

Krishna and Co. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-03-1997

Reported in : (1998)(97)ELT74TriDel

Appellant : Krishna and Co.

Respondent : Collector of Central Excise

Judgement :

1. This appeal arises from the Order-in-Original dated 25-5-1993, passed by the Collector of Central Excise, Jaipur, confirming the demand of Rs. 2,77,389/- under Rule 9(2) of the C.E. Rules, 1944 read with Section 11A(1) of the CESA, 1944. He has also imposed a penalty of Rs. 40,000/- under Rule 173Q of C.E. Rules, 1944.
2. The facts leading to the confirmation of demand are that the officers of Central Excise Collectorate, Jaipur visited the factory premises of the appellants on 12-6-1992. During the course of checking, the officers were able to seize one private diary, which was maintained by Shri R.B. Singh, Authorised Signatory of the assessee showing clearances of M.S. Ingots from factory gate for the period from 25-5-1992 to 12-6-1992. On the basis of verification of physical stock of M.S. Ingots of Runner and Risers, which was verified in the presence of the said person, it was found that a quantity of 24.406 MT of M.S. Ingots and 12.535 MT of Runner and Risers were found short in stock. A statement was recorded from the said person, who admitted the clearance of M.S. Ingots from the factory gate for the said period and he appears to have admitted the clearances from Headquarters Office (branch transfer basis) without GP 1. He also admitted that

the quantity of M.S. Ingots shown in the diary did not tally with the quantity of M.S. Ingots shown in the respective GP 1s, sometimes they had prepared gate pass for less quantity as against the actual quantity removed from the factory as shown in private diary. A chart of clearances of M.S. Ingots/Runners and Risers from the factory as shown in private diary (date-wise) vis-a-vis the quantity shown in GP 1s and also the quantity removed from the factory without issue of GP 1s, without payment of duty was prepared in the presence of the said person. According to the said conclusion, the department alleged that 342.545 MT of M.S. Ingots/Runners and Risers were found to have been cleared without payment of duty. The statement of Shri S.K. Sehgal, General Manager was also recorded, who accepted the correctness of the documents prepared on 12-6-1992 in the factory. As regards the different of quantity of 342.545 MT of M.S. Ingots, he stated that against Entry No. 5, 33, 34 and 37 of the differential statement, a quantity of 11.230 MT (gate pass No. 56) 10.060 MT (gate pass No. 77), 10.130 MT (gate pass No. 79) and 9.615 MT (gate pass No. 81) were removed by them on payment of duty. But these clearances were not taken into consideration as the GP 1 numbers were not written in the diary. As regards the shortage of 24.406 MT M.S. Ingots and 12.535 MT Runners and Risers found in stock on 12-6-1992, Shri Arun Kumar Goenka stated that shortage might have occurred due to removal of M.S. Ingots on proceeding dates of which the GP 1 could not have been prepared. Therefore, the department alleged that they had suppressed the actual production by 301.510 MT (342.545 - 41.035) of M.S. Ingots and cleared the same clandestinely without payment of duty amounting Rs. 2,77,389/- contravening the provisions of various rules of CE Rules. Therefore, a show cause notice dated 1-9-1992 was issued demanding duty and also calling upon them to explain as to why they should not be penalised. The appellants filed a detailed reply dated 30th December, 1992 denying all the allegations.

It was stated by them that the diary maintained by the said person, Shri R.B. Singh is not at all an authenticated note book to substantiate the charge of suppression of production and clandestine removal of excisable goods against the noticees. The noticees maintained statutory records; all the clearances had taken place after payment of duty under cover of valid gate passes which is sufficient proof that the excise duty had been correctly paid before removal of the excisable goods. They

