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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-27-2002

Reported in : (2003)(85)ECC539

Judge : K Usha, B T K.K.

Appellant : Purify Filters

Respondent : Commissioner of Central Excise

Judgement :

1. The appellants M/s. Purify Filters manufacture Oil Filters falling under Chapter Heading 8421.00. They were issued a show cause notice dated 2-2-99 by the Addl. Commissioner of Central Excise, Faridabad, in which it is alleged that on 28-8-98, the Central Excise Officers intercepted a Tempo bearing Regn. No. HR-30-6073 at Faridabad. Sh.

Manoj Kumar, Driver of the tempo on enquiry stated that he had loaded the goods from the premises of M/s. Gauri Pack, NIT, Faridabad for delivery to M/s. Escorts Ltd., Faridabad. He produced a covering document which on scrutiny revealed that it covered 3000 pieces of oil filters and 200 pieces of liners in the brand name of 'Escorts' which were packed by M/s. Gauri Pack and the goods were received from the appellants M/s. Purify Filters, Faridabad, M/s. Lumax Filters Pvt.

Ltd., Gurgaon and M/s. Western Auto Spares, Ahmedabad. The Central Excise Officers visited the premises of the appellants M/s. Purify Filters, Faridabad. Sh.

D.K. Mattoo, partner of the firm produced invoice No. 56, dated 28-8-98 in respect of the goods loaded in the tempo. On scrutiny of the invoice it was observed that they had not mentioned the rate and amount of duty and debit particulars on the original and duplicate copies of the invoice. On verification of the triplicate and quadruplicate copies of the invoices it was observed that they had mentioned rate, amount of duty and debit particulars but the assessable value was different in comparison to what was shown in the original and duplicate copies of the invoice. It, therefore, appeared that the appellants were giving different particulars on one set of invoice consisting of original and duplicate copies and another set consisting of triplicate and quadruplicate copies. On further scrutiny it was noticed that the goods loaded in the tempo were unaccounted for in the RG 23A Part II and the duty was not debited in the PLA. Accordingly, 3000 pieces of oil filters valued at Rs. 1,50,840/-were seized along with the tempo and they handed over to Sh.

D.K. Mattoo for safe custody under a custody memo., dated 28-8-98. Sh.

D.K. Mattoo in his statement of even date deposed that they were supplying oil filters to M/s. Escorts Ltd. (SPD) @ Rs. 46.65 per piece and to M/s. Escorts Ltd. (TD) @ Rs. 44.50 per piece for the current financial year 1998-99; that the quality of both the oil filters was same but their buyers were paying different amounts to them. He also stated that the intercepted goods pertain to M/s. Escorts (SPD); that they were raising invoices in quadruplicate out of which on the original and duplicate copies of invoices they were indicating assessable value @ Rs. 50.28 per piece including Central Excise duty and that they were not mentioning any duty payment particulars on the said copies. However, on the triplicates (meant for Central Excise) and quadruplicate copies, they were indicating assessable value @ Rs. 46.65 per piece and they were also giving duty debit particulars; that this procedure was being adopted since January, 1998. But, however, on verification it was found that the party had adopted this procedure since June, 1995. The Central Excise Officers further recorded statement of Sh. Anil Sehgal, Chief Manager of M/s. Escorts Ltd., Faridabad on 28-8-98. In his statement, he deposed that they were engaged in the trading of tractor spare parts; that as per their purchase order dated 2-5-98 issued in favour of M/s. Purify Filters, they are paying them unit rate plus central excise duty maximum @ 13% or as claimed in the

invoices. He also produced invoice No. 36 and No.37 issued by M/s. Purify Filters wherein the unit price had been mentioned at Rs. 50.28 inclusive of central excise duty and this price matched with the unit price of Rs. 44.50 plus central excise duty of 13%.

