(2004) 01 GUJ CK 0005

In the Gujarat High Court

Case No : Special Civil Application No. 15713 of 2003

Smartchem Technologies Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 20-01-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2
Constitution of India, 1950 — Article 226

Citation : (2004) 173 ELT 456

Hon'ble Judges : M.S. Shah, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; D.N. Patel, SCGSG, for the Respondent

Judgement

M.S. Shah, J.—Rule.

2. Heard Mr. Praesh M. Dave, learned Counsel for the petitioners and Mr. D.N. Patel, learned Senior Central Government Standing Counsel for the respondents on the question of interim relief.

3. Mr. Dave for the petitioners has submitted as under :-

3.1 The petitioner-Company is making Ammonium Nitrate by prilling (evaporating) Ammonium Nitrate Melt. The prilling process only involves removal of impurities from Ammonium Nitrate Melt and, therefore, there is no manufacturing.

3.2 By Circular No. 44/89, dated 19-7-1989 (Annexure "B" to the petition), the Central Board of Excise and Customs directed all the authorities under the Excise Act that no excise duty can be lawfully charged or be required to be paid on Prilled Ammonium Nitrate as is obtained from "ammonium nitrate melt" since excise duty is chargeable only on manufacture of excisable goods. The said circular still holds the field.

3.3 Notwithstanding the decision of the Larger Bench of CEGAT in 2000 (72) ECC 502 the Central Board has not withdrawn the above numbered Circular dated 19-7-1989 and, therefore, the department is bound by the said circular, as held by the Apex Court in M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, and in The Paper Products Ltd. Vs. Commissioner of Central Excise,

3.4 The decision of CEGAT in Supreme Chemical Works (supra) is not applicable to the Prilled Ammonium Nitrate because the decision in Supreme Chemical Works was in respect of Ammonium Nitrate flakes manufactured from Ammonium Nitrate melt. Prilled Ammonium Nitrate and Ammonium Nitrate flakes are two different products and, therefore, the Deputy Commissioner has erred in invoking the CEGAT decision in Supreme Chemical Works.

3.5 In the Supreme Chemical Work (supra), the Tribunal was not concerned with the prilling process and it was only concerned with manufacturing of Ammonium Nitrate flakes. Therefore, the observations made by the Tribunal in Supreme Chemical Works'' case holding the decision in 1986 (6) ECR 375 as incorrect, cannot be accepted as a considered statement of law 1986 (6) ECR 375 and 1993 (68) ELT 589 were two different cases dealing with two different products and, therefore, the Tribunal was not justified in holding that Anil Chemicals Pvt. Ltd. was not correctly decided.

3.6 Mr. Dave has also referred to the declaration filed by the petitioners on 16-1-2003 which was long prior to the date of search and seizure in June, 2003 and in particular our attention is invited to Paragraphs 8 and 9 of the declaration. In Para 8(a) of the said declaration, the petitioners had stated that the product is not excisable in terms of CBEC Circular No. 44/89, issued on 19-7-1989. In Para 8(b), the petitioners had indicated the ground of exemption under the said circular and also pointed out the stand taken by the department in the past that conversion of Ammonium Nitrate Melt into Prilled Ammonium Nitrate does not amount to manufacture and no new product comes into existence.

4. On the other hand, Mr. D.N. Patel, learned Senior Standing Counsel for the Central Government has submitted that when the Larger Bench of CEGAT has already held in Supreme Chemical Works'' case that the statement of law in Anil Chemicals'' case must be held to be incorrect, the view taken by the respondent-officers cannot be said to be illegal or arbitrary.

Mr. Patel has further referred to the reply affidavit of Mr. Haresh T Bhatia, Assistant Commissioner of Central Excise & Customs, Vapi Division stating that Circular No. 44/99, dated 19-7-1989 of the CBEC was issued on the basis of the decision of the Tribunal in Anil Chemicals'' case and, therefore, once the very foundation of the circular has been knocked down by the decision of the Larger Bench of the Tribunal in Supreme Chemicals Works'' case, the respondents are justified in initiating proceedings against the petitioners for recovery of excise duty on the basis that prilling amounts to manufacturing.