stated that no reliance can be placed on the note book/diary of Shri R.B. Singh in the presence of statutory records and gate passes which revealed payment of duty before clearance of the same from the receipts of duty paid goods at consignee's end, it would have satisfied the department in respect of the actual receipt of duty paid goods at that end. They also stated that the department had not made any enquiry to substantiate the charge of clandestine removal by producing any corroborative evidence to establish suppression of production and clandestine removal. In this regard, a judgment rendered by the Tribunal in the case of Ganga Rubber Industries v. Collector of Central Excise, as reported in 1989 (39) E.L.T. 650 was relied. It was also stated that the entries are wrong in the diary inasmuch as they did not show separately the quantity cleared and loaded in the truck from the factory on payment of duty on proper gate passes and the additional quantities loaded/handled in the truck from the noticees duty paid godown at Delhi. It was contended that even the entries in the note book are not wrong but that there is no mention of the fact that some more ingots were loaded/handled from their duty paid godown at Delhi. They also denied that Shri Arun Goenka, General Manager had confirmed the statement of Shri R.B. Singh and all the maintenance of the said notebook/diary. They denied the correctness of 301.510 MT of M.S. Ingots clearances arrived at from the diary.

3. The learned Collector gave a hearing and has passed the impugned order. However, the said order has been passed in peremptory manner without due discussion on the details called out from the diary and without any corroborative evidence.

4. According to the learned Advocate, the present order of the Collector is a non-speaking order and it is the order without due discussion on the evidence. It is his submission that a mere private register or a diary cannot be the basis for confirming duty. The statements are also not sufficient. It is his submission that there has to be some evidence in the form of use of raw materials, use of electricity and ultimate manufacture of goods and also sale of the goods to some purchasers. It is his submission that in the present case, the department had not taken pains to collect any corroborative evidence in the form of verification of even statutory registers in the form of RG registers, Form-4, and other statutory

registers. The department ought to have verified the statutory registers pertaining to inputs, electricity records and other registers to arrive the conclusion that there has been indeed excess production of 301.510 MT of M.S. Ingots which has not been entered in the statutory registers and the same having been removed clandestinely. It is his submission that failure on the part of the department to even substantiate the case that these materials has led to failure of justice and therefore, on this basis itself the impugned order is required to be set aside. He points out that that Tribunal has consistently been taking a view that private registers by itself cannot be the sole criterion for confirming the demands without bringing in corroborative evidence. In this regard, he relies on the judgment rendered by the Tribunal in the case of Ganga Rubber Industries v. Collector of Central Excise, as reported in 1989 (39) E.L.T. 650, wherein on a similar circumstances, the Tribunal has held that :- "The department could have and should have made enquiries to find out if the entries in the two books were genuine or not. Transport Companies, Octroi Posts, and Consignees to whom the goods were allegedly sent were the resources from which verification of the accounts was possible. No verification was done. Besides, the principle of law is that it is up to the Revenue to prove reliability of the books. It does not appear that any attempt has been made to compare the hand-writing in the books with that of any one in the factory. It is therefore, to be held that the Revenue has not proved that the entries in the accounts in these books represented actual clandestine removals. The benefit of doubt is therefore, extended and the Boards' order is set aside to the extent that the duty was demanded on the basis of these registers".

5. The learned Counsel also relied on the judgment rendered in the case of Kashmir Vanaspati Pvt. Ltd. v. Collector of Central Excise, as reported in 1989 (39) E.L.T. 655, wherein it has been held in paras 4 & 5, which is reproduced herein below :- "4. I have gone through the records of the case and the arguments advanced before me. The only evidence on the basis of which duty has been demanded and penalty has been imposed in this case is a private note book seized from Shri Desh Raj, Contractor. This note book was maintained by the labourers engaged by Shri Desh Raj. I have seen the entries made in the note book on 21-1-1986, 22-1-1986, 5-2-1986 and 11-7-1986. I find that on 21-1-1986 there is an entry of loading 1275 tins and packing 1600 tins. Whereas figure of

loading is authenticated by initial, there is no authentication of the figure of packing. On 22-1-1986 entries indicate that 1600 tins were packed and 3930 tins were loaded. The figure 1600 tins against packing is initialled, but 3930 tins in respect of loading is not authenticated by any signature. This is one of the entries in dispute. On 5-2-1986 there is an entry of packing 2000 tins which is not authenticated by any initial. There is an entry of loading 6234 tins which is authenticated by initial. The digit "6" in the above figure of 6234 is overwritten. On the same date, there is figure 3331 tins against the unloading. There is correction in this figure. On 11-7-1986, the entry is the Gurumukhi. However, Shri Jain has explained that on that date there is an entry of Ghee loading 2276 tins. This figure bears overwriting and is also-not authenticated by any initial.

