

Bhel Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-25-2003

Reported in : (2004)(112)LC587Tri(Delhi)

Judge : A T V.K., P Bajaj

Appellant : Bhel

Respondent : Cce

Judgement :

1. The common issue involved in these three appeals, filed by M/s.

Bharat Heavy Electricals Ltd., is whether duty of Excise is payable on the goods cleared by them as a free warranty replacement.

2. Shri Z.U. Alvi, learned Advocate, fairly mentioned that the issue on merit has been decided by the Supreme Court in their own case - B.H.E.L. v. CC and CE, Indore . On. the question of penalty imposed under Section 11AC of the Central Excise Act, the learned Advocate submitted that there cannot be any suppression on their part as the department has earlier adjudicated the matters on this aspect alone on 6.12.1991 and 18.6.1998; that the present show cause notice have been issued for the period November, 1998 to June, 1999; that thus all the show cause notices have been issued after both the Adjudicating orders passed by the Commissioner, Indore/Bhopal; that in addition immediately after the first Adjudication Order dated 6.12.1991 the Appellants had addressed 3 letters to the

Commissioner with copy to Asst. Commissioner and Suptd. seeking clarification and permission to knock off the provisions of 2.5% towards free warranty replacement from the contractual price since duty on replacement was held to be payable separately at the time of their clearance. He finally submitted that penalty under Rule 173Q of Central Excise Rules, 1944 is also not imposable as the issue involved is an issue of legal interpretation.

3. Countering the arguments Shri Vikas Kumar, learned SDR, submitted that in spite of Adjudication Order, the Appellants were clearing the free warranty replacement without payment of duty; that as such the goods were being cleared by the without payment of duty and the penalty provisions contained in Rule 173Q will be invocable; that this clearance of the goods without payment of duty and without the cover of invoice under Rule 152A (Sic 52A) of the Central Excise Rules inspite of the Adjudication Order show the intention to evade payment of duty making provisions of Section 11AC invocable.

4. We have considered the submissions of both the sides. It has been held by the Supreme Court in their own case as "that so far as the customer is concerned the total amount paid, included the components towards 'Complaint Reserve' is price for the machinery." The Supreme Court also did not agree with the contention of the Appellants that when a part is replaced under warranty the value of that part is zero and no Excise duty is payable on that part. It has been held by the Supreme Court that "in order to promote sales manufacturers and dealers very often after incentives e.g. supply of free T.V. or some other equipment or goods. One of the incentive offered is a warranty to replace a part within a particular period. Merely because manufacturers and dealers choose to offer such incentive does not mean that goods which is otherwise excisable, should be exempted from paying Excise duty. When offering the incentive, the manufacturer or dealer is choosing to take upon himself the cost of that goods. So far as the Revenue is concerned that goods remain excisable." In view of this the duty is payable by the Appellants on the warranty free replacement. The learned Advocate for the Appellants has also not pressed on merits in view of the Supreme Court's decision.

Accordingly we uphold the demand of Central Excise duty.

5. We agree with the learned Advocate that provisions of Section 11AC of Central Excise Act are not invocable. The penalty under Section 11AC can be imposed only where duty of Excise has not been levied or paid, etc. by reasons of fraud, collusion, or any wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or Central Excise Rules with intent to evade payment of duty. It is not disputed by the Revenue that the Commissioner of Central Excise in his order has confirmed the demand of duty on this ground. The very fact that the Supreme Court has decided the issue goes to show that the Revenue was aware of the clearance of free warranty replacement without payment of duty. Accordingly it cannot be alleged by the Revenue that the duty has not been paid on account of suppression of fact or fraud etc. We, therefore, set aside the penalty imposed under Section 11AC of the Act. However, we agree with the learned SDR that the penalty is imposable under the provisions of Rule 173Q of the Central Excise Rules, 1944 which provides that penalty is imposable if any manufacturer removes any excisable goods in contravention of any of the provisions of Central Excise Rules. It is not in dispute that the Appellants have removed the free warranty replacement without payment of duty without following the procedure prescribed under the Rules in spite of the fact that two decisions of the Commissioner have gone against them. It has been held by the Supreme Court in the case of *Zunjarrao Bhikaji Nagarkar v. U.O.I.* Rule 173Q both things are necessary, (i) goods are liable to confiscation, and (ii) person concerned is liable to penalty." The Adjudicating Authority has imposed a penalty of Rs. 1 lakhs each in appeal No. E/1221 & 1222/2002 which we uphold. In appeal No.E/1223/2002 the penalty imposed under Rule 173Q is Rule 5 lakhs which is on the higher side. We reduce the same to Rs. 1 lakh. All the appeals are disposed of in these terms.

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