2. In view of the information collected from the appellants as well as M/s. Escorts Ltd., it is averred in the show cause notice that the appellant had supplied oil filters as per details given below : 3. Accordingly, it is alleged that M/s. Purify Filters received Rs. 15,69,203/- as duty from M/s. Escorts Ltd., Faridabad but they have deposited Rs. 10,47,843/- as Central Excise duty; that they had thus recovered an amount of Rs. 5,21,360/- extra but had not deposited the same to the Government account. Accordingly, it is alleged that the party contravened the provisions of Section 11D of Central Excise Act, 1944 read with Rules 91,52A, 53, 173C, 173F, 173G and 226 of Central Excise Rules, 1944 inasmuch as they had collected duty at the full rate from M/s. Escorts Ltd., Faridabad but deposited duty at concessional rate by manipulating the invoices; that they have defrauded the Government to the tune of Rs. 5,21,360/- during the period from June, 1995 to August, 1998 which attracted the extended period as per proviso to Section 11A(1) of Central Excise Act, 1944. They are therefore called upon to show cause why duty amounting to Rs. 5,21,360/- should not be recovered from them under Section 11A and 11D of Central Excise Act, 1944, why the seized goods valued at Rs. 1,50,840/- and tempo valued at Rs. 2,50,000/- should not be confiscated under Rule 173Q and Section 115 of the Customs Act, 1962, why a penalty should not be imposed on them under Section 11AC & Rule 173Q and why the interest should not be charged from them under Section 11AB of Central Excise Act, 1944.

4. On considering the reply of the party, the Addl. Commissioner of Central Excise, Faridabad vide his Order dated 9-3-2001 held that the noticee had not refuted the allegation that they had collected the Central Excise duty of Rs. 15,69,203/- from M/s. Escorts Ltd., Faridabad, but deposited only Rs. 10,47,843/- by manipulating the central excise invoices and the extra amount of Rs. 5,21,360/- was kept by them for themselves. He observed that they had raised four copies of invoices in two sets, one set consisting of original and duplicate (first set) and other set consisting of triplicate and quadruplicate (second set). In the first set, they had

only mentioned assessable value and the rate inclusive of duty at full rates whereas in the second set, they mentioned the assessable value per unit as Rs. 44/- (instead of Rs. 42/- as per P.O.) for the years 1995-96 and 1996-97.

Similarly, in the year 1997-98 (from December 1997 onwards) and 1998-99 (up to August, 1998), they mentioned assessable value as Rs. 46.65 (instead of Rs. 44.50 as per P.O.). The duty had been paid at concessional rate. The reasons for mentioning higher assessable value on the second set was that the total value plus duty at concessional rate matched the figures of the total value inclusive of full duty as given in the first set. It is observed that these facts are admitted by Sh. D.K. Mattoo, partner of the company in his statement dated 19-11-98. It is further observed that the Central Excise Act or the Rules made thereunder do not permit an assessee to prepare invoices in the manner as adopted by the noticee; that under Section 11D of the Act, the amount of central excise duty collected by the noticee is required to be deposited in the Government exchequer; that the noticee not only concealed information of charging higher duty from the buyer, but also manipulated the central excise invoices with intent to evade payment of central excise duty. Therefore, the differential duty of Rs. 5,21,360/- is required to be recovered from the noticee under Section 11A of the Act. In respect of the seizure of the goods from the tempo, the adjudicating authority has observed in his order that on scrutiny of central excise records, it was found that the said goods were not accounted for in the RG 1 Register and the duty was not debited in PLA; that the noticee had not mentioned the rate and amount of duty and debit particulars on the original and duplicate copies of the said invoices; that on further verification of the triplicate and quadruplicate copies, it was noticed that the rate, amount of duty and debit particulars in these copies were different as compared to original and duplicate copies of the invoices. Therefore, it is apparent that though the noticee had issued invoice No. 56, dated 28-8-98 in respect of the goods loaded in the tempo but the said invoice was manipulated one; that it was manipulated and fabricated by the noticee with a mala fide intention to short-pay the central excise duty on these goods. It is therefore held that the seized goods are liable for confiscation under Rule 173Q. The same observation is made in respect of the seized tempo. Consequently, the original authority in his order has confirmed the demand of Rs. 5,21,360/-under Section 11A and has further imposed an equal

amount of penalty under Rule 173Q of the Rules read with Section 11AC of the Act on M/s. Purify Filters, Faridabad. He also imposed a penalty of Rs. 1 lakh on Sh. D.K. Mattoo, partner of the firm under Rule 209A of the rules. He has also ordered for the confiscation of the seized goods valued at Rs. 1,50,840/- under Rule 173Q. But since the said goods were already released provisionally to the noticee and were not available for confiscation, he appropriated an amount of Rs. 25,000/- out of the cash security of Rs. 1,00,210/- furnished by the party towards redemption fine. The adjudicating authority ordered for the confiscation of tempo but however gave an option to the appellant to get the release of the same on payment of a redemption fine of Rs. 40,000/-.

