**Embassy Enterprises Vs. Commissioner of Central Excise**

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**SooperKanoon Citation** : sooperkanoon.com/33457

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Dec-16-2003

**Reported in** : (2004)(164)ELT314TriDel

**Judge** : P Bajaj

**Appellant** : Embassy Enterprises

**Respondent** : Commissioner of Central Excise

**Judgement** :

1. In this appeal, the appellants have challenged the impugned order-in-appeal dated 20-6-2003 vide which the Commissioner (Appeals) has affirmed the order-in-original of the adjudicating authority who confirmed the duty demand and imposed penalty as detailed therein on the appellants.

2. The duty demand has been confirmed against the appellants after serving show cause notice on them for having removed 2,631 pairs of shoes involving duty of Rs. 2,58,496/- in a clandestine manner during the years 1997-98 and 1998-99.

3. The learned Counsel has contended that there is no evidence on record to prove that removed pairs of shoes were finished goods and marketable; rather those were odd pairs in a semi-finished condition which were not marketable. He has also contended that the duty demand raised is time-barred as extended period could not be invoked against the appellants who had already informed of the material facts to the Department. On the other hand, the learned JDR has

reiterated the correctness of the impugned order.

4. I have heard both the sides and gone through the record. The appellants are engaged in the manufacture of footwears. The perusal of the record shows that they had taken out the disputed pairs from the factory for showing it to their different buyers for approval. As a general practice, one shoe from the relevant pair was retained in the Head Office and the second odd shoe was kept by the manufacturing unit in order to manufacture the footwears according to the said design and shape. Those pairs of the shoes were not in a finished condition and could not be even marketed. Even the adjudicating authority has observed regarding those shoes "that being in a single odd piece, it was deprived of the element of marketability". After so observing the adjudicating authority could not contradict itself by recording thereafter that it was not acceptable that the samples cleared were not marketable. The findings recorded by the adjudicating authority are thus self contradictory regarding the marketability of the single odd pieces of footwear. The retention of one shoe from the pair by the Head Office and the second shoe by the manufacturing unit of the appellants was duly recorded by them in the statutory records. The figures regarding the odd pieces of shoes were taken by the Excise officers at the time of checking from that record. The odd pairs of shoes being neither fully finished nor marketable, could not be subjected to excisability. In Dharangadhra Chemical Works Ltd. v. Union of India - 1997 (91) E.L.T. 253, the Apex Court has observed "that the product even if covered by the Tariff entry will not be excisable to duty unless marketable". Apart from this, the duty demand raised from the appellant is on the face of it time-barred. The duty has been demanded for the years 1997-98 and 1998-99 whereas the show cause notice was issued only on 26-6-2001, by alleging that the appellants had suppressed the facts from the Department. But the adjudicating authority has in the order-in-original observed in clear terms that the appellants had maintained proper record for removing of such samples and such activities were very much in the knowledge of the Department.

After so observing, the authority had still proceeded to confirm the duty demand by applying the extended period of limitation.

5. In my view, in the face of above findings of the adjudicating authority, it could not be concluded that the appellants had suppressed any material facts regarding the removal of the samples of the unfinished shoes by them. In Pushpam Pharmaceuticals Company v.Collector of Central Excise, Bombay, 1995 (78) E.L.T. 401, the Apex Court has observed that "where the facts are known to both the parties, the omission by one to do what he might have done and not that he must have done, does not render it suppression of facts". Therefore, the extended period of limitation against the appellants could not be invoked. The duty demand must be held to be time-barred.

6. In view of the discussion made above, the impugned order of the Commissioner (Appeals) is set aside. The appeal of the appellants is allowed with consequential relief, if any, permissible under the law.