Mr. Patel has further submitted that when the Tribunal has held that the decision in Anil Chemicals'' case was not correct, but the decision in IDL Chemicals'' case was not correct, it means that the manufacturing process is the same in both the cases. Hence, the judgment of the Larger Bench of CEGAT is applicable in the instant case. Mr. Patel has also relied on Circular No. 23/98, dated 27-74998 from the Directorate General of Anti-Evasion (Central Excise) in support of his contention that prilling Ammonium Nitrate involves manufacturing process.

5. Having heard the learned Counsel for the parties, we are of the view that the petitioners have made out a strong prima facie case for the purposes of interim relief insofar as the recovery of past dues is sought to be made by the respondent-authorities from the petitioners herein. In the first place, although it is true that what is challenged in this petition is a show cause notice (Annexure "L" to the petition), the basis of the notice is the CEGAT judgment in Supreme Chemical Works'' case:-

"On scrutiny of the records, it appears that the unit is taking resort to the CBEC Circular Nos. 44/89, dated 19-7-1989 & 56/89, dated 21-9-1989 issued subsequent to the CEGAT Special Bench "C" New Delhi Order .... dated 7-6-1985 in the case of Anil Chemicals Pvt. Ltd., Aurangabad v. Collector of Central Excise, Aurangabad, wherein it was upheld that production of Prilled Ammonium Nitrate 99% from Ammonium Nitrate 75% to 82% does not amount to manufacture under Central Excise Law/Act. However, it appears that the Larger Bench of CEGAT, Court No. III, New Delhi vide MISC. Order No. .... dated 7-6-2000 in Appeal Nos. ...... in case of Supreme Chemical Work v. Collector of Central Excise, Jaipur, upheld that production of Crystals of Ammonium Nitrate from Ammonium Nitrate Melt amount to manufacture. In the above order, the statement of the Law laid down in CCE, Aurangabad v. Anil Chemicals Pvt. Ltd. (supra) was held to be incorrect and ratio of law laid down in IDL Chemicals Ltd. (supra) was endorsed to be correct one. The CEGAT, Special Bench "C", New Delhi vide Order No. ... dated 29-6-1993 ... . in case of IDL Chemicals Ltd. v. Collector, Central Excise, has upheld, conversion of Ammonium Nitrate Melt into Ammonium Nitrate Flakes amounts to manufacture u/s 2(f) of the Central Excise Act, 1944.

In light of the above facts, the matter was referred to the CBEC for clarification. The CBEC appears to have clarified that the Director General Anit-Evasion has already issued the Modus Operandi Circular No. 23/98, dated 27-7-1998 in this regard and as per which Prilling & Coating of Ammonium Nitrate melt amounts to manufacture."

6. Insofar as the first part of the above quoted paragraph is concerned, it is obvious that the Commissioner of Central Excise, Vapi is treating the Board Circular dated 19-7-1989 as not applicable in view of the Larger Bench decision of the CEGAT in Supreme Chemical Works'' case. However, the assertion made on behalf of the petitioners that Circular No. 44/89, dated 19-7-1989 (Annexure "C") is not cancelled or withdrawn, is not disputed on behalf of the respondents. In that view of the matter, we are of the view that the principles laid down by the

Apex Court in M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, and The Paper Products Ltd. Vs. Commissioner of Central Excise, will reply. In the said decisions, the Apex Court has taken a view that departmental circulars are binding on the department even if such circulars are not warranted by the language of any section of the Act. In the above decisions, the Apex Court confirmed the relief in favour of the assessee on the basis of such circulars even through, on interpretation, the Court took a different view.

7. Reference is also required to be made to the declaration filed by the petitioners on 16-1-2003 i.e. prior to the date of search and seizure which took place in June, 2003. In Para 8(a) of the said declaration, the petitioners stated that the product is not excisable in terms of CBEC Circular No. 44/89, issued on 19-7-1989 and in Para 8(b), the petitioners pointed out that the petitioner-Company has taken over chemical business in question from Bhagwati Nitrate Pvt. Ltd. with effect from 1-11-2001 and continues to buy Ammonium Nitrate Melt and carry out prilling to make Prilled Ammonium Nitrate as was done before. The petitioners also pointed out the stand of the department on as many as four occasions in the past that making of Prilled Ammonium Nitrate does not amount to manufacture.

