
(2011) 03 AP CK 0036
In the Andhra Pradesh High Court
Case No : C.E.A. No. 37 of 2011

Commissioner of Customs and Central Excise	APPELLANT
Vs	
ITW India Ltd.	RESPONDENT

Date of Decision : 31-03-2011

Acts Referred:

Citation : (2011) 268 ELT 311

Hon'ble Judges : V.V.S. Rao, J;B.N. Rao Nalla, J

Bench : Division Bench

Advocate : A. Rajashekar Reddy, SC for CBEC, for the Appellant;

Final Decision : Dismissed

Judgement

B.N. Rao Nalla, J.—This appeal is filed by the Commissioner of Customs & Central Excise, Hyderabad, against the Final Order No. 1084/2007 dated 7-9-2007 passed by the Customs Excise and Service Tax Appellate Tribunal (for short "the Tribunal") in Excise Appeal No. 820 of 2005 2008 (124) ECC 16 whereby and whereunder the show cause notice issued to M/s. ITW India Limited-Respondent firm is set-aside stating that the show cause notice is time-barred.

2. The brief facts of the case are that the Respondent firm is manufacturers of non-destructive testing equipments and consumables. According to the Revenue, there was a godown at Plot No. 31, APIIC, Phase-II, IDA, Pashamylaram in Medak District. The godown premises is not registered nor declared with the Central Excise Department. The Respondent firm is repacking certain chemicals in the said godown premises. The chemicals namely ZYGLO-ZP-4B and 9C RED concentrate were received in bulk packing of 205 liter of drums and those were repacked into small packs of 1 kg. and cleared as "trading goods" without payment of duty. On enquiry by the Revenue, it transpired that the goods ZYGLO-ZP-4B were classified under chapter sub-heading 3206.20, and by virtue of Note 3 to Chapter 32, the activity of repacking in smaller packs and labeling would amount to manufacture. According to Revenue, the goods 9C RED were

classifiable under Heading 2821.90. According to Revenue, the Respondent firm had deliberately suppressed the information relating to the composition of the product as also the literature relating to it with an intention to evade payment of duty. According to Revenue, no information was given in respect of such activity on the pretext that it was classifiable under Heading 3204. It appears Chapter 10 was incorporated in Chapter 28 as per which, in relation to the products of Chapter 28, labeling or re-labeling of containers and repacking from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer would amount to manufacture. Therefore, the Respondent firm was issued a show cause notice in O.R. No. 12/98, dated 29-3-2000 requiring it to show cause to the Joint Commissioner, Central Excise, Hyderabad as to why penalty amounting to Rs. 2,44,459/- being the duty on the goods manufactured and cleared by the Respondent firm during the period from 3/95 to 5/99 should not be imposed on it with interest, and why the plant and machinery, land and building used in connection with the manufacture and removal of the goods should not be confiscated to the Government. The Respondent firm in reply to the show cause notice stated, inter alia, that the show cause notice is clearly barred by the time as there is no suppression of facts with any mala fide intention to evade payment of duty as it has brought to the notice of the Assistant Collector, Central Excise, Hyderabad by its letter dated 28-7-1992 about the nature of activities carried out by it in Phase II, IDA, Pashamylaram i.e. repacking of imported Magnaflux 9C RED into smaller pack and its classification under sub-heading 2812.90; that the Commissioner, Central Excise, Hyderabad by his O-I-O No. 36/97, dated 28-11-1997 had also dropped the demand on the manufacture of Magnaflux consumables and fluid products including the aspect of suppression of facts and that the Jurisdictional Assistant Collector is the competent authority to decide the classification matters, but not the adjudicating authority. However, the Joint Commissioner, passed an order dated 28-3-2003 in Original C.EX. No. 26 of 2003 demanding the Respondent firm to pay an amount of Rs. 2,44,459/- being the duty evaded on the goods manufactured and cleared during the period from 3/95 to 5/99 with penalty of Rs. 1,44,948/- and to pay Rs. 1,44,948/- towards interest.

3. Against that order, the Respondent firm filed Appeal No. 111/2004 (H-I) CE before the Commissioner of Customs and Central Excise (Appeals), Hyderabad. The learned Commissioner considering the material placed on re-cord and the relevant provisions of law modified the orders of Joint Commissioner by reducing the duty from Rs. 2,44,459/- to Rs. 2,05,386, penalty from Rs. 1,44,948/- to Rs. 1,18,960/- and interest from Rs. 1,44,948/- to Rs. 1,18,960/-. Challenging the order of the Commissioner to the extent of rejection of Respondent firm's contention that the show cause notice was time-barred, the Respondent firm preferred Excise Appeal No. 820 of 2005 before the Tribunal. The Tribunal after reappraisal of the matter passed final order holding that the show cause notice dated 29-3-2000 was time barred and the impugned order is set aside to the extent that the show cause notice was not time barred. Hence, this appeal.

4. The learned Counsel for the Appellant contended that the Tribunal erred in holding that the intimation sent on 28-7-1992 by the Respondent firm was sufficient to put the department to notice about the Respondent firm converting the material into small packs; that the DGCEL Officers had visited the Respondent firm at Plot No. 31, Phase-II IDA, Pashamylaram, Medak District and found the discrepancy in classification of the products and non-intimation of the activity of repacking, and issued show cause notice dated 29-3-2000; that the Tribunal failed to notice that the intimation given by the Respondent firm was in respect of premises at Plot No. 36, Phase II, IDA, but not in respect of premises at Plot No. 31 and that the Tribunal should have seen that the show cause notice was issued in respect of Plot No. 31, where repacking activity of chemicals was taking place.

5. We have perused the order-in-original, order-in-appeal, as well as order passed by the Tribunal.

6. It is to be seen that the Respondent firm filed the appeal before the Tribunal challenging the order of the Commissioner (Appeals) only to the extent that it rejects the contention of it that the show cause notice was time barred. The Respondent firm has accepted the classification of the goods as done under the order of the Commissioner (Appeals). The Respondent firm sent the intimation on 28-7-1992 to the Jurisdictional Assistant Collector of Central Excise with a view to bring to the notice of the Revenue about the nature of activities in connection with two products i.e. ZYGLO-ZP-4B and 9C RED. In the said intimation it was stated that the trading activity was carried out in Plot No. 31, Phase II, IDA, Pashamylaram. It was also stated that the Respondent firm is repacking the bulk goods into smaller pack and sold them with their brand name. It was specifically contended that repacking the bulk goods into smaller packs did not amount to manufacture in relation to any of the Chapter of Excise Tariff and that it is a trading activity and did not amount to manufacture. The Revenue authorities did not take any steps against the Respondent firm pursuant to the intimation dated 28-7-1992. It is pertinent to note that pursuant to the intimation, the Deputy Commissioner had made an order on 3-2-1998 (41/98) in respect of one of the items covered thereunder and held that there was no suppression of facts as the Respondent firm has already brought the matter to the notice of the Jurisdictional Assistant Collector. Further it is to be seen that the Jurisdictional Assistant Collector at the relevant time was the competent officer and as such the Revenue cannot disown the communication dated 28-7-1992.

7. For the aforesaid reasons, we are of the view that the show cause notice dated 29-3-2000 was time-barred and it was rightly set-aside by the Tribunal and as such, the appeal is liable to be dismissed.

8. In the result, the Appeal is dismissed.