

Deena Paints Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-23-2000

Reported in : (2001)(96)LC170Tri(Delhi)

Judge : J Balasundaram, S T G.R.

Appellant : Deena Paints

Respondent : Cce

Judgement :

1. In the impugned Order Ld. Commissioner has held "the duty of Rs. 33,799,83.54 was not paid/short paid by reason of wilful misstatement and or suppression of facts with an intention to evade the payment of duty. The duty of Rs. 33,799,83.54 is therefore, rightly demandable under provision to Section 11A(1) of Central Excise Act 1944. The interest on the duty of Rs. 33,799,83.54 not paid/short paid by reason of wilful mis-statement or suppression of facts is also demandable under Section 11AB of the Act *ibid*. The penalty equivalent to Rs. 33,799,83.54 is also imposable on the said M/s. Deena Paints Ltd. under Section 11 AC of the Central Excise Act, 1944.

2. Accordingly I demand duty of excise amounting to Rs. 33,799,83.54 from the said M/s. Deena Paints Ltd. under Section 11A(1) of the Central Excise Act, 1944. I impose a penalty of Rs. 33,799,83.54 on the said M/s. Deena Paints Ltd. under Section 11 AC of the Central Excise Act, 1944 read with Rule 173Q of Central Excise Rules 1944. I demand interest on duty of excise amounting to Rs.

33,79,983.54 from the said M/s. Deena Paints Ltd. under Section 11AB of the Central Excise Act, 1944.

3. The facts of the case in brief are that the appellants are engaged in the manufacturing of paints, Varnishes. They are availing modvat credit of duty paid on inputs under Rule 57A of the Central Excise Rules, 1944.

4. On 9.10.1997 Central Excise Officers visited the factory of the appellants. On physical checking of the finished product as well as raw materials a stock of finished product involving Central Excise duty of Rs. 13,116 and raw materials involving Central Excise duty of Rs. 25,094 was found in excess and was seized. Statement of Shri Budh Ram foreman of the factory was recorded. In his statement he deposed that he had been working in the factory for the last 26 years; that he was keeping the daily account of production whatever was manufactured in a day in his diary; that he handed over the diary to the officers; that in the said notebook he had maintained the details of daily production of paints manufactured container capacity-wise, colour-wise as well as date-wise production of the same and that he had signed every page of the notebook; that in the appellant's factory total of 11 persons were working under his supervision; that he was responsible for the manufacturing of the finished product out of the raw material.

5. The statement of Shri V.K. Nanda, Manager of the factory was also recorded. He deposed that he was working in the factory for the last 20 years; that he was looking after Central Excise work of the factory; that he looked after the day today production of the factory; that he recorded the production in RG I register on the basis of the information of production given to him by Foreman Shri Budh Ram, who was responsible for making production; that they were not maintaining any other record of production and entries were made on verbal intimation given by the foreman; that notebook recovered from Shri Budh Ram contained details of production and that he did not know whether Budh Ram was recording any production made by him date wise and quantity wise; that their average daily production was 800 Ltrs per day; that he was making entries of the production on alternate days; that he admitted that production shown against each date in the

notebook was genuine and correct; that Budh Ram was maintaining production of finished goods made on daily basis for the purpose of getting over time. He submitted that for recording of total production made in a month this was the only record of production; that he has seen page No. 18 of the notebook which contained details of finished goods manufactured during the month of April 1997.

6. Scrutiny of the records resumed revealed that the appellants manufactured 4,85,114 Ltrs. during the period 1.4.1995 to 9.10.1997.

However, only 2,61,215 ltrs. of paints was reflected in the RG 1 register during the said period. It was therefore, alleged that the appellants wilfully suppressed the production of paints the extent of 2,23,899 Ltrs. valued at Rs. 1,72,93,183 and thus this fact was suppressed from the department with the intention to evade payment of Central "Excise duty". Accordingly a show cause notice was issued to the appellants asking them to explain as to why duty amounting to Rs. 33,79,953.54 should not be demanded from them and why penalty should not be imposed and why interest should not be charged.