Looking to the various entries in the other pages of the note book, I find that there are overwritings in many cases. Shri B.R. Sharma, an employee of the appellants, has also stated in his written statement that he made some of the entries in the note book on account of the work done by the labourers in the factory premises and that labourers used to come to him for getting the entries made in respect of the work done. In view of the fact that many of the entries are not authenticated by the signature of anybody, there is overwriting in the entries without proper attestation and note book was maintained by the labourers and not by Shri Desh Raj, Contractor, personally, I am of the view that this is not a dependable record to establish clandestine removal of vegetable products manufactured by the appellants unless the same is supported by other evidence, such as, raw material consumed, goods actually manufactured and packed etc. There is no such evidence on record.

There is also no co-relation between the consumption of raw materials, vegetable product manufactured, packed and cleared. In the circumstances, it cannot be held that 956 tins of vegetable products were actually manufactured by the appellants and clandestinely removed from the factory without payment of duty.

5. In view of the above discussions, the impugned order has to be set aside and the appeal allowed. I order accordingly."Metal Fitting Pvt. Ltd. v. Collector of Central Excise, as reported in 1997 (93) E.L.T. 747, wherein demand has been

raised on the basis of similar statements and private registers.

7. The learned DR submits that the case has been built up on the basis of private diary and the admitted statements. These admitted statements have not been resiled by the party and therefore, such statements have binding effect and they cannot be set aside merely on the ground that corroborative evidence has not been produced. Therefore, he submits that the department were able to establish the facts found in the diary from the statements recorded from the persons. Therefore, the demands raised are required to be confirmed including the penalty, as there has been clear clandestine removal in the case.

8. On a careful consideration of the matter, I am satisfied that the submissions made by the learned Advocate has got force. The learned Collector has not taken pains to verify the contents of the diary and to scrutinise each and every entry with that of the statutory registers. After recording the case of the appellants and the respondents, he has confirmed the demands on the ground that there has been admission in the case. It has been reiterated by the Tribunal time and again that in case of clandestine removal, the department ought to produce corroborative evidence. Even if there are statements admitting the existence of private registers, even then the party has to be given an opportunity to explain each and every entry. In this particular case, the department has accepted few of the entries on the basis of the statements of one Shri Arun Goenka, General Manager of M/s. Krishna & Co. The department in this case has not shown to whom the other 301.510 MT of M.S. Ingots has been sold from the private diary.

Obviously, there should have been sale to some parties and it was for the department to have culled out from the diary itself about that purchasers of these goods and thereafter, statements ought to have been recorded to corroborate the statement made by Shri R.B. Singh. Although initially the General Manager, Shri Arun Goenka is said to have admitted about the presence of private diary. However, the same has been disputed on a later time. Therefore, in a circumstances, where the assessee has putforth various pleas in reply to the show cause notice and has asked for re-authentication of the stocks as well as the contents of the diary, therefore, the department could not have brushed aside

these defence, however, they might be insufficient. The learned Collector ought to have examined all the aspects of the matter and a detailed finding should have been given to arrive at, as to how much quantity was cleared clandestinely, then merely accepting the statements that there has been a clearance of 301.510 MT of M.S.Ingots. The learned Counsel has relied on the judgments noted above and the extracts. From the extract of the judgment, it is clearly held that the department should not base the case solely on the private diary but there has to be sufficient corroboration and such corroboration can also be obtained from the seized record itself with verification from the statutory registers and also from the details of electricity consumed and input registers maintained by them. The learned Counsel submits that all these registers are still available and the department are at liberty to carry out a second verification for which the assessee does not have any objection. The learned Counsel further submits that there has been no clandestine removal in the case as alleged but the statements were given in hurry and out of fear and although same was not resiled. He points out that a detailed reply to the show cause notice was given which has not been considered at all.

It is also his submission that there is no cause to indulge in clandestine removal as the appellants had started the factory newly and they were in the business only for 5 months. Therefore, taking into consideration all these factors into account and the fact that the order is not a speaking order, it is but proper that the impugned order is set aside and the matter remanded to the original authority with a direction that the original authorities shall grant the appellants an opportunity of hearing and to defend their case. The original authorities shall carry out de novo proceedings in the light of law laid down by the Tribunal in the above noted judgments.

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