(i) The Asstt. Collector, Central Excise, Daman vide letter No. F.No./MISC/MODVAT/92/3752, dated 30-6-1992 held that conversion of Ammonium Nitrate Melt into Prilled Ammonium Nitrate does not amount to manufacture and no new product comes into existence.

(ii) Vide letter No. F.No. V/MISC/TECH/92-11, dated 3-6-1994, the Asstt. Collector, Central Excise, Daman reiterated the non-excisability of Prilled Ammonium Nitrate.

(iii) By RPAD letter No. BNPL/567/2K, dated 14-9-2000 to Superintendent of Central Excise, Sarigam sought advice on any change in legal status as regards non-applicability of excise on the product, but the higher authorities did not advice any change.

(iv) After taking over the unit, the petitioner-Company filed letter dated 12-12-2001 with the Asstt. Commissioner, Central Excise, Daman stating that since Prilled Ammonium Nitrate is manufactured from Ammonium Nitrate Melt, the petitioners are unable to obtain Excise Registration and seeking confirmation thereof. The authorities did not inform the petitioners that the petitioners were carrying out any manufacturing activity.

The respondents have not stated any part of the declaration as incorrect.

8. As regards the MO Circular No. 23/98, dated 27-7-1978, the same deals with manufacture of Ammonium Nitrate and Calcium Carbonate from Calcium Ammonium Nitrate as will be clear from the contents of the said circular sent by the Deputy Director (Intelligence) to all the Commissioners of Central Excise, which read as under :-

"Information recommended in the Directorate General indicates the manufacturers of the Ammonium Nitrate and Calcium Carbonate from Calcium Ammonium Nitrate are evading duty by not getting themselves registered with the department. The manufacturing process of Ammonium Nitrate involves dissolving of Calcium Ammonium Nitrate placed in stainless steel pan by the application of steam. Ammonium Bicarbonate and settling against the paradox are thereafter added to the solution and is allowed to settle for some time. Thereafter the upper level of solution is sucked into a dryer and Ammonium Nitrate in powder form emerges as resultant product. The residual material in the pan is Calcium Carbonate, which is a by-product.

2. This process involves a chemical reaction and a new commercial product having a distinct name, character and use emerges as a result of manufacturing activity. The said product i.e. Ammonium Nitrate is marketable and is sold to be manufacturer of explosives etc. Both the products i.e. Ammonium Nitrate and Calcium Carbonate are excisable and leviable to Central Excise duty."

It appears that the above circular deals with manufacture of Ammonium Nitrate and Calcium Carbonate from Calcium Ammonium Nitrate and not with making Prilled Ammonium Nitrate from Ammonium Nitrate Melt. As against the above process, the process employed by the petitioners was explained in Para 9 of the petitioners'' declaration dated 16-1-2003 in the following terms :-

"We buy Ammonium Nitrate Melt mainly from Gujarat Narmada Valley Fertilizers Company Limited (GNFC) and put it through evaporators for improving the concentration. The said concentrated Ammonium Nitrate is then put through prilling tower leading to change in physical state from liquid to solid to suit end application. Between Ammonium Nitrate Melt and Prillled Ammonium Nitrate there is no change in chemical composition (NH4NO3) except for removal of extra moisture and change from liquid to solid."

It, therefore, appears that the process being carried on by the petitioners is different from manufacturing activity referred to in MO Circular No. 23/98. In fact, MO Circular No. 23/98 by itself does not even refer to prilling.

9. In the above view of the matter and also in view of the fact that in the past the department had itself examined the case when the petitioners'' predecessor was running the factory making the same product that the process in question did not amount to manufacture, the petitioners have made out a strong prima facie case for the grant of interim relief against recovery of past dues prior to 11th June, 2003. Since the petitioners have already started paying excise duty from 11th June, 2003 onwards, we are not granting the relief for the period on and from 11th June, 2003.

10. Accordingly, there shall be interim relief in terms of Para 9(FF) with a clarification that this interim relief is only confined to the stay of the impugned notice dated 1-11-2003 at Annexure "L" to the petition and that this interim relief does not extend to any demand for the period after 11-6-2003.