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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-11-1999

Reported in : (2000)(68)ECC304

Appellant : Universal Containers Pvt. Ltd.

Respondent : Commr. of C. Ex.

Judgement :

1. This is the party's appeal against the above captioned impugned order dated 20-12-1994 of the respondent praying for setting aside the same along with show cause notice dated 23-7-1985.

1. The brief facts of the case are that the appellant manufactures metal, containers falling under item No. 46 of Central Excise Tariff.

On 14-8-1983 Superintendent paid a surprise visit and verified the statutory records RG1, GPs and production reports of appellant, and noticed that entries of production and clearance was erased, overwritten and less production and clearance were shown. They have cleared metal containers without payment of duty, and contravened Rule 9(1) read with Rules 523A, 53, 173G of Central Excise Rules, show cause notice was issued seeking recovery of Central Excise duty under proviso (1) to Section 11 A of Central Excise Act, and imposing penalty under Rule 226,173Q of the above Rules. Appellant replied on 4-11-1985 contending that there were only clerical mistakes and excisable goods were manufactured and cleared on payment of excise duty. Notice is issued beyond 6

months, for the period 25-4-1981 to 15-4-1983. All RT returns were finally assessed. There is no suppression as internal audit and CERA Audit has been conducted during the above period. After holding personal hearing on 15-9-1994 and hearing the Consultant Shri S.H. Joshi and S. Padmanabhan for appellant, and after going through the material available on record, the Collector of Central Excise, Bombay-I has passed the impugned order confirmed the demand of Rs. 61,639.08 under the show cause notice dated 23-7-1985 and dropped Rs. 5,096.74 ps and imposed penalty of Rs. 40.000/- under Rule 9(2) read with Rule 226 and 173Q on appellant. Hence this appeal.

2. The learned Counsel for appellant Shri D.D. Gwalani has argued that whole demand is based on annexures to show cause notice. There is no difference between the quantity shown in the delivery challan or quantity debited in RG1. The only errors are debit is shown in next day, in the wrong variety of goods. Admittedly there are difference in the quantity shown in delivery challan and RG1 debit entry. There could not be any demand for correct quantity shown and debited. Dealing clerk made a technical error in making entries in RG1 and delivery challan.

Token penalty would serve the purpose. Show cause notice is issued nearly after two years, after the department gained knowledge on the date of Superintendent's visit. Case was decided on 07-2-1995, as the show cause notice dated 23-7-1985 without any reason. As per page 6 of impugned order, clandestine removal is negated. As per annexure 'B' to show cause notice, removal is made on payment of duty. Only Rs. 2,000/- penalty is fixed under Rule 226. How Rs. 40.000/- was imposed is not clear. Synopsis is also filed. The learned JDR Sri K.M. Patwan has urged there is discrepancy in all the entry in annexure 'B' to show cause notice. Serial No. 11 and 15 are clear. There is erasure and over writing. As per page 7 of impugned order there is no clerical error. In the reply it is urged that there is no fraud or misrepresentation.

Mistakes are pointed out in records. The matter may be remanded to verify when goods left and where gone, and also for reconciliation of errors. Order No. E/1298/97 of New Delhi, CEGAT is relied on in Appeal No. E/658/99-B, dated 18-

6-1997.

3. Point for consideration is whether there are sufficient and statutory grounds to allow the appeal. I answer in the affirmative.

4. Perused the show cause notice dated 23-7-1995, reply dated 4-11-1985 and annexure 'A' and 'B' to show cause notice, impugned Order-in-Original dated 20-12-1994 and Section 11A(1) proviso to Central Excise Act, appeal memorandum. The period involved is 18-8-1983 as per Form EA3 annexed to the appeal memorandum, and from April 1981 to April 1983 as per Annexure 'A' to the show cause notice. Evidently show cause notice is issued under proviso to Clause (I) of Section 11 of Central Excise Act, after a gap of 2 years 3 months from the end of the period, by the Superintendent (P&I), Division E, Bombay -1 with a copy to the Assistant Collector.