5. All the noticee parties filed appeals and the Commissioner (Appeals), New Delhi vide his Order dated 14-2-2002 confirmed the amount of duty Rs. 5,21,360/- and a penalty of equal amount imposed on the appellants M/s. Purify Filters under Section 11AC. The Commissioner (Appeals) further held that the goods loaded in the tempo were rightly confiscated. He however set aside the confiscation of the tempo and the penalty imposed on Sh. D.K. Mattoo, partner of the appellant. With regard to the plea of the appellant that the provisions of Section 11D are not applicable in their case, he observed : "The appellants have further contended that their case is not covered under Section 11D as at the relevant time, Section 11D was not incorporating the necessary machinery provisions. While going through the part of the order-in-original, I find that the adjudicating authority has not based the recovery under the above section. Hence, this contention is not acceptable." 6. This is an appeal filed by M/s. Purify Filters against the impugned order of the Commissioner (Appeals). We have heard Sh. J.M. Sharma, Consultant for the appellants and Sh. P.K. Jain, SDR for the respondents. The facts of the case are not disputed by either side. The burden of submission of the consultant for the appellant is that the provisions of Section 11A are not applicable in their case since in this case there are clear findings both in the order-in-original as also in that of the lower appellate authority that the appellants have collected higher amount from their buyers M/s. Escorts Ltd. by way of central excise duty than what they have deposited with the department.

It is contended that the Commissioner (Appeals) has specifically mentioned that the duty on them is not confirmed under Section 11D but the same is confirmed under Section 11A. Ld. Consultant for the appellant has placed reliance on the judgment of the Hon'ble Madras High Court in the case of Eternit Everest Ltd. v. U.O.I - 1997 (89) E.L.T. 28 (Mad.) in which the Hon'ble High Court has made the following observations : "On a careful consideration of the scope of Section 11A, we are of the view that the machinery or procedure contemplated under Section 11A can be said to be available only when any of the contingency visualized under the said provision arise or exist viz., when any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded. The provisions of Section 11A, in our view, definitely postulate and designed to deal with a case of duty otherwise exigible under law as duty leviable under the Act which happen due to some mistake or error to be not levied or paid or has been short levied or short paid or erroneously refunded.

The words 'short paid' or 'not paid' cannot be said to have relevance or by any means claimed to refer to even cases of any other payment or sum payable which is not really payment of duty leviable or exigible under the Act. Short levy, or short payment or erroneous refund equally postulates a pre-existing order of assessment or adjudication of duty liability by a competent authority under the provisions of the Act observing the procedure prescribed therefore or on compliance with the principles of natural justice and cannot by itself enable an Excise Officer to have resource to the procedure visualized under Section 11A of the Act to a case arising under Section 11D which really do not deal with a case of non-levy of duty or short levy or short payment of duty or erroneous refund of any such duty. On the other hand having regard to the fact that Section 11D deals with a case where there was no liability to duty as such under the Act, but yet a person or a manufacturer has chosen to collect any amount from the buyer of goods as representing duty of excise but not really in law and excise duty, there is no scope or justification to deal with a case arising under Section 11D invoking the machinery under Section 11A in the absence of any independent provision as such either under Section 11A of the Act enabling application of such machinery to cases under Section 11D or otherwise permitting the attraction or applicability of such procedure under Section 11A by deeming a sum due under Section 11D as

the duty liable under the Act or any other provisions of the Act providing for entertaining a claim or determining or adjudication of such a claim or a dispute in this regard in respect of the factum of actual collection of any amount as representing the duty of excise though no such duty under the Act is leviable or exigible under the provisions of Act." 7. Shri P.K. Jain, ld. SDR for the respondent submits that the appellants do not dispute the facts of their having collected the extra amount of Rs. 5,21,360/- from their buyers representing central excise duty. On the facts obtaining in this case we are of the considered view that the appellants cannot be subjected to recovery of duty under the provisions of Section 11A. Ld. Consultant for the appellants are also not disputing that the case would more appropriately be covered under the provisions of Section 11D. The provisions under this Section are invoked in the show cause notice but the same are not made applicable in the orders of lower appellate authorities. We therefore consider it imperative that the case should be examined and finding recorded as per the provisions of Section 11D. These provisions have been amended with retrospective effect from 12-5-2000 vide Section 103 of the Finance Act, 2000. The impugned order is therefore set aside. The matter is remanded to the original authority for de novo consideration and passing an order as per our above observations. The issues relating to the confiscation of the seized goods and imposition of penalty would remain open and shall be reconsidered. The appellants shall be afforded a reasonable opportunity of making further written representation as also that of personal hearing. The appeal is disposed of in these terms.