Commissioner of Central Excise Vs. Pratap Singh

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-05-2002

Reported in : (2002)LC224Tri(Delhi)

Judge : S T G.R., P Bajaj

Appellant : Commissioner of Central Excise

Respondent : Pratap Singh

Judgement :

1. The above captioned three appeals have been directed against the common Order-in-Appeal dated 14-6-2001 passed by the Commissioner (Appeals), Central Excise, Jaipur. Appeal Nos. E/1936 & 1937/01-NB have been preferred by the Revenue against part of the impugned order vide which the Commissioner (Appeals) had dropped the duty, penalty and interest against the company M/s. Kamachi Granites (P) Ltd. (referred to as assessee-company), while appeal No. E/1570/01-NB has been filed by the assessee-company, for questioning the correctness of the impugned order of the Commissioner (Appeals) vide which he had upheld the penalty of Rs. 50,000/- imposed under Section 112 of the Customs Act, through Order-in-Original, dated 12-10-2000, by the Joint Commissioner against them.

2. The facts are not much in dispute. The assessee-company is a 100% EOU. The company is engaged in the manufacture of polished granite slabs and tiles. During the course of physical stock verification by the officers of the customs on 10-7-99,

592.675 sq. mts. of polished granite slabs and tiles manufactured by the company were found to be short, when compared with entries in RG-1 register and a panchnama to this effect was drawn on the spot. The authorised signatory of the company namely Pratap Singh Kamat also admitted this fact in his statement recorded on the spot. He admitted the sale of goods to the relatives of the company during the last few days in domestic area without the cover of the invoice without the payment of excise duty. He further stated that the company was under the impression that sale up to the value of Rs. 509 lakhs in the DTA, by them, being 100% EOU, was exempt from duty. Show cause notice after completion of the investigation, was served on the company and its authorised signatory Pratap Singh Kamat, as well as on Kewal Chand Kothari and Ghinsu Lal Kothari, Directors of the company, vide which the duty demand raised was of Rs. 8,73,131/- under Section 11A of the Central Excise Act.

Penalty was also proposed to be imposed on all these notices. That notice was contested by the company, its directors and the authorised signatory, named above. In reply, the company denied the clandestine removal of the goods in DTA and maintained that the statement of its authorised signatory Pratap Singh Kumat was taken by use of force. No physical verification of the goods was conducted by the company since the start of the unit and this has resulted in shortage of the goods as against the entries made in the statutory record. They also averred that there was mistake in the calculation as they did not manufacture slab of the size of 2' x 1/6'.

3. The Joint Commissioner who adjudicated the show cause notice confirmed duty demand of Rs. 8,73,131/- under Section 11A(2) of the Central Excise Act against the company-assessee with equal amount of penalty under Section 11AC of the Act and penalty of Rs. 1,00,000/- under Rules 9(2), 209 and 226 of the Central Excise Rules, payable with interest under Section 11AB of the Central Excise Act. He also imposed penalty of Rs. 50,000/- on the company under Section 112 of the Customs Act as well as of the same amount on Kewal Chand Kothari and Ghinsu Lal Kothari and of Rs. 25,000/-on Pratap Singh Kumat, authorised signatory.

4. This order of the Joint Commissioner dated 12-10-2000 was challenged in appeal by the company and Shri Pratap Singh Kumat, authorised signatory. The Commissioner (Appeals) after referring to the law laid down in Kantal Granites (P) Ltd. and Anr. v. CCE [2001 (132) E.L.T. 214 - 2001 (43) RLT 829 (CEGAT-Ban.)] and Apex Court decision in SIV Industries v. CCE -2000 (117) E.L.T. 281 (S.C.) and also of the Tribunal in T. Gayathri Reddy and Anr. v. CCE - 2001 (94) ECR 726 (T) (South Zonal Bench), reversed the order-in-original of the Joint Commissioner and observed as under :- "However, so far as the basic arguments of the appellants is concerned that the provisions of the Central Excise Act would not apply for the purpose of levy of duty, I am entirely in agreement with the said submissions, which are based upon the ratio of the case law referred to above. In the present case also the department's finding is that the appellants had clandestinely cleared the goods to the DTA even though they had not been allowed to sell the same in India by the competent authority, namely, the Development Commissioner. Consequently, duty demand under Section 3(1) proviso to (ii) (ibid) cannot be invoked and duty etc. can only be realised in terms of the provisions of the Customs Act, 1962 as laid down in the aforesaid decisions. Hence, the duty demand is set aside.

