(2005) 05 DEL CK 0069

In the Delhi High Court

Case No : Writ Petition (C) No. 8498 of 2005

Kaycee Electricals APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 19-05-2005

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11C

Citation : (2005) 82 DRJ 289

Hon'ble Judges : Swatanter Kumar, J;Madan B. Lokur, J

Bench : Division Bench

Advocate : V. Lakshmi Kumaran and M.P. Devnath, for the Appellant; Virender Sood and Anshuman Sood, for the Respondent

Final Decision : Allowed

Judgement

Swatanter Kumar, J.—By this common judgment we would deal with the contentions raised before us in the above two writ petitions as they arise out of one and the same order passed by the Customs Excise and Service Tax Appellate Tribunal dated 18th January, 2005. However, we would be referring to the facts of W.P.(C) No. 8498/2005.

2. The petitioners are engaged in the process of making copper wire rods out of copper wire bars. During the period 1st May, 1980 to 31st March, 1980, they were clearing these wire rods and availing exemption from payment of duty under notification number 119/66-CE dated 16th July, 1966. The petitioner had filed a classification list mentioning therein that the copper wire rods would be made out of copper and copper alloys in crude form/virgin metal. On 29th July, 1983 a show cause notice was issued by the respondent demanding duty on the ground that petitioners had manufactured wire rods from the wire bars purchased either from MMTC or received from the dealers on job-work basis. It was further indicated in the said notice that the petitioners were not entitled to the exemption as the raw materials used by the petitioner is not copper in its crude form, that is to say, that copper wire bars are not covered as "raw

materials" in terms of the notification. The petitioner filed a detailed reply to the said show cause notice, copy of which has been annexed to the writ petition as Annexure P6. In this reply, the petitioner had stated detailed reasons to support his entitlement for exemption in terms of the notification. However, the adjudicating authority confirmed the duty demanded from the petitioner vide its order dated 5th February, 1991. Aggrieved from the said order, the petitioner preferred an appeal before the Appellate Tribunal. It is averred by the petitioner that during the pendency of the appeal before the Tribunal, the Central Government issued a notification being notification No. 3/91 dated 30th January, 1991 u/s 11C of the Central Excises Act, 1944 (for short ''the Act'') stating that in view of the practice that is generally prevalent regarding levy of excise duty on copper wire rods manufactured out of duty-paid copper wire bars, whole of the excise duty livable on the wire rods should not be required to be paid during the period commencing from 1st of August, 1984. However, the Appellate Tribunal vide its order dated 12th November, 1991 remanded the matter back to the adjudicating authority with the direction to examine the extension of the benefit of notification dated 30th January, 1991 issued u/s 11C of the Act. In de novo adjudication, authority reconfirmed the duty taken, by holding that the benefit of both the notifications, that is notification No. 119/66 and 3/91 were not available to the petitioners. Again on appeal, the matter was remanded back to the adjudicating authority to be decided in terms of the order of the Appellate Tribunal dated 1st May, 1995. Against this order, the petitioner preferred an appeal before the Supreme Court which was dismissed as withdrawn but liberty was granted to the petitioner to approach the Government of India for clarification of the notification vide order dated 19th December, 2002. The petitioners appeared before the Commissioner, Central Excise, New Delhi on 16th December, 2004 and submitted a detailed representation. The Commissioner of Central Excise vide an order dated 18th January, 2005 confirmed the duty demanded. Against this order the petitioners preferred an appeal which came up for hearing before the Appellate Tribunal on 1st April, 2005 on which date the Tribunal disposed of the said application, subject to deposit of an amount of Rs. 40 lacs within six weeks as a pre-condition for hearing of the appeal. It is this order which has been challenged in the present writ petition.

3. While relying upon a judgment of this Court in the case of M/s. Sony India Limited Vs. Union of India and Others, and of the Supreme Court in the case of Aman Marble Industries Pvt. Ltd. Vs. Collector of C. Ex., it was contended that the petitioner has a strong prima facie case and is entitled to the hearing of the appeal without imposition of any pre-deposit condition. It is also contended that there is no manufacturing activity and conversion by the petitioner from copper wire rods to copper wire bars and the petitioners are entitled to the benefit of the notification. Reliance was also placed upon the judgment of the Bombay High Court in the case of Municipal Corpn. of Gr. Bombay Vs. Devidayal Electronics and Wires Ltd., .

4. On the other hand, the learned Counsel appearing on behalf of the

Department contended that the petitioners have themselves admitted their liability to pay and in fact had offered to pay the amounts as indicated in the order in question, and the petitioners were not entitled to the benefit of the notifications issued. This also is disputed by the learned Counsel for the Petitioner that the question of depositing any amount would arise only if there is liability to pay in law. An argument of the Petitioner cannot form basis for imposing levy of a duty upon the Petitioner.

5. It is a settled principle of law that if the Petitioner is able to establish a strong prima facie case showing that there is likelihood of Petitioner being not liable to pay any duty, in that event, enforcing a pre-deposit condition would be unfair and unjust. Relying upon the case of Sony India Ltd. (Supra), the contention raised on behalf of the Petitioner is that in terms of the notification and the fact that the activity of the Petitioners of making wire rods or wire bars is not a manufacturing activity and is specifically excluded in terms of the notification, no liability can be fastened upon the Petitioner by imposition of custom duty.

6. In the case of Devi Dayal Electronics (Supra) the Bombay High Court in somewhat similar circumstances took the view that undertaking the process of making copper wire bars and wire rods even if it reduces the thickness would amount to processing alone and not manufacturing. Manufacturing essentially employs change but every change would not be manufactured. Wherever a change is coupled with and is a result of treatment, labour or manipulation and transformation into a new product with a distinct character and name, then alone it could be said to be manufacturing activity.

7. We may also notice that vide order dated 19th December, 2002 Supreme Court had permitted the Petitioner to withdraw the Civil Appeals with liberty to approach the Government for issuance of the clarification in relation to the notification dated 30th January, 1991. When the clarification was pending before the Authorities the demand was confirmed by the Authorities and duty was imposed upon the Petitioner.

8. In these circumstances it is difficult for us to hold at this stage that Petitioner does not have a prima facie case, at the same time we also cannot ignore the fact that the Petitioner voluntarily had stated that he would be willing to deposit the duty to some extent without prejudice to its rights. If the liability in law does not arise the Respondents cannot take advantage of such a submission made on behalf of the Petitioner. This would be of some relevance in determining the hardship which may be caused to a particular party, and enforcement of the pre-deposit condition if the duty was otherwise livable upon the party. In the present case the Competent Authority has confirmed the demand against which the Petitioner has preferred an Appeal.

9. In the circumstances aforenoticed we are of the considered view that in the event the Petitioner is directed to deposit a sum of Rs. 15 lacs and Rs. 5 lacs respectively in each of the Appeals filed by him before the Appellate Tribunal, not

only the condition of pre-deposit shall stand satisfied, but it would also meet the ends of justice. The observations made by us in relation to the Petitioner having a prima-facie case would no way influence the Appellate Authority which would determine the matter on merits and in accordance with law.

10. The Writ Petition is allowed limited to the extent aforestated while leaving the parties to bear their own costs.

