriate rate was paid and that such short received quantity has been shown as "process loss" in their Rule 57 F (2) challans and registers for which there is no provision of in MODVAT rules and therefore the assessees are liable to pay duty on the short received quantity. Similar was the allegation in respect of copper bars/ copper rods for the period from November, 1986 to March, 1990 for a quantity of 410.325546 M.T. alleged to have been short received. Further it was alleged that during the period from 29.06.1987 to 21.08.1989, the assessee unauthorizedly removed the scrap of 544.283 M.T. of lead scrap without obtaining any permission from the competent authority under Rule 57 F (2) of the rules and therefore the assessee is liable for payment of Central Excise duty. Further it was alleged that the records under Rule 57 F (2) were not maintained properly as required. Based on the above allegations, it was stated that the assessee had violated the provisions of Rule 9 (1) read with Rule 173 F, Rule 53 read with Rule 173 G (4), Rule 54 read with Rule 173 G (3) Rule 52 A, Rule 57 A read with notification no. 177 of 86 dated 01.03.1986, Rule 57 F (2), Rule 57 G (1) and Rule 226 of the Central Excise Rules and therefore liable for payment of Central Excise duty as well as the penalty.

5. The assessees submitted their reply stating that they have imported copper bars or rods through canalizing agencies like MMTC or Hindustan Copper Limited and the said copper is sent to different processers for drawing rods there from and after which they are brought to the assessee's factory for drawing wires finer than 14 SWG for use in the manufacture of telecommunication cables. At times copper rods are sent to fabricators who draw wires finer than 14 SWG on job works basis and return the same. Further they stated that they also imported Pig Lead through MMTC which is used for sheathing telecommunication cables in order to prevent transgression of moisture. The Pig Lead cannot be used in the

manufacture of their final product unless lead is mixed with a 0.85 % of Antimony which is also imported through MMTC and since the assessee does not have facility for mixing lead with antimony, the imported lead and antimony are given to fabricators/processers to carry out the process of mixing. It was further stated that during the course of manufacture of telecommunication cables as well as at the time of drawing of copper wires finer than 14 SWG from copper rods scrap of various types are generated and they send the scrap to fabricators/ processers on job charges basis for recovery of copper which is used again for manufacture of their final product namely the telecommunication cables. It was submitted that such procedure was adopted by the assessee ever since 1962 and after the introduction of MODVAT Scheme they have opted for availing of MODVAT from 1986 in terms of Rule 57 G (I). Further the assessee stated that they have applied to the jurisdictional Assistant Collector of Central Excise, Asansol Division in the prescribed form from time to time for permission to remove inputs or partially processed goods under Rule 57 F (2) and/or Notification No. 214/1980 dated 25.03.1986 as amended from time to time. Based on such application, permission was granted to them under Rule 57 F (2) subject to condition that waste, if any arising in the course of manufacture of intermediate products should be returned to their factory. Further it was stated that they represented to the Assistant Collector about their working process and procedure and requested to modify the order in regard to the permission for removal of inputs or partially processed goods under Rule 57 F (2). The Assistant Collector by letter dated 08.09.1989 made certain amendments in his permission letter to operate under Rule 57 F (2) and there after payment of duty was accepted from their re-processers without authorization from the assessee. The department further directed that in their contracts with the re-processers, the names and quantity of processed goods to be returned by the processers as well as the names and quantity of recoverable waste and scrap should be mentioned. In terms of the said direction, the assessee in the purchase order clearly mentioned these details. Further the assessee stated that in every processing/ manufacturing operation, there is bound to be some invisible loss which can be ascertained on the basis of engineering standard and such loss is bona fide. Further it was stated that the waste generated during the process is not liable for payment of excise duty. The allegation made in the show cause notice regarding removal of various types of cable scrap was denied and it was stated that the scrap arising during the course of manufacture of telecommunication cables did not possess the property of conducting electricity that the Central Excise Authority classified the scrap as copper waste and scrap falling under sub-heading No. 7402.00 vide order dated 25.07.1989 in terms of classification list No. 1/86 w.e.f. 1st March, 1986. The assessee further stated the purchased order clearly mentions the name and quantity of recoverable items as well as the quantity of process loss and percentage thereof; that the assessee has received full quantity of the recoverable items from their processers and duly accounted in the statutory books. That necessary instructions were given to the processers to strictly follow the Central Excise procedures and to pay duty on non-returnable waste/ scrap generated in the course of reprocessing operation. The assessee mentioned that certain scrap was seized from one of the processers who has paid the Central Excise duty on waste and scrap.

