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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-16-2003

Reported in : (2004)(93)ECC158

Judge : S T Gowri

Appellant : Borax Morarjee Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. The appeal is against the order of the Commissioner confirming the rejection by the Asst. Commissioner of Customs, Ambernath Division, in the order impugned in the appeal, the claim for refund of Customs duly filed by the appellant.

2. The appellant is absent and unrepresented despite notice. The application filed by Mr. A.S. Sahota, Consultant, "on behalf of the appellant" addressed an objection raised by the registry that legible typed copies of the order in original and order in appeal should be filed. It says that after receipt of the notice he tried to contact the appellant but could not do so and that since he is not appealing before the Tribunal for more than two years for medical reasons, the matter may be adjourned.

3. I do not find it possible to adjourn. Firstly, there is no authority by the appellant for engaging Mr. Sahota. Secondly, if as Mr. Sahota claims, he has not been appearing before the Tribunal for more than two years for whatever reason, it

would be expected that he would have returned the papers to the appellant within these two years. Thirdly, the copy of the notice has been sent to the appellant who has not cared to reply. I however find the orders in original and orders in appeal legible, as does the departmental representative and after reading them and the appeal and hearing the departmental representative 1 proceed to decide the appeal.

4. The appellant imported a consignment of prorax penta hydracin filed a bill of entry in May 1992 to the Bombay custom house for its constructive deposit in a warehouse and removal to the public bonded warehouse in Ambernath as required by law then prevailing the appellant deposited 50% of the assessed duty in the Mumbai custom house before the goods were removed in Ambernath. The goods were cleared from the warehouse at Ambernath on three occasions in May on payment of duty.

The appellant subsequently filed a claim for refund on the ground that as against the quantity of 1500 tons that it imported, it received only 1449.74 tons and duty on the remaining quantity of 50.26 tons and was wrongly paid. The Asst. Commissioner of Customs, Ambernath before whom claim was filed dismissed the claim on the ground that the short receipt at Mumbai had not been established by evidence. He said there was no survey undertaken before the goods were cleared for home consumption and found absence of evidence to exclude pilferage as a cause of loss and also to show that the goods had not been delivered to any other person. Her order having been confirmed by the Commissioner (Appeals), the matter is before the Tribunal.

5. The departmental representative raises a point that the Asst.

Commissioner at Ambernath did not have jurisdiction to decide on the refund claim because, the short delivery, if it indeed took place, happened within the jurisdiction of the Commissioner of Customs, Mumbai and any claim for refund or remission could have been filed before the Asst. Commissioner of Customs, Mumbai. While his claim has some merit, since say that 50% of the duty was paid in Mumbai and sought to be warehoused, it is not possible for me to say with certainty that the jurisdiction of the Asst. Commissioner at Ambernath is excluded. Half of the duty was paid at Ambernath. However, the question of jurisdiction is not relevant as after considering the contention of the appellant I am unable to see that the refund claim has any merits.

6. The appellant has enclosed to the appeal a copy of the survey report dated 16.6.1992 carried out by Therapeutic Chemical Research Corporation, claiming to be government approved inspection agency. In this report, it is stated that the total quantity that was handed over to the appellant between 26.5.1992 and 4.6.1992 comprised 1449.74 tons.

Neither the Asst. Commissioner nor the Commissioner (Appeals) refer to the survey report and there is nothing to show that it was filed before them. A case is therefore not made out for considering the survey report by this Tribunal.

7. There are other objections also to accepting the refund claim.

Copies of the into-bond and ex-bond bill of entry have not been produced. Assuming that there was a loss of goods if the loss was due to pilferage, the question of Section 13 of the Act would apply for removing the duly of such goods. Only if they were pilfered after they were unloaded and before an order was made for clearance for home consumption in deposit for warehouse. It is not possible to say in the absence of bill of entry (o such an order was made. If the pilferage occurred subsequent to the order for home consumption having been made, but before (hey were actually cleared the importer would not be entitled to remission either in (onus of Section 13 or in terms of Section 23. Section 13 provides for remission in the casc of goods pilfered before an order for home consumption or warehousing has been made. Section 23 provide for a situation where remission of the goods which have been lost otherwise as a result of pilferage or destroyed neither of these section will be applicable. It has not been shown that the goods were not pilfered. Therefore the claim for refund has not been substantiated.