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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-22-2002

Reported in : (2003)(85)ECC85

Judge : P Chacko, B T K.K.

Appellant : Rajasthan Explosives and

Respondent : Cce

Judgement :

1. The appellants, M/s Rajasthan Explosives & Chemicals Ltd. Dholpur (hereinafter refers to as M/s RECL) manufacture explosives falling under sub-heading No. 3602.00. Their factory premises were visited by the officers of the Central Excise Division, Alwar on 8.11.97, On scrutiny of the documents resumed from their premises, it was observed that they were maintaining more than one set of invoices of identical serial numbers. Under these duplicate invoices, they had cleared a total quantity of 10,927.25 M.Ts of different varieties of explosives (slurry) totally valued at Rs. 16,75,44,038 during the period from 1.9.95 to 31.3.98 without payment of duty amounting to Rs. 3,21,30,295.

The explosives were sent to different collieries of M/s Coal India Ltd., (hereinafter refers to M/s CIL). It was observed that the party had received full payment for the value of these explosives including the Central Excise duty but the duty was never deposited with the Central Excise department. Accordingly, the proceedings were initiated against them and they were issued a show cause notice on 3.10.2000 by

the Commissioner of Central Excise, Jaipur in which it was alleged that the party operated a current account in SBBJ, Dholpur where they enjoyed on overdraft facility of Rs. 140 lakhs upto 26.12.96. This facility was increased to 200 lakhs on their production of invoices, transportation receipts (GRs) and delivery challans vouching for the receipt of the material by the customers. The Bank immediately on receipt of the requisite documents from the party credited 90% of the particular bill amount (inclusive of excise duty and other element) in their account. Accordingly, the appellants were submitting the copies of the invoices and other documents to the bank. On scrutiny of these documents, it was observed that the assessee was maintaining two sets of invoices but the duty was paid only on one set of invoices. The increased overdraft limit was availed from the bank on these clearance documents. Shri Rakesh Kumar Arora, Manager of SBBJ, Dholpur in his statement dated 30.5.98 deposed inter alia that M/s. RECL had received 90% of the amount against the despatch documents and the central excise invoices, that M/s RECL after receiving the payment from various collieries either used to deposit it through DD or deposited it in their collection account being operated at the bank situated near the concerned colliery and that the amount so deposited was adjusted against the bills for which M/s RECL used to inform the bank. He confirmed that the payment in the context of these bills was being settled regularly.

2. Shri Vinod Kumar Garg, Manager (Finance) of M/s RECL in his statement dated 5.6.98 deposed that he used to present central excise invoices, delivery orders and material receipts etc. received from their marketing department to the bank for drawing upto 90% of the amount against such documents; that he used to present the DDs/TTs alongwith covering letters to the bank and got reconciled the bills as directed by the marketing department of RECL; that in the covering letters, the description of the invoices/bills viz., number and date of bills was being given against which such DDs/TTs were to be adjusted.

He deposed that due to financial crisis, Shri Rajesh Jain, M.D. of RECL had given him the direction to prepare two sets of invoices for the clearance of the goods, out of which only one set was declared to the Central Excise department. He also admitted that the parallel sets of invoices were being used for clearance of the goods. On examination of the documents submitted to the bank, it was averred

that the clearances effected under these were not entered in any statutory records. Shri O.P. Gupta, Manager (Distribution & Excise) of RECL in his statement dt. 3.6.98 deposed that whenever the fake sets of invoices were required to be used by them for clearances, the same were serially numbered with the numbering machine by using the same serial numbers and PLA/RG 23A Pt. II entry numbers which were mentioned on the statutory invoices; that the practice of issuance of fake invoices was is vogue in RECL since 1995-96 and that some times, he also used to authenticate the fake invoices at the direction of Shri B.D. Agarwal (V.P.) and Shri Rajesh Jain (M.D.) of RECL 3. It is therefore alleged in the show cause notice that some of the invoices submitted to the bank by RECL belonged to other sets of invoices which were used to clear the goods to subsidiaries of M/s CIL without payment of duty; that the assesses had resorted to clandestine removal of goods (explosives) by using the parallel invoices and that though the assessee had received full payment including the Central Excise duty from CIL, but the amount of Central Excise duty was never paid to the excise department. It is alleged that the total number of parallel invoices were found to be 1184 through which material was supplied to various collieries of CIL. M/s RECL, Dholpur are therefore called upon to show cause why the duty amounting to Rs. 3,21,30,295 should not be recovered from them by applying extended period of demand under Section 11A(1) of Central Excise Act, 1944 and why a penalty should not be imposed on them under Section 11AC and Rule 173Q of Central Excise Rules, 1944. They are called upon to show cause why interest should not be charged from them under Section 11AB. Shri Rajesh Jain, M.D., Shri B.D. Agrawal, VP. (Commercial), Shri A.K. Jain, V.P. (Production), Shri Vinod Kumar Garg, Manager (Finance), and Shri O.P. Gupta, In-charge of Excise and M/s Garuda Shakti Transport Co., Dholpur who had transported the offending goods are called upon to show cause why penalty should not be imposed on each one of them under Rule 209A of Central Excise Rules, 1944.