6. With regard to the short receipt of various types of cable scrap, it was stated that the shortage is due to invisible and melting loss and such loss cannot be recovered and no duty is payable for such shortage. Further waste cannot be considered to be excisable and therefore no duty can be levied on the same, similar was the stand taken in respect of short received of cables bars/rods. With regard to the allegations of removal of lead scrap, the assessee pointed out that they had applied to the Assistant Collector to avail the concession provided under Rule 57 F (2) and permission was granted to them. Further merely for non-compliance of the procedural formality, duty cannot be demanded when the inputs were returned from the processers after reprocessing and they had received the recoverable quantities of the goods mentioned in their purchase order. Further it was stated that the show cause notice was barred by limitation and the ingredients required to invoke power under Section 11 A (1) of the Act was absent and therefore such power could not have been invoked. The adjudicating authority namely the Assistant Collector, Central Excise, Bolpur did not agree with the stand taken by the assessee on the ground that under Rule 57 F (2) there is no provision for “process loss”.

7. It was stated that scrap/ waste generated in the course of proceedings should be either returned to the manufacturer or appropriate excise duty has to be paid on the same. Further, with regard to the contention of the assessee that the show-cause notice is time barred, the Collector observed that the assessee has not maintained the records properly in the manner required under Rule 57F(2) and therefore, the power under Section 11A of the Act was invoked as the assessee committed an irregularity which was willful. With the above finding, the adjudicating authority by Order dated 30th March, 1992 confirmed the proposal in the show-cause notice. Aggrieved by the same, the assessee preferred appeal before the Tribunal.

8. The Tribunal took note of the decision of the Larger Bench of the Tribunal in the case of Wieth Laboratories Ltd. Versus Collector of Central Excise, Bombay 2000 (120) E.L.T. 208 (T-LB) and held that the assessee had opted for clearance of waste and scrap under the provisions of Rule 57F(2) with due permission of the jurisdictional Central Excise Authority and no duty can be levied on the same. With regard to the duty directed to be paid on waste and scrap of PVC wire and cables, the Tribunal followed the decision in Finolex Cables Ltd. Versus Collector of Central Excise, Pune 1996 (86) E.L.T. 418 (Tribunal) which was affirmed by the Hon’ble Supreme Court and it was held that PVC waste and scrap was not excisable and hence, not liable for duty. With regard to the correctness of the exercise of power under Section 11A, the Tribunal found that there was no allegation of suppression or mis-statement in the show-cause notice and therefore, the extended period of limitation under Section 11A of the Act could

not have been invoked.

9. The learned Senior Standing Counsel for the revenue reiterated the findings recorded by the adjudicating authority and referred to the decision in Finolex Cables Ltd. as well as the decision in Itel Industries Ltd. Versus Assistant Commissioner of Central Excise 2012 (275) E.L.T. 145 (Ker.). The learned Advocate appearing for the respondent submitted that the Tribunal rightly set aside the order of the adjudicating authority and the decision in Finolex Cables Ltd. will clearly support the case of the assessee and has drawn out attention to the relevant paragraphs of the said judgment. Reliance was also placed on the decision of the Hon'ble Supreme Court in Union of India & Others Versus Hindustan Zinc Ltd (2015) 15 SCC 312.

10. After we have elaborately heard the learned Counsels for the parties and carefully perused the materials placed on record, we have no hesitation to hold that the order passed by the Tribunal was just and proper and does not call for any interference. We support such conclusion with the following reasons. Firstly, to invoke the power under Section 11A that is to invoke the extended period of limitation there should be a clear finding of willful mis-statement or suppression on the part of the assessee with an intent to avoid payment of duty. On perusal of the show-cause notice we find there is absolutely no such allegation against the assessee and this aspect of the matter is not disputed by the revenue. The allegation against the assessee was that of not properly maintaining the register required to be maintained in terms of Rule 57F(2) of the Rules. If such is the allegation against the assessee, the adjudicating authority committed a serious error in invoking the power under Section 11A of the Act. A reading of the show-cause notice clearly shows that the information was gathered from the registers and challans maintained by the assessee and the show-cause notice is not on account of any discovery of new facts by the department either by conducting an inspection or based on intelligence. Therefore, the Tribunal was right in holding that the extended period of limitation could not have been invoked by the authority.

11. With regard to the allegation of non-payment of duty of waste and scrap, the decision of the Tribunal in Finolex Cables Ltd. will clearly apply and support the assessee's case. This decision was affirmed by the Hon'ble Supreme Court as the Special Leave Petition filed by the revenue was dismissed as reported in 1997 96 ELT A 229 (SC). At this juncture, it would be relevant to take note of the following paragraphs of the decision in Finolex Cables Ltd.