5. The question of time bar requires consideration. Annexure 'A' to show cause notice alleges that when erstwhile Superintendent, Central Excise Preventive and Intelligence paid a surprise visit to the factory premises of appellant on 18-8-1983 and verified the statutory records RG1 gate passes and production reports, it was noticed that the entry relating to production and clearance was erased or overwritten and less production and clearance were shown in statutory record. On checking the entry record relating to production and clearance from April 1981 to April 1983 following irregularities were noticed which has resulted either in removal of excisable goods without payment of duty or suppression of production and clearance have also not been satisfactorily accounted for in statutory factory records. Details of production delivery challans, quantity removed etc., are shown in Annexure 'B' to the show cause notice. In Para 1 and 2 of notice it is alleged that duty of excise amounting to Rs. 61,639.08 (basic Rs. 58703.89 and Special Rs. 2935.19) has not been levied or paid or has been short levied as specified in Annexure 'A' and 'B' and it is recoverable from the appellant under proviso to Sub-section (1) of Section 11A of Central Excise Act, and appellant has also contravened the provisions of Rule 9(1), read with Rule 52A, 53, 173G of Central Excise Rules, show cause notice was issued to appellant as to why it should not be recovered and why penalty should not be imposed under Rule 173Q of Central

Excise Rules. Annexure 'B' is the tabular columns with the heading delivery challan with RG1. 8 columns are provided with serial No, date, delivery challan No, quantity cleared as per delivery challan, quantity debited as per RG1 register, difference in RG1 + quantity Nos. difference in delivery challans (-) quantity numbers, value. 43 items are covered for the period from 25-4-1981 to 24-3-1983.

In another table with heading production report with RG1, seven columns are provided, in serial No, date, PR No., quantity as per production report, quantity as per RG1, difference in (+) (-), A/Value. 8 items are shown for the period from 5-4-1982 to 15-4-1983. In the reply to show cause notice, appellant has challenged the show cause notice that the department in raising the demand has gone beyond 6 months of the date of show cause notice. Extended time limit of 5 years cannot be made applicable, unless the same has been invoked in the show cause notice alleging fraud, collusion, suppression of facts, mis-statement or intentional evasion. If it is not done, only normal period of 6 months is applicable. Entire demand is time barred. Order-in-Original considers the question of limitation in page 7 of it. Annexure 'A' makes a clear averment that "entries in the production register and other statutory bills were erased, over-written and less production and clearance were shown in the statutory record, with reference to proviso to Clause (I) of Section 11A of Central Excise Act, the contention of the appellant can not be accepted.

6. The appellant in the appeal memorandum has attacked the above finding in the grounds of appeal No.6 to 9 that on 18-8-1983 when the Superintendent paid surprise visit and verified statutory records and seized them, the department required knowledge about the functioning of the appellant's factory, and notice is issued beyond 6 months from that date, and it is time-barred under Section 11A of Central Excise Act.

There was no question of suppression of facts on the part of the appellant with an intention to evade payment of duty. Invoking larger period under Section 11A in making the demand of duty is not sustainable and the finding in Order-in-Original in that regard is not sustainable.

7. From the above facts, it is seen that as contended by the appellant show cause notice on Annexure 'A' is not clear regarding invoking larger period to make a demand. There is no clear case about the particular entry in a particular statutory record is erased or overwritten. Annexure 'B' does not spell it. Order-in-Original is also not clear and pointed out in that regard. Mere mention of provision is not sufficient. Some positive action of the appellant must be shown to connect with the suppression of facts with an intention to evade payment of duty, which is absent in this case. Allegations in Annexure 'A' shows that the department has no definite ground in the case. They are not substantiated. In the absence of the proviso to Section 11A(I) of Central Excise Act cannot be applied to the case. The contention of the appellant regarding the question of time bar deserves to be upheld.Accepting it, point raised is answered in the affirmative. The impugned order has to be set aside on the ground of limitation. So I pass the following order.

8. For the reasons discussed above, the appeal is allowed with consequential relief if any, according to law, and impugned order is set aside.

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