Commissioner of C. Ex. Vs. C.M. Re-rollers and Fabricators

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-12-2003

Reported in : (2004)(168)ELT506TriDel

Judge : S Kang, M T K.D.

Appellant : Commissioner of C. Ex.

Respondent : C.M. Re-rollers and Fabricators

Judgement :

2.1 These are Department's appeals against the Order-in-Original passed by the Commissioner of Central Excise on the basis of directions issued by the Central Board of Excise and Customs. In the impugned order, the Commissioner has partly confirmed the duty demand raised against the respondents and consequentially imposed penalties on the respondents.

However, the Commissioner has dropped the demand in respect of certain allegations levelled in the show cause notice. The Department's appeals are basically directed against that portion of the order, which relates to the dropping of the demand and pray for confirmation of the demand for the amounts, which have been dropped and also pray for consequential imposition of higher penalty on the respondents than what has been imposed in the impugned order.

2.2 In the show cause notice issued to the respondent-manufacturer viz.

M/s. C.M. Re-Rollers and Fabricators (Respondent No. 1) and other respondents, it was alleged that they have indulged in clandestine manufacture and removal of the excisable goods viz. M.S. Flats/rods etc. manufactured by them during the period March, 1994 to August, 1994. The Commissioner in his impugned order has dealt with each of the allegations listed below in the following manner :- (A) Non-accountal of 289.335 M.Ts. of raw material in the raw material account.

Findings - [Non-accountal of Raw material to the extent of 39.955 MT is confirmed. However, it is held that there is no clandestine removal and failure is only technical in nature).

(B) Non-accountal of finished goods production of 2,597 M.Ts.

involving duty of Rs. 43,77,344/-.

(C) Clandestine removal of 263.5813 M.Ts. of finished goods against 49 fake invoices.

Findings - [Duty of Rs. 1,04,972/- confirmed for 16 invoices (65,970 M.Ts.), rest dropped].

(D) Finished goods removal of 135.078 M.Ts. involving duty of Rs. 2,08,729/- against defective invoices, the duty payment of which cannot be co-related with the debit entry shown to establish the payment.

(E) Clandestine removal of 260 M.Ts. of finished goods in the guise of agricultural equipments (Heading No. 84.32). The actual goods under removal being of flats/bars etc. (duty amounting to Rs. 3,28,790/-).

(F) Clandestine removal of finished goods weighing 95.125 M.Ts.

figuring in the loader's advices of the transporters.

2.3 The Commissioner in the adjudication order gave his findings on each of the afore-mentioned allegations the gist of which is extracted in the brackets below each allegation whereas in the Revenue's appeal only a few findings are under challenge, which are discussed individually.

3.1 A-Non-accountal of 289.335 MTs. of raw material - (i) The Commissioner on critical analysis of the evidence of raw material record maintained by the manufacturer, observed that, there was irregularity only in respect of 39.955 M.Ts and not for the entire quantity of 289.335 M.Ts. as mentioned in the show cause notice.

However, the Commissioner has noted that there was collateral evidence even for this quantity, (39.955 M.Ts) indicating the receipt of raw material from authorized sources and there was no intention to suppress its accountal for the purpose of clandestine manufacture of finished goods.

(ii) The Revenue appeal disputes the acceptance of respondent's version by the Commissioner regarding respondent's claim that shortage of 34.855 M.Ts. in the raw material account was relatable to the Trading Account. The appeal is stating that, permission under Rule 51A was not obtained.

3.2 However, we note that, failure to record the raw material in the required record itself does not lead to a conclusion that there was an evasion. Secondly, the permission under Rule 51A, is of material significance only for the finished goods and not the raw material.

Further, the Commissioner has already held that there was a non-accountal of 39.955 M.T. of raw material in the relevant records and yet he did not deem it necessary to penalise the respondents.

Except for suggesting that the evidence of trading activity for 34.855 MT should not have been accepted by the Commissioner, the Revenue appeals do not bring on record any other corroborative evidence to prove that such non-accountal was indeed there. Besides even inclusion of this additional quantity of 34.855 MTs. of so called non-accounted quantity, in the quantity of 39.955 MT., the same will not make any impact on the ultimate conclusion that, the non-accountal of raw material (whether 39.955 MT alone or along with the additional quantity of 34.855 MT) was a merely technical breach, which is not disputed or challenged in the Revenue's appeal.

4. B-Non-accountal of 2,597 M.Ts. of flats/bars etc. involving duty demand of Rs. 43,77,344/- - The allegation is levelled on the basis of private record that has been allegedly seized from the factory's premises. The Commissioner has dropped the demand for Rs. 43,77,344/-.

While the respondents are disclaiming the ownership of the said record, in the appeal it has been pleaded that recovery of the said record is duly recorded at Serial No. 14 of the annexure to the panchnama dated 6-8-1994 drawn on the spot. In the Order-in-Original, it has been mentioned by the Commissioner that the entries in the said private record are of doubtful nature. The Commissioner's observations on this critical aspect of the case are reproduced herein below :- "Against the allegation that they have, during the period 1-3-1994 to 27-6-1994 manufactured a quantity of 2,597 MTs Flats/MS Square Bars, but have not accounted for them in RG-1 register and removed them without payment of duty of Rs. 43,77,344/-, the party No. 1 to 4 have denied that the private record belongs to them and the same has been seized by the department from their factory premises. They submitted that the Panchnama recorded on the day of the visit of the officers does not indicate as to where from the private record was recovered and from whose possession.

