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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-15-2002

Reported in : (2002)(81)ECC366

Judge : A T V.K., S Rang

Appellant : Dhar Cement Ltd.

Respondent : Cce

Judgement :

1. In these appeals, arising out of a common Order, the issue involved is whether the benefit of Notification No. 24/91-CE, dated 25.7.1991 is available to the Cement manufactured by M/s Dhar Cement Ltd. 2. Shri Ashutosh Upadhyay, learned Advocate, submitted that M/s Dhar Cement Ltd., is having a mini Cement plant having installed capacity of less than 1,98,000 tonnes per annum; that as per the condition of Notification No. 24/91, they applied for and the Director of Industries issued a Certificate dated 27.7.1995 about the installed capacity of their unit to be 1,98,000 M.T., per annum; that, however, on persuasion of the Central Excise Officers, the Director of Industries amended the said certificate under amendment dated 26.4.1997; that they represented the matter before the Director of Industries, who after making a detailed enquiry, again issued a certificate dated 9.9.1997 under which the amendment dated 26.4.1997 was cancelled and their installed capacity as certified under Certificate dated 27.7.1995 was confirmed; that the condition of the Notification has been complied with by the appellants. The learned Advocate, further, submitted that when the Legislature has given the

authority to Director of Industries, then no body else can enjoy the said authority; that Central Excise Authority cannot sit as an Appellate Authority to the Director of Industries; that the Adjudicating Authority mainly relied upon the statement given by them to financial institution and others wherein it is alleged that the appellants had themselves stated that their installed capacity is 750 TPD, 1000 TPD or 2,47,000 TPA; that it was held in the case of Punjab Oil & Silicate Mills v. C.C.E. declaration of figures of sales before the Department of Industries with supporting affidavit will not suffice for making out a case of clandestine removal of goods and demanding duty thereon. Reliance was also placed on the decision in the case of Rishab Refractories Pvt.

Ltd. v. C.C.E, Chandigarh , wherein it was held that "merely because the assessee conducted himself in a manner which was not conducive to ethics, the taxing authority could not invoke the provisions of reassessment and penalise him. The morality and intention of an assessee, the Court observed, does not enter into the field of adjudication in taxing law." 3. The learned Advocate also mentioned that once the appellant had produced a proof of the certificate duly issued by a Competent Authority regarding installed capacity, it was not open to the Adjudicating Authority to deny the benefit of the Notification to them by substituting his own concepts; that it was held in the case of R.A.Cement Pvt. Ltd. v. C.C.E. Allahabad 2000 (90) ECR 359 (T), that "Notification No. 175/86 speaks of a certificate granted by the Directorate of Industries If something new or wrong came to the notice of the Central Excise Authority, they should bring them to the notice of the Directorate of Industries. In the instant case, they, no doubt brought to the notice of the Directorate of Industries. However, the Directorate of Industries neither cancelled their certificate nor withdrawn it." Reliance was also placed on the following decisions: held by the Bombay High Court that the customs officers are not in law empowered to investigate into the correctness or otherwise of an import licence given by the appropriate authorities. Jyoti Refinery, v. C.C.E., Mumbai it was held that the Customs Authorities are bound by the certificate issued by the DGTD under the Notification and cannot ignore or bypass it on the ground that it was issued under mistake or mis-representation. Bombay Chemicals Pvt. Ltd. v. Appellate Collector of Customs (iv) Yellamma Dassappa v. C.C., Bangalore , wherein it was held that unless the certificate validly issued is

cancelled, the Customs Authorities cannot initiate seizure proceedings.

4. The learned Advocate also contended that the Adjudicating Authority has not considered the reply to the show cause notice submitted by the appellants; that they were not allowed the cross examination of the Investigating Officer; that had the cross examination been allowed they would have proved that entire facts were well within the knowledge of the Central Excise Officer and extended period of limitation could not be invoked; that the draft report of NCMB was not given to them; that they had not suppressed any fact from any Department; that there was no question of obtaining an incorrect certificate from the Director of Industries; that the Certificate was issued to them by the Director of Industries after full and complete investigation in the matter. He finally submitted that looking to the facts and merits of the case, no penalty is warranted on the Appellant Company; that the Department has not alleged any specific role for evading central excise duty played by other appellants and as such no penalty is imposable on them; that the penalty on Managing Director/Director can be imposed only if they had played a definite role in the alleged offence] as held by the Tribunal in the case of Walchand Nagar Industries v. CCE ; that the Department had not adduced any evidence as to how the Appellant No. 2 and 3 had played a definite role in the alleged offence.

5. Countering the arguments, Shri A.K. Jain, learned SDR, submitted that the exemption under Notification is available subject to the condition that the installed capacity is 1,98,000 tonnes per annum; that the burden is on the Appellants to prove that the conditions specified in the Notification have been satisfied by them; that in Amendment dated 26.4.97 issued by the Directorate of Industries, the crucial word "Installed" was deleted from the Certificate issued earlier to the Appellants: that the capacity was now certified on the basis of SIA Registration produced by them; that accordingly benefit under the Notification is not available to the Appellants; that subsequent certificate dated 9.9.1997 had been given on the basis of report submitted by S.I.S.I. which has not given the installed capacity as the said agency has only made a guess of the capacity; that the assessment of SISI was relating to the production capacity of the plant and not to the installed capacity; that even the, said production capacity was calculated without taking into consideration pre-heat suspension, per-calculator, etc., installed in their plant. The

learned SDR, further submitted that District Industries Centre Dhar (M.P.) has given a certificate dated 24.11.1993 to the effect that "after substantial expansion by increasing installed capacity from 66000 M.T.to 2,47,500 M.T. per annum, M/s Dhar Cement Ltd. have commenced production from 20th November, 1993"; that another Certificate of same date (24.11.1993) is in respect of licensed capacity and not installed capacity; that the said Certificate was never produced by the Appellants; that as such Central Excise duty is demandable from them and penalty is imposable; that the Appellants may be using these two different certificates for different purposes.