4. The notices replied to the show cause notice in which they submitted that the difference between the material manufactured and supplied has been worked out on the basis of the invoices submitted to the bank and to the Central Excise department; that the difference of quantity which has been worked out is assumed to be the goods manufactured and cleared clandestinely for which payment had

been received from the bank but there is no charge in the show cause notice about the manufacturing activity of excisable goods shown in the invoices submitted to the bank and manufactured clandestinely. It is contended that in respect of the purported manufacture and clandestine clearance of excisable goods, there is no charge of excess use of raw material and consumption of power etc. as per the invoices submitted to the bank; that no enquiries have been made from the collieries of CIL on whom the invoices in question are raised; that the show cause notice, nowhere mentions that the goods in respect of the impugned invoices were received by CIL and duty was paid by them and that in the absence of any corroborative ground/evidence, the demand of duty is unwarranted. The noticees also questioned the invocation of the penal clause under Section 11AC and Rule 173Q for imposition of penalty on M/s RECL as also against the proposal for imposition of penalty on the officers of the Company under Rule 209A.5. On considering the replies filed by the noticee parties, the Commissioner of Central Excise, Jaipur vide his order dt. 23.2.2001 however confirmed the demand of duty of Rs. 3,21,30,295 on M/s RECL under Section 11A and imposed a penalty of equal amount on them under Section 11AC of the Central Excise Act, 1944. He further imposed an additional penalty of Rs. 10 lakhs on them under Rule 173Q. He directed that the company shall be liable to pay the interest as per the provisions of Section 11AB. The Officers of the company are subject to penalty under Rule 209A as per the particulars below: 6. The Commissioner of Central Excise in his order has stated that it is an admitted fact that the assessee prepared all the invoices and routed the same through the bank; that the corresponding transport documents viz., bilties/GRs were also submitted for these invoices; that Shri Vinod Kumar Garg, Manager (Finance) of RECL in his statement dt. 5.9.98 admitted that the parallel sets of invoices were also being used for clearance of goods. He has observed that these invoices are sufficient to conclude that the impugned goods had actually been cleared clandestinely; that once this conclusion is arrived at, the assessee's plea that they did not manufacture these goods is untenable and has no force as they did not adduce any evidence in this regard. He has observed that the Central Excise department has nothing to do with the non-receipt of payment against these goods, as it is a matter between the concerned bank and the assessee; that the department cannot be expected to

trace out such recipients of these goods, as the same have been clandestinely removed and in such cases every effort is made to conceal each and everything. He has therefore held that the impugned goods have been manufactured and cleared clandestinely without payment of duty which is recoverable from them under Section 11A(1) of the Central Excise Act, 1944 and they are also liable for penal action as proposed in the show cause notice. He has also observed that the assessee cannot record a plea to suggest that the documents were prepared without manufacture/removal of goods and that they did not relate to any goods. As regards the proposal for penal action against the officers of the company under Rule 209A, he has observed that the said officers had concerned themselves with the activities postulated in Rule 209A in respect of the goods which they knew or had reasonable belief that the same were liable to confiscation under Central Excise Rules, 1944.

7. M/s RECL, Shri B.D. Agrawal, V.P. (Commercial) and Shri A.K. Jain, V.P. (Production) have filed these appeals against the impugned order of the Commissioner of Central Excise.