5.……. It is in this context that the assessee appellants' reliance on the Delhi High Court decision in the case of Modi Rubber v. U.O.I. – 1987 (29) E.L.T. 502 assumes relevance. The Tribunal in its decision in the case of C.C.E. v. Aluminium Industries 1987 (31) E.L.T. 748 had followed that decision. The Aluminium Industries case also was one in which the Department found that wires and cables was the intended manufacture, but at time, in the process of such manufacturing, some portion comes out defective and damaged which is unfit to be used a goods as perfect material and cannot be used as electric cables and wires. These were sought to be classified as goods not elsewhere specified in the Tariff under Item 68 C.E.T. The Tribunal observed as follows in para 5 of its decision to say how scrap is not goods :

"Scrap is not a goods that the factory set out to produce. We can even say that the scraps arose in spite of the factory's efforts to prevent their appearance because they represent a loss to the factory as rejects incapable of fetching the price of the prime products. When they do sell the scrap, it is at a fraction of the price of the prime goods. This led the Assistant Collector into seeing in the scraps a finished product with a new character and new name and new use. Scraps have no character not do they have a name unless the word 'scrap' is a name; but I hold differently. Scrap is a 'name' that is not much used in central excise assessment; it applies to copper aluminium, iron, plastic, paper; it is no name to assess a product by; waste, scraps and rejects are not names of goods but names of non-goods, materials that could have been but did not become prime goods."

6. The Tribunal, thereafter, considered the Supreme Court decision in the case of Khandelwal Metal & Engg. Works. v. U.O.I. – 1985 (20) E.L.T. 222 and noted that the Supreme Court said that the production of waste and scrap was a necessary incident of the manufacturing process. Following then the ration of Delhi High Court's decision in the Modi Rubber case (supra), the Tribunal held as follows in para 15 of its order to say that waste or scrap will not be dutiable unless specifically covered by the entry in the Tariff Schedule:

"In 1987 (29) E.L.T. 502 (Del.) (Civil Writ Petition No. 214/1982, decided on 8-12-1986) re : Modi Rubber Limited, Modi Nagar v. P & Another v. U.O.I. & Others, the High Court at New Delhi dealt with just this problem. The waste and scrap of rubber tyre products were assessed by the department under Item 68. The Court noticed that Item 15A has specific heads for waste and scrap, and Item 18 for non-cellulosic waste; but item 16 for Tyres had none. The Court observed that when the legislature wanted to cover waste or scrap arising in manufacture, it has been specifically provided in the tariff items. After a thorough analysis, the court rules in para 16 that waste and scrap obtained in the course of manufacture are not goods, and that there was no event of manufacture of waste or scrap."

In the result, it is held that waste and scrap of wires and cables are not excisable goods and the question of their classification under CETA, 1985 does not arise. So far as the satisfaction of the officers as to past clearances of the materials as scrap, the appellants in this appeal have submitted that they can produce documentary evidence to support their claim and that they will be in a position to satisfy Central Excise Officers on this aspect with reference to the description in this invoices, the price fetched, and the mode of sale of the material which was on weight basis. It would appear that usable wires and cables are sold in length. This aspect may also have to be considered with the submission that under the

Indian Electricity Act and the rules made thereunder, it is an offence to sell wires with improper insulation, voltage, etc. They have, further, submitted that the percentage of total production of cables whether before 1-3-1986 or on and after that date would more or less remain the same. Therefore, it is directed that in respect of past clearances of such scrap where it was without excise presence such collateral documentary evidence can be taken as a working formula by the Department.

12. The learned Advocate appearing for the respondent also placed reliance of the decision of the Tribunal in Commissioner of Central Excise Versus Chemical Process Equipments Pvt. Ltd. 2017 SCC Online CESTAT 12059 wherein it was held that duty proposed on aluminium scrap is not sustainable. The decision in the case of Itel Industries Ltd. relied on by the revenue is clearly distinguishable on facts where the Court found a clear infraction of the procedure required to be followed / adopted under Rule 57A of the Act. Therefore, the said decision will not render any assistance to the case of the revenue. The Tribunal took note of the important fact that the assessee has opted for clearance of waste and scrap under Rule 57 F(2) of the rules by obtaining permission from the jurisdictional Central Excise Officer and if that be so, no duty could have been demanded from the assessee. The revenue was harping upon the fact that it is not plastics alone which are wastes and scraps but also copper. The test is as to whether the material which comes out as scrap, does possess the characteristics of a telecommunication cable or in other words, can it be used for the process of conducting electricity. If the answer to this query is in the negative, it will qualify as scrap. In the instant case, there is no intermediary product such as cable scrap as the essential character of the telecommunication cables is that it should be capable of conducting electricity. If it fails such a test then it qualifies to be termed as scrap. As already pointed out, there was no allegation of any willful mis-statement or suppression of fact by the assessee with an intent to avoid payment of duty and therefore, the power under Section 11A of the Act could not have been invoked by the authority.

13. Thus, for all the above reasons, we find that the order passed by the Tribunal does not call for interference. In the result, the appeal is dismissed and the substantial questions of law are answered against the revenue. No costs.