As the provisions of Section 3 (ibid) and Rules 100A to 100H and Rule 173A (ibid) would apply to Central Excise levy and control only on such goods which are allowed to be sold in India, the same would not apply to other goods manufactured/removed to which provisions of Chapter IX of the Customs Act, 1962 and specially Sections 9, 61 and 65 only would apply [Para 5(a) of Kuntal Granites refers], the penalty/interest provisions invoked are also illegal and are set aside except to the extent mentioned below".

5. The Counsel for the company-assessee has, before us, reiterated the law laid down in the above referred cases and the correctness of the impugned order-in-appeal passed by the Commissioner (Appeals).

According to the Counsel, the proviso appended to Section 3 of the Central Excise Act, is not attracted to the present case as the goods were removed by the company a 100% EOU, without permission of the competent authority. No central

excise duty, according to the Counsel, under the main Section 3 of the Central Excise Act, could be therefore demanded. Duty, if any, could be demanded under the Customs Act from, the company, a 100% EOU. He has also raised another contention that the activity of the company of sawing and polishing granite block to form granite slabs, did not amount to manufacture, as held by the Apex Court, while dismissing the appeal in Shah Granites Pvt. Ltd. v.Collector - Civil Appeal No. 3145 of 1998 filed by the Collector of Central Excise, Bombay against CEGAT Order No. 785/97-D, dated 4-8-1997 reported in Court-room Highlights at A238, E.L.T. Volume 134.

6. The learned SDR, on the other hand, has contended that judgment of the Apex Court in SIV Industries (supra) has been wrongly interpreted by the Commissioner (Appeals) and also the law laid down in Kuntal Granites (P) Ltd. and T. Gayathri Reddy and Anr. (supra). The provisions of main Section 3 of the Central Excise Act are applicable to the case, as the company had removed the goods in DTA, as a 100% EOU in a clandestine manner, without the permission of the competent authority.

8. The issue in the present appeals relates to the nature of duty payable by the company-assessee a 100% EOU on the goods which, were not allowed to be sold in India to them by the competent authority i.e. the goods which had been sold by them in a clandestine manner without the permission of the competent authority. Section 3(1) of the Central Excise Act with proviso, in the relevant part, reads as under :- "Section 3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied. - (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985 : Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, - (ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into

India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)".

9. The interpretation of the expression "allowed to be sold in India" in proviso to Section 3(1) of the Central Excise Act, came up before the Apex Court in SIV Industries Ltd. v. CCE - 2000 (117) E.L.T. 281 (supra), for determining the rate of duty on the goods removed by 100% EOU unit after debonding of the unit. In that case, the appellant SIV Industries was a 100% EOU. They later on sought permission to withdraw from 100% EOU scheme and the Ministry accorded the necessary permission. Some goods were lying in that unit at that time and those were removed after debonding. The dispute arose regarding the rate of duty payable on those goods. The plea taken by the manufacturers was that they were liable to pay duty under Section 3(1) of the Central Excise Act, together with customs duty on the imported raw material used in the manufacture of said finished goods lying in the stock, whereas the Revenue took a stand that excise duty under the proviso to Section 3(1) of the Central Excise Act was payable on the finished goods and with no customs duty being levied on the raw materials gone into the manufacture of the finished goods. The expression "allowed to be sold in India" appearing in the proviso to Section 3(1) of the Act was, thus, bone of contention between the parties in that case. The Apex Court, in that case, while resolving this contention, observed as under :- "The expression "allowed to be sold in India" in proviso to Section 3(1) of the Act is applicable only to sale made up to 25% of the production by 100% EOU in DTA and with permission of the Development Commissioner. No permission is required to sell the goods manufactured by 100% EOU lying with it at the time the approval is accorded to debond. The Apex Court further observed in Para 25 that the provisions of Chapter VA (Rules 100A to 100H) would not be applicable where 100% EOU is outside the EOU Scheme after it is debonded".

10. Following the above referred observations of the Apex Court, the Bangalore Bench in Kuntal Granites (P) Ltd. and South Zone Bench in T.Gayathri Reddy (supra) had taken the view that in a case of removal of the goods in a clandestine

manner by a 100% EOU, without payment of duty, the duty in terms of proviso to Section 3(1) of the Act would not be leviable. But it has been nowhere expressly or impliedly ruled by the Apex Court or by the Benches of the Tribunal in the above referred cases that where the goods had been removed/sold without permission by an 100% EOU, even central excise duty under main Section 3(1) would be also not payable by the assessee, which is a charging section and clearly enacts that excise duty is leviable on all excisable goods produced or manufactured in India. The proviso to this secti6n, referred to above, only lays down the rate of duty to be charged from 100% EOU where the goods had been sold by such a unit with permission.

