

Videocomp Electronics Vs. Commissioner of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-14-1999

Reported in : (1999)(66)ECC475

Appellant : Videocomp Electronics

Respondent : Commissioner of C. Ex.

Judgement :

This is a party's appeal against the above captioned impugned order dated 27-10-1998 of the Commissioner of Central Excise (Appeals), Mumbai-III praying for setting aside the same and to decide the appeal on merits and set aside the order for duty and penalty and for such other relief.

1. The brief facts of the case are that the appellant is engaged in manufacture of TV Mechanical Tubes falling under Chapter 84, CETA, 1985, holding registration certificate. On the verification of the statutory records by preventive staff of Division IX, it was noticed that the appellant had removed 10,139 numbers of TV mechanical tuners under the cover of the delivery challan without payment of Central Excise duty and following Central Excise procedure such as clearance under invoice and accounting for RG 1 register. The appellant stated that the goods were received for repairs from the customer and returned after the necessary repairs, and they could not show any documents such as D-3 declaration under Rule 173H of foreign filed register showing such receipt of goods. The above goods valued at Rs. 9,43,393/- have been cleared from April, 1993 to December, 1994. The appellant has voluntarily paid the Central Excise

duty 83,269.72. R.S. Marathe, accounts executive and partner Shri G.K. Sharda in their statement admitted that they know the provision of Central Excise rules and have neither maintained Form V register nor filed D-3 declaration. The assessee had no intention to evade payment of Central Excise and contravened the Central Excise Rules. The show cause notice dated 8-4-1997 was issued by the Additional Commissioner of Central Excise, Mumbai-II to the appellant calling upon to show cause as to why the duty amounting to Rs. 83,340.47 leviable on the finished products i.e.

10,139 nos. of TV mechanical tuners valued 9,43,393/- cleared clandestinely during April, 1992 to December, 1994 should not be demanded and recovered under proviso to Sub-section 1 of Section 11A of the Central Excise Act and why the voluntarily paid amount of Rs. 83,269/- should not be appropriated towards it and why an interest of 20% on the total duty determined to be payable should not be demanded and recovered under Section 11AB of the Act and why penalty equal to the amount of duty determined to be payable, should not be imposed under Section 11 AC of the Central Excise Act After receiving the reply from the appellant and holding the personal hearing on 25-10-1997 and after hearing the parties, the Addl. Commissioner has confirmed the demand and appropriated Rs. 83,269.72 voluntarily paid towards it and imposed equal penalty of Rs. 83,340.47 under Section 11 AC and demanded interest under Section 11AB of the Central Excise Act. Appeal preferred against that order was dismissed under the impugned order under Section 35F on the ground that the appellant failed to pre-deposit the penalty of Rs. 83,340.47 within 15 days from the date of stay order dated 27-4-1998 and failed to comply within 20 days. Hence this appeal.

2. Both parties are heard. They have argued on the merits of the case.

The appellant is a manufacturer of tuners a SSI unit, the production of which is within 50 lakhs and they are availing of benefit of Notification No. 175/86 and 1/93. In the instant case, they had received tuner for repair along with the challan of the customers and after repair returned the same with their challans. Since it is a small unit, D-3 intimation was not given and Rule 173H was not applied. Only on suspicion, clandestine removal of the tuners is allowed, which is an offence and

required to be proved by the department. The duty 83,740/- is already paid by them regarding to tuners during January to March 1995 and the show cause notice is issued on 3-4-1997 beyond six months and it is barred by time. The penalty and interest under Section 11AB and AC cannot be levied, as the said provisions were not existing during the period in which the above events have happened. According to the departmental representative the appellant have avoided the verification by the department in not following Rule 173H and not filing D-3 intimation regarding the repairs and the return of the same, and the maintenance of the records in that regard. The goods are not available in the factory. Only the preventive staff could detect. The payment of duty by the appellant is an acceptance of the case. There is no dispute of the payment of duty on the tuner earlier, but the goods returned now are not after repair but a clandestine removal. The appellant has pointed out the correspondence from the customers regarding the receipt of the tuners after repairs.

3. From the above, it is clear that there is no dispute about the payment of excise duty on the tuners manufactured by the appellant. As submitted by the departmental representative the question is about whether there was a clandestine removal or repair of the returned tuner to the customers who had purchased from them? The imposition of penalty and interest is challenged on the ground that the provision invoked was not available at that time. The order-in-appeal confines only about the dismissal of the appeal for non-compliance of the penalty amount of Rs. 83,340.47 as per the order dated 27-4-1998 and the compliance of the same. So from this it is clear that the Commissioner has not dealt with the case on the merits. The appeal was dismissed at a preliminary stage at 35F of Central Excise Act for non-deposit of the penalty amount. In the absence of any decision by the appellate authority on the merits of the case, now this appeal cannot be considered and disposed of, only on the scrutiny of the order-in-original when there is an appellate authority available for this job.

4. Admittedly, the duty is paid by the appellant. The question of clandestine removal is a matter of proof by the department. The liability for payment of interest and penalty depends upon the decision on merits. Apart from that whether the penalty could be imposed in the instant case under Section 11 AC is a legal

aspect. So under these circumstances the stay application is allowed and the appeal is remanded back to the Commissioner (Appeal) to hear the appellants on merits and dispose off the case in accordance with law and impugned order is set aside.

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