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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/4116/2004 Date 22/08/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S NATIONAL ENGINEERING CO.
LINK ROAD, FARIDABAD
121002

M/S NATIONAL ENGINEERING CO. Appellant
Vs
C.C.E. DELHI-IV, FARIDABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No. 616/08** **2004 Excise** dated 13-8-08

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar

(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E. DELHI-IV, FARIDABAD
   C.R. BUILDINGS, (DELHI-IV) NEW C.G.O. COMPLEX, NH-IV, FARIDABAD
2. Adv. / Consult
   ~~MR I.S AGGARWAL~~ SH, BIPIN GARG, ADV,
   B-1/1289-A, VASANT KUNJ,
   N. DELHI-70
3. S.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, COURT No. I,
NEW DELHI

Excise Appeal No.4116/2004-EX(BR)

(Arising out of order in original .13/RH/Adj/2004 dated 30.6.2004 passed by the Commissioner Customs & Central Excise, Faridabad)

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member(Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

M/s National Engineering Corporation Appellant
(Rep. by Shri Bipin Garg, Advocate)

Vs

CCE, Delhi-IV Respondent
(Rep. by Shri V.K. Agarwal, DR)

Coram: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member(Technical)

Date of Hearing: 1.8.2008
Date of Decision: 13-8-08

Per M. Veeraiyan:

FINAL ORDER NO. 616/08-EX

This is an appeal against the order of the Commissioner No.13/RH/Adj/2004 dated 30.6.2004. The said order was passed by the Commissioner in de-novo adjudication proceedings as per the directions of the Tribunal vide Order No. E/1302/97-B.1 dated 26.8.1997.

2. Heard both sides.

3. The relevant facts, in brief, are as follows:

a) The appellant is engaged in the manufacture of goods known as 'Oxygen lancing pipes'. The appellant wrote a letter dated 17.3.1994 to the Deputy Commissioner of Central Excise, Faridabad stating that they were purchasing steel tubes from tube mills in sizes upto 19/20 mm OD and thickness of 1.2 mm to 2 mm; that the tubes were cold drawn to reduce the outer diameter to desired size. They sought clarification as to whether the activities so undertaken would amount to manufacture. By a letter dated 28.4.1994, a clarification was issued by the Department that their resultant product was excisable and chargeable to Central Excise duty.

b) A letter dated 3.6.1994 was issued by the Superintendent seeking information including details of clearance figures and as the details were not furnished, summons were issued and statements were recorded on 20.7.1994. However, for subsequent summons there was no cooperation from the party.

c) A show cause notice dated 28.7.1995 was issued proposing demand of duty amounting to Rs.73,60,631/- relating to the period July, 1990 to March, 1994 and proposing penal action.

d) By an order dated 26.11.1996, the then Collector of Central Excise, New Delhi passed an order confirming demand of duty as above and imposing equal amount of penalty on the appellant.

e) The party filed appeal before the Tribunal. It was argued by the DR that the appellants had carried out activity on the HR sheets but party claimed that activity was undertaken by them on steel tubes purchased by them on payment of duty.

f) As the dispute was fundamental in nature, the Tribunal by order dated 26.8.97, remitted the matter for de-novo consideration. All the claims made by the appellant were kept open.

g) Before the Commissioner, they raised issues that the total turnover included figures relating to the goods traded/exported by them. However, it appears that they failed to produce any evidence in support of this claim. It also appears that they failed to produce any evidence about the purchase and duty paid nature of steel tubes, claimed to have been used for producing 'oxygen lance pipes.'

h) Commissioner vide impugned order dated 30.6.2004 (passed in pursuance to Tribunal order dated 26.8.97) confirmed duty amounting to

Rs.73,60,631/- and imposed equal penalty under 173-Q of Central Excise Rules.

4.1 The learned Advocate submitted that they purchased mostly duty paid tubes; redrew the pipes to required dimensions; such redrawing did not amount to manufacture prior to 1.3.97 in respect of products falling under 7306.

4.2 He also submits that in respect of the pipes they undertake activities like threading and socketing and the new product is also pipes falling under 7306. Since a new product has not emerged, the product should not be treated as excisable.

4.3 He also made alternate submissions. CBEC Circular No.190/24/26/CX dated 27.3.96 clarified that process of manufacturing pipes from steel pipes would amount to manufacture. Such clarification has been issued as doubts have been expressed on the said issue. Therefore, the demand relating to the period July 1990 to March, 1994 by a show cause notice dated 28.7.95 should be treated as time barred.

4.4 He submits that they are eligible for the benefit of notification No.202/88 and as regards the duty paid nature of inputs used, they were not required to produce any proof in view of the explanation to the said notification which reads as follows:

"For the purposes of this notification, all stocks of inputs in the country, except such stocks as are clearly recognisable as being non-duty

paid or charged to Nil rate of duty, shall be deemed to be inputs on which duty has already been paid."

4.5 The learned Advocate relies on the following decisions in support of his contention that extended period of limitation cannot be invoked:

Continental Foundation Jt Venture Vs CCE Chandigarh-I
2007 (216) ELT 177 (SC)

Pushpam Pharmaceuticals Co. CCE Bombay
1995 (78) ELT 401 (SC)

Indian Oil Corporatin Ltd (Haldia Refinery) Vs CCE Kolkata-II
2-005 (191) ELT 996 (Tri. Kolkata)

Gopal Zarda Udyog Vs CCE New Delhi
2005 (188) ELT 251 (SC)

CCE & C, Pune Vs Vulcan Leval Ltd
1985 (22) ELT 123 (Tribunal)

5.1 The learned DR draws our attention that the appellants did not cooperate by furnishing the relevant details even at the time of investigation in 1994. A remand order dated 26.8.97 was passed by the Tribunal leaving all issues open and with specific direction to consider the dispute whether the appellant manufactured using HR sheets or duty paid tubes. Under these circumstnaces, it was necessary on their part to furnish the relevant details. They have not produced the relevant records before the adjudicating authority.