8. We have heard Shri P.C. Jain, Advocate for the appellants and Shri M.M. Dubey, JDR for the respondents. While Shri P.C. Jain, the Ld, Counsel for the appellants has asserted the submissions made by the noticees before the adjudicating authority, the Ld. JDR has reiterated the findings arrived at in the impugned order. We have carefully considered the submissions made before us by both the sides. The appellants are not contesting the charge that they submitted the Central Excise invoices, delivery orders and the transport documents (GRs) issued by M/s Garuda Shakti Transport Company, Dholpur to the bank by means of which they represented to the bank that the clearances were actually effected to the collieries of CIL of the goods under these documents on which the Central Excise duty is duly paid. They are also not contesting that the invoices and the other supporting documents are represented to be as genuine documents but the Central Excise duty reflected in them is not paid to the department. In order to establish that the clearance of the excisable goods has actually taken place in respect of the goods covered by these invoices, the transport documents viz, delivery challans and GRs issued by the transport

company are also attached with each one of the invoices. The Ld. JDR during the course of hearing of the appeal showed to us the time and date of removal along with the registration number of the vehicle given in the invoices by which the goods were actually removed.

The particulars reflected in the delivery challans tallied with those mentioned in the invoices. These documents are completely identical to the ones which the appellants themselves are admitting to be the genuine ones and under which the goods are actually cleared and the duty paid. In the face of these admitted facts, therefore there is absolutely nothing to distinguish between the two sets of documents.

Further, Shri Vinod Kumar Garg, Manager (Finance) of the company in his statement dt. 5.6.98 admitted that both the sets of invoices are genuine and were presented to the bank on the instructions given by Shri Rajesh Jain, M.D; that two sets of invoices were prepared and only one set was declared to the Central Excise department. Shri O.P. Gupta, Manager (Distribution & Excise) of RECL in his statement dt. 3.6.98 supported the above facts and deposed that all the invoices were serially numbered with the numbering machine by using the same serial numbers and PLA/RG 23A Ft. II entry numbers etc., as those mentioned in the statutory invoices. He also stated that some times, he used to authenticate the invoices at the direction of Shri B.D. Agrawal, V.P. and Shri Rajesh Jain, M.D. Shri Rakesh Kumar Arora, Manager, SBBJ, Dholpur in his statement dt. 30.5.98 also supported these facts and deposed that RECL after receiving the payment from various collieries either used to deposit it through DD or deposited in their collection account being operated at the bank situated near the concerned colliery. It is also clearly mentioned in the Statement of Facts enclosed with the show cause notice that Shri Rajesh Jain, M.D., Shri B.D. Agrawal, V.P. (Commercial) of RECL and the Manager of M/s Garuda Shakti Transport Company, Dholpur - who had transported the goods - were repeatedly summoned for recording their version of the facts on eighteen different dates between the period from 19.5.98 and 19.11.98 but they failed to honour such summons. These noticees have not rebutted this fact either before the adjudicating authority or in their appeal before this forum. Furthermore, the appellants did not file any written statement before

the authorities to reconcile the total quantity of goods cleared by them on payment of duty against which they have received payment from the collieries as against total quantity of goods purported to have been cleared against the fictitious documents in respect of which no payment is received. They also did not rebut the statements given against them by the aforementioned witnesses much less they asked for their cross-examination before the adjudicating authority to counter the allegations made against them by these witnesses. In the absence of any such effort on their part, when the clearance of the goods without payment of duty is fully supported by their own documents, it is futile to argue that the production of this quantity of explosives is not supported by the raw material or the electricity consumed etc. Shri P.C. Jain, Ld. Counsel for the appellants, in support of his submissions, has placed reliance on the following decisions of the Tribunal: Rishab Refractories (P) Ltd. v. CCE, Chandigarh 1996 (87) ELT 93 (T) Suvarna Polymers (P) Ltd. v. CCE, Hyderabad 2000 (70) ECC 533 (T): 2000 (120) ELT 148 (T) M/s K.J. Diesels (P) Ltd. v. CCE, Kanpur 2000 (120) ELT 505 (T) In the above decisions, the Tribunal has held that the inflated figures of clearances submitted to the State Industrial Department, to the Bank or reflected in the monthly bank statements alone is not sufficient for payment of duty on alleged clandestine removal in the absence of any other corroborative evidence. Shri M.M. Dubey, Ld. JDR has countered these submissions of the appellants by relying on the following decisions: CCE, Madras v. M/s Madras Chemicals 1986 (24) ELT 308 (Tri.).