7. In reply to the show cause notice the appellant submitted that the entire case of the department is made on a diary maintained by a labourer and the statements of labourer and the production manager of the factory. It was argued that the department has not brought on record any evidence that the appellants had procured additional raw material and manufactured the goods. It was also argued by the appellants that the department has not brought on record any evidence about clandestine removal of the goods without payment of duty. It was also submitted that there was no evidence placed on records to show that appellants received any amount of sale proceeds of the goods. It was therefore, contented by appellants that duty was not demandable in the absence of any proof or records. It was submitted that clandestine manufacture and clandestine removal of the goods without payment of duty should have been proved properly, which was not done, Ld.

Commissioner after examining the various facts and the evidence on records and submissions made by the appellant held as indicated above.

8. Shri G. Shiv Das and Shri M.P. Devnath Ld. Advocates submit that the case of the department originated on a visit to the factory and physical checking of the stocks; that certain raw materials were reported to be short; that this allegation of shortage of raw materials has been dropped by the jurisdictional Assistant Commissioner. It was argued by the counsel that only evidence relied upon by the Commissioner is statements of Shri Budh Ram and Shri V.K. Nanda and the diary maintained by Shri Budh Ram. Ld. Counsel submits that both Shri Budh Ram and Shri V.K. Nanda had retracted their statements and filed affidavits; that Shri Budh Ram the person who maintained the diary had explained in his affidavit that the notebook maintained by him did not reflect the correct position. It was contended by the advocates that for manufacture of 2 lakh Ltrs. of paints a lot of raw materials will be required. It was contended by them that department has not adduced any evidence to prove that such large quantity of-inputs had been brought in the factory. It was argued that the department conducted extensive inquiries about supply of raw materials including containers but have not been able to gather any evidence to prove that such large quantity of raw materials was procured by the appellants and had manufactured more than 2 lakh Ltrs. of paints. It was submitted by the counsels that department had verified records maintained by the appellants at their depots at various places but no discrepancy was found. It was, therefore, submitted that it was not possible for the appellants to manufacture more than 2 lakh ltrs. of paints and clear the same without payment of duty without purchase of raw materials of higher quantity and without accounting for the same. It was submitted that figures recorded in the diary maintained by Shri Budh Ram are not corroborated by any other evidence and therefore, the department's claim that the appellants had clandestinely manufactured, larger quantity, of paints and clandestinely removed the same without payment of duty is not supported by any evidence. In support of this contention, the appellants placed reliance on the judgement of the Tribunal in the case of CCE, Meerut v. Moon Beverages Ltd. reported in 1999 (33) RLT 153 : 1999 (85) ECR 657 (T) in the case of Kabra Enterprises and Others v. CCE reported in 1999 (30) RLT 664, in the case of Kothari Products Ltd. and Ors. v. CCE, Kanpur reported in 1999 (31) RLT 67 : 1999 (82) ECR 33 (T) and in the case of Commissioner Central Excise v. Raman Ispat Pvt. Ltd. The counsels submitted that imposition of penalty of an equivalent

amount under Rule (sic) 11AC read with Rule 173Q is not sustainable since the period of demand in this case is from 1.4.1995 to 7.10.1997.

It was submitted by them that the statute was amended for imposition of penalty equivalent to the amount of duty in September 1996 and therefore, any penalty under Section 11AC can cover the period after 28.9.1996. The counsel also submitted that penalty cannot be jointly imposed under Section 11AC read with Rule 173Q. In support of their contention, they cited and relied upon the decision of this Tribunal in its final order A-41/99-NB dated 27.5.1999. Counsel therefore, submitted that in view of above submissions and the case law cited and relied upon by them, the appeal may be allowed. Shri Mewa Singh Ld. SDR submits that the entire case is to be viewed in the facts and circumstances. He submits that on the visit of the officers un-accounted stock in excess of the recorded balance was found.

Presumably it was kept for clandestine removal without payment of duty.

This excess stock is to be viewed in the light of the fact that there was a notebook being written by the foreman of the unit indicating daily production date-wise and colour-wise. He submits that the figures recorded in this diary are to be accepted as verified by the person who maintained the dairy. He submits that these figures have further been confirmed by Shri Nanda, Manager concerned with maintenance of Central Excise records. Ld. D.R. submits that these figures of the diary are further confirmed by first statements of S/Shri Nanda and Budhram. He submits that though there is retraction of these statements by these two persons yet it is to be seen as an afterthought inasmuch as the statements were only explanations to the entries in the diary and therefore, since the figures in the diary were confirmed by the statements of these two persons, these should be treated as corroborative evidence. Ld. DR, therefore, submitted that these pieces of evidence were sufficient to prove clandestine production and clandestine removal. He re-iterated the findings of authorities below.