5.2 The duty has been demanded only on the oxygen lance pipes.

The oxygen lance pipes is a specialised product. He relies on the literature for this product from web site http://www.pgegroup.com/oxylance.html It is required for use in high temperature for supplying oxygen to burn metals etc. It requires to be 'cleaned for oxygen use'. This is a sensitive part and must be free from oil and grease to prevent possible explosions that may occur due to mixing of oil and grease. .

5.3 If they had manufactured from HR sheets, the said product namely oxygen lance pipes, fall under a tariff heading different from HR sheets and also carry a different name, has different character and made for a different use. If they had manufactured from steel tubes, even though the two products might fall under same heading, the resultant product has a new name , it has entirely different character and meant for a specific use and the same has come out of a series of activities and hence excisable.

5.4 The activity of redrawing was to fulfil certain objective. In addition to redrawing, processes like threading, socketing, cleaning has been done and the new product has arisen out of conscious and specialised processes. It is a specialized product meant for specific and special purpose.

5.5 The benefit of Notification No. 202/2008 is dependent on conforming to specifications of 'dimensions' which is a condition precedent; it is also subject to the condition precedent that inputs have paid duty; both the conditions should be fulfilled before availing the exemption. These have not been fulfilled. Therefore, he seeks upholding of the order of the original authority.

6. The learned DR submits that the Explanation to Notification No. 202/88 is a one time relaxation for all stocks of inputs in the Country. In respect of the present case, the applicant is under obligation to prove that the input has paid appropriate duty.

7. We have carefully considered the submissions from both sides. At the outset, we find that the matter is before the Tribunal for the second time having been remanded to original authority in 1997 i.e. more than a decade ago. The remand was necessitated as the applicant raised the plea that they have manufactured the disputed product from steel pipes and not from HR sheets. However, the remand order kept all issues open. Admittedly, appellant was not able to produce any evidence regarding their defence claim that the products were made from steel tubes.

8. We find from the material placed on record before us that the oxygen glance pipes is a product meant for a special purpose; it has come as a result of several processes undertaken on HR sheets, strips, coils or steel tubes. Each of the process, for example, drawing or redrawing, threading, socketing taken alone, may not amount to manufacture. But the cumulative effect of all these processes would be entirely different. Even if the starting material was steel pipes as claimed by the appellant,

we are of the considered opinion that bringing oxygen lance pipes into existence would stand the test of manufacture as it has acquired a new name and has entirely a different character and is meant for a use different from the use of steel pipes out of which they might have been made. We are in agreement that the oxygen lance pipes requires to be cleaned for oxygen use as otherwise it may pose danger during use of the same. Therefore, we hold that this is a new product liable for excise duty under 7306 during the relevant time.

9. Having held the same as excisable, we proceed to consider the claim of the appellant to the eligibility of exemption under Notification No. 202/88 CE dated 20.5.1988. The Notification is subject to two important conditions. The dimensions should be as specified in the said notification. The burden to prove that the dimensions are as specified is on the assessee who claims the benefit of the notification. This condition should be satisfied before the exemption can be allowed. The appellant has not been able to produce any evidence about their satisfying this condition. The other condition is that the inputs used for manufacture of the impugned product should be duty paid. The explanation deeming the duty paid nature holds that 'all stocks of inputs in the country' are deemed to be duty paid inputs. The explanation does not hold that all stocks of inputs procured from the market are duty paid. The learned DR submits that the explanation should be treated as one time relaxation of

the available stock at the time of coming of the notification. We are in agreement with this view of the learned DR. Otherwise, it can lead to a situation where not only all stocks of inputs in the country at the coming of the notification but also whatever produced and procured by the various manufacturers over the years would be deemed to be duty paid.

10. As regards the application of extended time limit, we find that during the relevant period, the applicant has not registered with the excise authorities and has not followed the excise procedures. They claim to have entertained a doubt after the introduction of budget in March, 1994 which ~~it~~ was clarified to them promptly by the Department. This can not lead to an inference that they acted bonafide in the past in July 1990 to March, 1994. Such an approach would lead to regularising irregularities of the past. Having manufactured a specialised product through special processes their presumption that they were not dutiable, cannot be considered bonafide. Nothing prevented from raising the doubt earlier. The extended time limit has been correctly invoked.

11. However, having regard to the facts and circumstances of the case, and considering that the demand relates to pre-11AC period, we are of the view that some leniency may be shown in the quantum of penalty imposed.

12. The appeal is disposed of on the following terms:

The oxygen lance pipes are held to be excisable and that they are not eligible for the exemption Notification No. 202 of 2008. The duty demand by the original authority invoking extended time limit is upheld. The penalty is however, reduced from Rs.73,60,631/- to Rs. 30,00,000/- (Rupees Thirty lakhs only).

The appeal is disposed of.

(Order pronounced on 13th August, 2008).

(Justice S.N. Jha)
President

(M. Veeraiyan)
Member(Technical)

MPS*