Commissioner of Central Excise Vs. N.D. Textiles

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-12-2004

Reported in : (2004)(94)ECC424

Judge : A M Moheb

Appellant : Commissioner of Central Excise

Respondent : N.D. Textiles

Judgement :

1. The Revenue's appeal is against the order of the Commissioner (Appeals), Surat, who in the impugned order set aside the order of the original authority.

2. The facts briefly are that the Central Excise officers conducted a search of the shop premises of M/s N.D. Textiles. The proprietor of the shop is one N.R. Kamra. He was present during the search. He is engaged in the purchase and sale of MMF. He received fabrics from different mills since March 1995. When the stock of fabrics was challenged it was found that Rs. 9,724.50 L.mts of MMF was in excess of the book balance.

He explained that he purchased grey fabrics from the open market and got them processed through different mills of the city, namely: (1) Madhusudan Silk Mills, (2) Om Prakash Jai Prakash Dyeing and Printing Mills and (3) Luthra Dyg. & Prg. Mills. The officers seized the excess stock as the prop admitted that he got grey fabrics processed and received them without the cover of Central Excise invoices and without payment of duty. The excess stock as per his own admission is non-duty paid. The officers also recovered some incriminating documents from him in the form of kachcha delivery challan evidencing receipt of Rs. 81, 274.25 L.mts from various Mills on which no Central Excise duty was paid. In his statement before the officers he gave the names of the mills, which processed the grey fabrics purchased by him. He also admitted he paid the processing charges to the mills in cash. He admitted that duty is payable on the processed fabrics as he was the merchant manufacturer. On different dates he paid the Central Excise duty involved on the goods seized and the one involved in the fabrics mentioned in the kachcha delivery challans. Verification with the Mills, who are alleged to have issued in kachcha delivery challans, resulted in the denial from the persons concerned with the mills. The officers thereupon confronted the proprietor of N.D. Textiles with the denials. He stated in his further statements that he lied to the officers about the mills who processed the fabrics and that he was responsible for the duty on the fabrics as a merchant manufacturer and that he had deposited the duty involved. A show cause notice was issued. No reply was received. A personal hearing was given but none turned up on behalf of M/s N.D. Textiles. The Assistant Commissioner adjudicated the case ex-parte. He confiscate the fabrics found in excess of the stock; confirmed Central Excise duty of Rs. 24,310/- paid vide TR6 challan and the one paid this various cheques under Rule 9(2), imposed a penalty of Rs. 24,310/- under Rule 209A and imposed a penalty Rs. 5,000/- on the appellant.

3. In appeal, the Commissioner (Appeals) set aside the order. He observed that the statements of the proprietor were not voluntary, the statements were written in English and were stereo typed, the department did not establish the non-duty paid nature of the fabrics, confiscation and penalty not sustainable and the mills, who were alleged to have fabricated the fabrics, denied having done so. He also brought out page 5 of his order, referring to an earlier order he passed in respect of similar goods found in similar circumstances, that duty can be demanded only from a manufacture according to the Apex Court's decision in Ujagar Print's case. Para 30 and 30B of the Supreme Court order has been paraphrased. He also observed again referring to another order he passed that the department has established the non-duty paid nature of the goods. The onus is on the investigating

officers to determine when and where the goods were processed and how they reached the shop premises from where they were seized. He held that the officers did not succeed in doing so in this case as well because the statements of the prop of the shop were not voluntary. He set aside the order of the original authority on the above grounds.

4. The department's appeal extensively relied upon Notification No.27/92 (NT) dated 9.10.1992 though this was not even referred to either in the show cause notice or in the order in original. It is not clear what the Revenue wants to derive from this Notification. A reading of this shows that a manufacturer of fabrics has to discharge all liabilities if the trader fails in his obligation. The department also relied upon the decision of the Hon'ble Supreme Court in case of Bajrang Gopilal v. M.N. Balkundri and Ors. 1956 (25) ELT 609 (SC) who while upholding the order of the High Court ruled that in a case where cloth is manufactured in power-looms out of the yarn supplied by someone who owns it, it is the supplier of yarn who is the manufacturer and therefore is liable to pay duty. The department argues that in the present case N.D. Textiles is the purchaser (supplier) of the grey fabric and he got it processed through various mills by paying only labour charges and so he is the manufacturer who has to discharge the duty liability. The department rightly demanded the duty from the shop keeper and imposed penalty on him.

6. It is a cardinal precept of law that a fraud overrules all. In the present case, the department through the statements made by the owner of the fabrics, established the non-duty paid nature of the goods.

Every lead given by the owner of the seized goods was followed up. When the lead did not take the officers any further, they approached him (the shopkeeper) again and he stated that he had spoken lies when he gave the names of the processors and that he had already paid the duty on the non-duty paid fabrics. The proprietor of M/s N.D. Textiles has the peculiar knowledge of the nature of fabrics in his possession but he refuses to part with that knowledge except saying that the fabrics are non-duty paid. In such a situation are the officers expected to leave (he fabrics in question alone on the sole ground that they are not able to establish who manufactured them even though there is a clear admission on the part of the person that the fabrics are non-duty paid, is the question. Such an action may lead to absurd results. More over what is admitted need not be proved aliunde. Proof of a fact in issue may be by direct evidence as well as by circumstantial evidence.

By circumstantial evidence is meant, proof of other relevant facts from which the fact in issue may be inferred. In quasi criminal cases prima facie doubt is sufficient to shift the onus to the assessee or accused (AIR 1949 Madras 116 in Narasinga Muthu Chettiar). There is sufficient circumstantial evidence in this case to establish the non-duty paid character of the fabrics.

7. The Commissioner (Appeals) cast doubts on the statements given by the respondent. The respondent himself did not cast any such doubts during the adjudication proceedings. He did not even reply to the show cause notice. Nor did he appear for a personal hearing. He did not retract any of his statements. It is not understood how the Commissioner (Appeals) concludes that the statements are dictated.

Viewed in the light of the fact that the respondent had been paying duty on the goods involved by cheques, I hardly see any reason in the Commissioner (Appeals)'s finding that the statements made by the respondent are not voluntary.

8. The Commissioner (Appeals) at one stage says that the department has to establish the non-duty paid character of the goods before proceedings against them, particularly when the goods are found in the buyer's premises. Very true. Indeed that should be the case. But in this case the department has done only that before they seized the goods and proceeded against them.

9. They could not have been rejecting the cheques sent by the respondent towards payment of duty when he himself says that he has to discharge the duty. It is a fact that the department could not bring out the processors of the fabrics. It was never disclosed to them.

10. All in all the department could establish the non-duty paid character of the goods. The Commissioner (Appeals)'s order casting doubts on the statements made by the respondent is not warranted. Once he rejected the statements the

whole case fell. The statements should not have been rejected lightly particularly when they are not retracted.

11. On the question as to who should discharge the duty, undoubtedly it is the manufacturer. But in the present case non-duty paid goods are found in some other person's premises who admits that he is liable to discharge the duty. The department cannot be faulted for accepting the duty and holding him liable to penalty for having actively connived in the process of evasion.

12. The Commissioner (Appeals) set aside the whole order of confiscation and imposition of penalties. M/s N.D. Textiles is a proprietary firm. The lower authority imposed penalty both on the firm and the proprietor. The Commissioner (Appeals)'s order insofar as it sets aside the penalty, has to be upheld. But it is not for me to decide which penalty has to be upheld in the absence of any representation from the respondents.

13. The appeal is allowed. The order of the Commissioner (Appeals) is set aside.