Ld. DR also submitted that the facts of each case cannot be exactly identical and therefore the cases cited and relied upon by the appellant do not apply to facts of the present case. He therefore, prayed that the appeals may be rejected.

9. We have heard the rival submissions. On careful consideration of the submission made we note that thrust of the arguments of the appellants was that except the diary and the statements of S/s. Nanda and Budhram there was no corroboration by any other evidence to prove that higher quantity of raw materials was procured and paints were clandestinely manufactured and clandestinely removed.

10. Appellants cited and relied upon the decision of this Tribunal in the case of Commissioner Central Excise, Meerut v. Moon Beverages Ltd. In para 10 of this judgement this Tribunal held" Further, it is well settled that the charge of clandestine removal cannot be established on the basis of one single factor which in this case, is the figures of sales reflected in the computerised sheets recovered by the Department from M/s. PEL. Other corroborative evidence such as evidence of other inputs required for manufacture of aerated waters namely Sugar, Carbon dioxide being purchased and utilised in the manufacture of the final product during the period in dispute is required. There is no such corroborative evidence in the present case. There is also no evidence regarding higher electricity consumption. There is also no evidence of receipt of extra sales proceeds of goods clandestinely manufactured or removed. We therefore, uphold the dropping of the demand of Rs. 4,72,51,048- 11. The Revenue has not, to our mind, advanced any convincing remarks to its above findings holding that the demand of Rs. 4,72,51,480/- is sustainable.

12. Ld. Counsel submitted that all the ingredients were absent in the instant case and therefore following ratio of the judgement the demand in their case should be dropped. The counsel also relied on the judgement of this Tribunal in the case of Kabra Enterprises and Others cited above. We find that in para 15 of this judgement this Tribunal held that we are of the view that categorical manufacture and categorical removal has to be proved. The counsel submitted that department has not proved any categorical manufacture and categorical removal without payment of duty in their case and therefore, department has not been able to make out the case.

13. Regarding notebook, the counsel relied upon the decision of this Tribunal of the case of Kothari Products Ltd. and others. In para 14 Tribunal in this case held that "similarly even though six notebooks were recovered during investigation an adverse inference was drawn from the same and in fact the entries in the notebooks clearly established that all the despatch were made against orders received, duty was paid and there was reference to the number of duty paying documents. Hence these notebooks support case of appellants No. 1 and not the case of department. Consequently nothing incriminating was found or recovered from the premises of the appellant either in the form of documents for receipts of raw materials or in the form of documents for despatch of any of the consignments or copy of the gate pass allegedly have been used for clandestine removal etc. Show cause notice does not allege any discrepancies regarding raw material account that the appellant No. 1 received any unaccounted raw material. The adjudicating authority has not found a serious omission in the investigation. Similarly adjudicating authority has also found that there was no discrepancy in the stock of finished products. Therefore obvious conclusion to be arrived at is that this aspect was thoroughly investigated and nothing adverse has been found". The Ld. Counsel submitted that ratio of this decision consequently covers their case. We find there is force in this argument of the appellant. In the case of Gurpreet Rubber Industries 1996 (63) ECR 68 (T) this Tribunal in para 7 observed "On these findings the Tribunal observed that the notebook at best indicates a certain quantity of cotton fabrics produced by the appellants and despatched to the Dying House for processing purposes. The notebook by itself does not indicate that the goods were removed from the factory.

The appellants have also shown and it has not been rebutted by the adjudicating authority that the entries of the production in the notebook are less than the entries of said production in the RG 1 register on some of the relevant dates." We note that ratio of this decision is also applicable to the facts of the present case.

14. On the question of the imposition of penalty, we note that a number of arguments were adduced before us, the first argument was that penalty under Section 11 AC cannot be imposed for the whole period as Section 11 AC was introduced in the statute book w.e.f. 28.9.1996. The 2nd argument was that

penalty cannot be jointly imposed under Section 11AC read with Rule 173Q. We find force in the argument of the appellant.

15. In view of the above discussion we hold that no case for demand of duty, imposition of penalty and charging of interest has been made out.

In this view of the matter the appeal is allowed.

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