No exemption/immunity from paying central excise duty on the sale of the goods made by 100% EOU, otherwise than with the permission of the authority, i.e. in a clandestine manner, had been expressly or even impliedly granted to such a unit, in the proviso to Section 3(1) of the Central Excise Act. The proviso does not confer any such right on a 100% EOU. Rather, Apex Court in Agricultural & Processed Food Products v. Oswal Agro Furane Ltd. -1996 (85) E.L.T. 3 (S.C.), has observed as under :- "Exemption from excise duty in respect of goods produced by a 100% Export Oriented Unit and "allowed to be sold in India" would not be available where such goods cleared into domestic tariff area without requisite permission from competent authority".

11. The above observations of the Apex Court provide complete an- swer to the nature of duty payable by a 100% EOU, where the goods had been sold by such a unit, without permission of the proper authority.

Therefore, in the instant case, the company is liable to pay excise duty under the main Section 3(1) of the Central Excise Act, for having removed the goods in D.T.A, without permission of the competent authority.

12. The observations of the Larger Bench of the Tribunal in Vikram Ispat v. CCE, Mumbai-III - 2000 (120) E.L.T. 800, can also be read with advantage in this case. Though, the question involved in that case was regarding the quantum of credit available on the inputs purchased from 100% EOU, by the manufacturer but the Larger Bench while dealing with the clearance of the goods by 100% EOU and the

nature of duty payable by that unit, in Para 16 of the judgment, held as under :- "The clearance of the goods by 100% E.O.U. are not import in the terms in which it has been defined under Section 2(23) of the Customs Act, according to which import, with its gramatical and cognet expression means bringing into India from a place outside India. This is also apparent from the fact that when the goods are cleared from 100% E.O.U. to any place in India, central excise duty under Section 3(1) of the Central Excise Act is levied and not the customs duty under the Customs Act. If it is to be regarded as import, then the duty has to be charged under Section 12 of the Customs Act, read with Section 3 of the Customs Tariff Act.

13. The Larger Bench in that case has also made the observations regarding method adopted by the law makers in recovering duty. Those observations read as under :- "The Revenue, it seems, is confusing the measure of the tax with the nature of the tax. The nature of the duty levied on the goods from 100% E.O.U. is excise duty and nothing else, whereas for determining the Quantum of duty the measure adopted is duty leviable under Customs Act as held by the Supreme Court in many cases. The method adopted by the law makers in recovering the tax cannot alter its character. Once it is held that the duty paid by the 100% E.O.U. in respect of goods cleared to any place in India is excise duty, the question of dissecting the said duty into different components of basic customs duty, auxiliary duty, additional duty of Customs or any other customs duty does not arise. The proforma of AR-IA on which the reliance was placed by the learned D.R. cannot change the legal position that the duty levied on 100% E.O.U. is a duty of excise and not customs duty".

14. The Board has also clarified the nature of the duty payable by the 100% EOU, unit in a case of sale of goods by such unit without permission, after referring the judgment of the Apex Court in SIV Industries, in Circular No. 618/9/2002-CX., dated 13-2-2002. The said circular reads as under :- "I am directed to invite reference to Supreme Court's judgment in case of SIV Industries v. CCE - [2000 (117) E.L.T. 281 (S.C.)] vide which the Apex Court had held that "proviso to Section 3(1) regarding the duty chargeable on goods cleared by EOUs shall be applicable only to sales made in DTA up to 25% of production which are allowed

to be sold into India as per provisions of EXIM Policy".

In other words, Hon'ble Court decided that if the goods are "not allowed" to be sold in India, the proviso to Section 3(1) of the Central Excise Act, 1944 shall not be applicable. The expression "allowed to be sold" has since been replaced with "brought to any other place" w.e.f. 11-5-2001 vide Section 120 of Finance Act, 2001(14 of 2001).

2. It has come to the notice of the Board that field formations are interpreting the judgment of Apex Court to the effect that if the goods cleared by EOUs are not allowed to be sold into India, the Section 3(1) of Central Excise Act, 1944 is not applicable and duty can be demanded under the provisions of Customs Act, 1962 only.