It is for the assesses to prove and substantiate their plea that the documentary proof recovered from their possession has nothing to do with the removal on manufacture of excisable goods by them. A legal proof is not necessarily a perfect proof but only a prudent man's estimate as to the probabilities of the case. The materials recovered during the course of investigation, the statement recorded from the various persons and the surrounding circumstances, coupled with the entries in the red pocket diary clearly point to the conclusion that the charge against the respondents regarding the clandestine removal of excisable goods is clearly made out by the Department." Roxy Enterprises (P) Ltd. v. Collector of C.Ex. 1991 (53) ELT 585 (T) (Majority decision) : Clandestine manufacture and removal of goods is an activity, which is done surreptitiously; secrecy and stealth are its covering guards. In such cases, direct evidence would rarely be

forthcoming which would prove a case beyond all doubts..... The burden shifted to the appellants on the basis of the statement furnished to the Bank and the Bank's stock taking report as to how the discrepancy occurred, but they are attempting to rebut the department's inference on no evidence at all. Physical stock taking is confirmed by several officers of the Bank. Their statements cannot be dismissed as unbelievable. Therefore, charge under Rules 9(2) and 173Q for levy of duty and penalty is established."Ram Gelkem Industries (P) Ltd. v. CCE, Madurai -1997 (89) ELT 178 (T) :- The appellants have also raised second set of invoices in respect of the sales made, Production figures were verified by the Bank officials A plea has been taken by the appellants that the figures given to the bank were with a view to get extra funds.

When verification has been done by the Bank officials, there is no reason to disregard the evidence in this regard Once the record show the fact of sale of goods, the appellant's plea cannot be accepted. We, therefore, upheld the demand of duty against the appellants." 9. On the face of the facts obtaining in the present case, the reliance placed by the Ld. Counsel for the appellants on the cited decisions in their favour is misplaced. In our view the facts of present case are more appropriately covered by the ratio of the decisions taken support by Ld. JDR. There are documents for the clearance of excisable goods without payment of duty issued by the appellants themselves. This evidence cannot be obscured by the plea of lack of evidence of the consumption of raw material and electricity etc. and the same is accordingly rejected upholding the findings arrived at by the Commissioner in his impugned order.

10. As regards the penalties imposed on the officers of the company, their role in the whole of the affair as such is not contested before us. The only plea raised before us by the Ld. Counsel for the appellants is that these persons cannot be subject to penalty under Rule 209A. In support of this contention, the reliance is placed on the decision of the Tribunal in Z.U. Alvi v. CCE Bhopal - 2000 (117) ELT 69 (T). In this decision an observation is made that the Commissioner proceeded against the appellant under Rule 209A, which can apply only to a person who dealt with the contraband article, not as a manufacturer; that appellant had no dealings with the contraband article otherwise than in his official capacity as an

employee of BHEL, the manufacturer. So by no stretch of imagination can the appellant fall within the purview of Rule 209A. Therefore, the Commissioner was clearly in error in thinking that penalty contemplated by Rule 209A could be imposed on the appellant who was only an employee of the manufacturer, namely BHEL.

11. We have considered the above submissions. It is observed from the facts in the cited decision, the appellant Shri Z.U. Alvi was in appeal before the Tribunal against the imposition of heavy personal penalty of Rs. 50 Crores on him under Rule 209A. It was the imposition of penalty of such a huge amount that the appellant was in challenge before the Tribunal. We do not find anywhere in this decision that the appellant had challenged the invocation of the provisions of Rule 209A for penalising him. The above observation seems to have been made by the Ld. Bench without looking into all the constituents of this rule.

Therefore, these observations are only an obiter dictum and not a considered opinion given on careful examination of all the aspects of the impugned rule which would be binding as a ratio decidendi of the case. The appellants otherwise have not advanced any other contention against the invocation of the provision of Rule 209A against them.

Consequently, all the appeals fail. It is contended that part of the period for demand of duty in this case is even before the provisions of Section 11 AC had come into force. M/s RECL have however not apportioned the amounts which would represent the duty liable to be realised from them before these provisions came into operation. This fact would however call for reduction of penalty on them.

12. Consequently, we uphold the amount of demand of Central Excise duty confirmed on the appellants, M/s RECL but however penalty imposed on them is reduced to Rs. 1.0 crore (Rupees one crore only) under Section 11AC. The penalty of Rs. 10 lakhs imposed on them under Rule 173Q is upheld. The amounts of penalties imposed on other appellants are reduced to the amounts as follows: (i) Shri B.D. Agrawal, V.P. (Comml) Rs. 1.5 lakhs (Rs. one lac & fifty thousand only) (ii) Shri A. K. Jain, V.P. (Production) Rs. 1.5 lakhs (Rs. one lac & fifty thousand only) 13. But for the above relief, all the appeals otherwise fail and

the same are accordingly dismissed.

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