I have critically examined the above private record vis-a-vis RG-1 Register and find that, the same (private records) does neither contain the name of the party to which it belongs nor contain any other evidence to indicate the nexus thereof with M/s. C.M. Re-rolling & Fabricator, Raipur, the party No. 1. The investigating officers have failed to adduce any evidence in this regard. Even it is not known as to in whose handwriting the entries in the said private records have been made. I further find in some instances RG-1 shows some production on a particular date whereas the said private production register shows NIL production on that date. For instances on dated 16-44994, 17-4-1994, 18-4-1994, 3-5-1994, 30-5-1994, 4-6-1994 and the entire month of July, 1994, private records referred to in the show cause notice or obviously mentioned by the unscrupulous manufacturers showing the actual quantity of day to day production and clearance which also includes the quantities recorded in the statutory records, for the purpose of discharging duty/taxes on such stock. Thus in any case, the quantity of productions and clearance accounted for in such dubious private accounts/records remain much more than the quantities accounted for in the statutory record leaving no scope for a situation when the statutory record shows more quantity of production and clearance as compared to such private account. In the instant case, as discussed above, there are several entries where no production have been entered in the said "private record" as against the production figures recorded in the statutory RG-1 record leading to logical suspicion of having any nexus said private of the said private record with the party Nos. 1 to 4.

Further no evidence has been adduced in the show cause notice as to where from the raw material has been purchased for manufacture of such goods recorded in the said "private record" and to whom such finished quantity has been sold. The investigating officers have failed to adduce any evidence in regard to above and the payment received against the sale of alleged suppressed production. There is no any case of neither seizure of the goods alleged to be removed clandestinely. In support of the allegation nor the investigating officer have been able to collect any evidence in regard to either the supplier of raw material which were used for manufacture of the alleged suppressed production or that of the buyer of such clandestinely removed goods as alleged in the show cause notice which is fatal to the charge contemplated in the show cause notice on this account rendering the allegation null and void being based on assumption, presumption and surmises.

Thus in the instant case as elaborately discussed above the investigation officers have abruptly failed to establish the relevancy of the said private records and the entries of production shown therein with the party Nos. 1 to 4. Besides above the investigating officers have failed to adduce corroborative evidence either in regard to the source of procurement of raw materials used for such alleged suppressed production or for their clandestine removal leaving reasonable doubt and suspicion in regard to the authenticity and ownership of said private record and the entries made therein. Thus in respectful agreement of the various judicial pronouncements referred to above, I am constrained to hold that there is no relevancy of the said 'private record' with the party's factory and their manufacturing activity and accordingly charges contemplated in the show cause notice placing reliance to the said private record including demand and recovery of

Central Excise duty amounting to Rs. 43,77,344/- fails, having no legs to stand. Held accordingly." 5. So far as the issue regarding dropping of the demand of Rs. 43,77,344/- by the ld. Commissioner, in the revenue appeal, it has been urged that the Commissioner was in error in discarding the evidence unearthed through private record seized by the investigating team. The appeal merely pleads to accept the details figuring in the private record without providing any worthwhile counter to the detailed reasoning (extracted above) given by the learned Commissioner in his order on the basis of which he holds that the entries in the said record cannot be relied upon. As outlined above the Commissioner has noted glaring discrepancies in the private record vis-a-vis the entries appearing in the RG-1, to conclude that the seized private record is not reliable. In the appeal, it has not been shown, as to how these discrepancies are to be overcome to extend credibility to the seized private record. Besides, as correctly observed by the Commissioner, no other corroboration regarding purchase of extra raw material or disposal of excess finished goods is unearthed. Therefore, we hold that the appeals of the Revenue on this point are devoid of merits.

6. Revenue appeals also mention that, since the Commissioner has already held that the party was engaged in the clandestine clearance of finished goods involving duty of Rs. 4.37 lacs, [sub-paras (C) & (E) of Para 2.1] he ought to have considered that, there is an evidence of clearance of 2,597 M.T of finished goods, even though the department did not have evidence of evasion for the entire quantity. It is urged in the appeals that, the circumstance showed that the party was engaged in the clandestine clearance activity.

7. We have carefully examined the above grounds and we are unable to subscribe to the postulates to the effect that, where there is an evidence of partial evasion, conclusion must be drawn to hold that there has been clandestine clearance of 2,597 M.T. of finished goods as alleged in the show cause notice. This is so because, the Commissioner in his order has weighed the entire evidence on record, including all the probabilities before discarding the allegation of clandestine clearance. It has been exhaustively brought out in the findings recorded by the Commissioner that, mere existence of entries of clandestine production in the seized private record cannot be sufficient evidence to confirm the allegation of

evasion. A corroboration is required to support this evidence with other material such as, evidence regarding procurement of corresponding raw material for obtaining the finished production allegedly concealed or the evidence regarding the disposal of this excess material. In the Revenue's appeal memorandum, no such attempt has been made to demolish the conclusions arrived at by the learned Commissioner.

8. Accordingly, we have no hesitation to hold that the appeals filed by the Revenue are without merit and deserve to be rejected.