Board has taken a serious view of this misinterpretation. The provisions of Central Excise Act, 1944 shall apply to all goods manufactured or produced in India for which Section 3 is the charging section. EOUs are also situated in India and the chargeability under Central Excise Act is never in doubt. Therefore, it is clarified that prior to 11-5-2001, the clearances from EOUs if not allowed to be sold in India, shall continue to be chargeable toxluty under main Section 3(1) of Central Excise Act, 1944.

Appropriate action may be taken immediately to safeguard revenue and all pending decisions may be settled accordingly." The Board's circular is binding and has to be given full weightage irrespective of the different interpretation by the Courts, as even observed by the Apex Court in CCE, Vadodara v. Dhiren Chemical Industries 15. Therefore, the legal position is quite clear and unambiguous that where the goods had been removed by 100% EOU in DTA, without permission, the proviso to Section 3(1) of the Central Excise Act, will not be applicable but the main Section 3(1) of the Act will be applicable and EOU would be liable to pay-duty in accordance with that section. In the instant case, the company-assessee is 100% EOU. Though they are not importing raw materials from any country outside India but are using indigenous raw materials for manufacturing the goods i.e.

granite slabs and tiles, for exporting the same. Therefore, being a 100% EOU, they could sell the goods in DTA with the permission of the competent authority and in that event, they were chargeable to duty in terms of proviso to Section 3(1) of the Act. But since they had removed the goods in a clandestine manner in DTA without permission, they are liable to pay duty under the main Section 3(1) of the Central Excise Act. The learned Commissioner (Appeals) appears to had with closed eyes, followed the judgments of the Apex Court in SIV Industries and of Bangalore and South Zonal Benches, of the Tribunal in Kantal Granites (P) Ltd. and T. Gayathri Reddy cases, respectively (supra), without going through the facts of those cases and the ratio of law laid down therein and jumped to the conclusion that duty payable by the company- assessee is only under the Customs Act and not under Section 3(1) of the Central Excise Act. Therefore, the impugned order of the learned Commissioner (Appeals) cannot be legally sustained.

16. The argument of the learned Counsel that the activity of the company-assessee did not amount to manufacture as per Apex Court observations, while dismissing Civil Appeal No. 3145 of 1998 filed by the Collector of Central Excise, Bombay against CEGAT Order No.785/97-D, dated 14-8-1997 (Shah Granites Pvt. Ltd. v. Collector) and as such, no duty whatever even under Section 3(1) of the Excise Act, can be claimed from them. But, in our view, this contention of the Counsel is wholly mis-conceived and not liable to be accepted. No such plea that their activity of manufacturing polished granite slabs and tiles from the indigenous raw materials i.e. granite blocks had not been taken by the company-assessee before the adjudicating authority.

Therefore, for the first time, this plea cannot be allowed to be raised in appeal before us.

17. The authorised signatory of the company admitted the removal of the goods in DTA without permission and without payment of duty. His subsequent retraction from that admission could not be given any weight being after thought. What was in fact disputed before the Commissioner (Appeals) was that duty payable by the company was under the Customs Act and not the Central Excise Act, being 100% EOU and relied upon the law laid down by the Apex Court and the Tribunal in the

above referred cases. The Apex Court while dismissing Revenue's Civil Appeal No. 3145 of 1998 [2001 (134) E.L.T. A238 (S.C.)] (referred above) passed only the following order :- The company-assessee has also not brought on record the details of the activities being carried out by them for manufacturing polished granite slabs and tiles. Apparently, polished granite slabs and tiles are quite distinct and different in shape, size than the blocks. In the commercial market also, the goods manufactured by them are distinctly known and traded than the blocks. Therefore, we are unable to accept the contentions of the Counsel.

18. In view of the discussions made above, the impugned order of the Commissioner (Appeals) to the extent to which it has been assailed before us by the Revenue in Appeal Nos. E/1936-37/01-NB, is set aside and that of Joint Commissioner (adjudicating authority) is restored.

The appeals of the Revenue accordingly stand accepted. The part of the impugned order of the Commissioner (Appeals) upholding penalty under Section 112 of Customs Act as imposed by the adjudicating authority on the company and challenged before us in Appeal No. E/1570/01-NB by the company is also set aside. The appeal of the company to that extent stands allowed.

19. Consequently, all the three above captioned appeals stand disposed of in the above terms. The Cross-objections filed by the company assessee and authorised signatory in the appeals filed by the Revenue, also stand disposed of accordingly.