6. The learned SDR referred to paragraph 14 of the show cause notice in which the results of the scrutiny of the documents seized during the search were mentioned; that according to the scrutiny, it was clear that the capacity of the Appellants' unit had increased to 2,47,000 tonnes per annum. He also mentioned that an independent Agency namely National Council for Cement and Building Material (NCCBM) visited the Appellant's unit and after physical verification of the equipments installed in the factory had submitted their report; that the report is thus based on factual data and is not based on presumptions and assumptions; it is apparent that the Appellants had obtained the certificate from the issuing authority fraudulently. He relied upon the decision of the Supreme Court in the case of Commissioner of Customs v.Candid Enterprises , wherein it was held that "fraud nullifies everything." He also relied upon the decision in the case of Collector of Customs, Rajkot v. Sauroshtra Steel Industries Ltd. .

7. In reply, the learned Advocate mentioned that the Annual Report of the Appellant Company mentions the capacity of the unit to be only 1,98,000 M.T., per annum; that para 14 of the show cause notice refers to actual production of cement which could be more than the installed capacity; that they had indicated to the Sales Tax Authorities about their intention to sell 2,47,500 tonnes cement and not talked about their installed capacity. Finally he submitted that as their installed capacity was certified by the Appropriate Authority, the benefit of exemption Notification cannot be denied to them. Reliance was placed on the decision in C.C.E., Indore v. Dhar Cements Ltd. 2000 (40) RLT662 (CEGAT) and Union of India v. Tarachand Gupta . The learned Advocate also contended that the penalty

under Section 11 AC of the Central Excise Act can not be invoked for the period prior to the Section coming into effect. The learned SDR commented that if penalty cannot be imposed for the entire period covered in the impugned matter, penalty is imposable under Rule 173Q(1) of the Central Excise Rules. He also pointed out that the letter dated 24.5.1991 addressed to M/s.

Industrial Credit and Investment Corporation of India refers to installed capacity of 2,47,500.

8. We have considered the submissions of both the sides. The concessional rate of duty was available to cement manufactured in a factory using rotary kiln with installed capacity certified as not exceeding 600 tonnes per day or 1,98,000 tonnes per annum and the total clearances of the cement produced by the factory, in a financial year, shall not exceed 2,20,000 tonnes. According to the Notifications the installed capacity of the factory shall be certified by an officer not below the rank of Director of Industries in the State Government. It is the contention of the Appellants that the Director of Industries in Madhya Pradesh under certificate dated 27.7.95 certified their installed capacity to be 1,98,000 M.T., per annum which was again confirmed under letter dated 9.9.97 after the objection raised by the Directorate General of Anti Evasion (Central Excise). The appellants have, further, contended, relying on various judgments, that the Department cannot investigate into the correctness of the certificate given by the Competent Authority. The Revenue, on the other hand has submitted that the Appellants have themselves mentioned their installed capacity to be 2,47,500 T.P.A., in various correspondences. The Revenue for example has referred to their letter dated 28.12.1993 addressed to the Ministry of Industries, Government of India, under which they enclosed a memorandum at the time of commencement of commercial production. According to this memorandum, Installed Capacity is 2,47,500 T.P.A. and unit of capacity is 750 T.P.A. The Revenue has also relied upon the Certificate dated 24.11.1993 issued by the District Industrial Centre, Dhar, M.P., which reads as under: This is to certify that after substantial expansion by increasing installed capacity from 66000 M.T. to 2,47,500 M.T. per annum by M/s. Dhar Cement Limited have commenced commercial production from 20th November, 1991.

9. The learned Advocate for the Appellants has not denied the issuance of such a certificate by District Industrial Centre during the hearing before us. He, however, has emphasised that the Appropriate Authority mentioned in the Notification has certified their installed Capacity to be 1,98,000 T.P.A., and as such has claimed that the benefit of Notification cannot be denied to them. The Revenue, on the other hand, has pointed out that the Certificate dated 9.9.1997 was issued by the Director of Industries on the basis of capacity of production assessed by Small Industries Service Institute (SISI) and capacity of the unit mentioned in SIA Registration, taking the higher one. In view of these facts and circumstances, we are of the views that the installed capacity of the unit needs to be determined in accordance with the Rules and Regulation in this regard, if any. As the Directorate of Industries had not referred to the Certificate dated 24.11.1993 by District Industrial Centre, we, in the interest of justice, remand the matter to the Adjudicating Authority with direction to approach the Competent Authority under the Notification to certify the installed capacity of the unit at the relevant time after taking into consideration all the facts, material and evidence furnished by both the sides. Thereafter the Adjudicating Authority will re-adjudicate the matter afresh in accordance with law.

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