Commissioner of Central Excise Vs. Ess Kay Polymers

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-13-2004

Reported in : (2004)(165)ELT566TriDel

Judge : P Bajaj

Appellant : Commissioner of Central Excise

Respondent : Ess Kay Polymers

Judgement :

1. None for the respondents. Shri Anurag Mishra, Advocate has requested for adjournment. But he has no locus standi to seek adjournment. His power of attorney is not on the file. The appeal has not been filed by the appellants, through him. He has also not filed his power of attorney authorising him to appear or seek adjournment on behalf of the respondents. Therefore, the request of the Counsel cannot be entertained. No request for adjournment has been received from the respondents' firm. I, therefore, proceed to decide the appeal after hearing the learned JDR.2. In this appeal, the Revenue has challenged the impugned order-in-appeal passed by the Commissioner (Appeals) vide which he has modified the order-in-original of the adjudicating authority. The issue involved in the appeal is as to whether the Commissioner (Appeals) was legally entitled to set aside the confiscation of the unaccounted goods and redemption fine as determined by the adjudicating authority and convert the penalty imposed under Rule 173Q by the adjudicating authority, to under Rule 226 of the Central Excise Rules.

3. I have heard the learned JDR and gone through the record. The facts borne out from the record are that the respondents are engaged in the manufacture of polyethylene tubing/polyethylene sheets/film and bags.

On carrying out physical verification of the stock of the final products and inputs lying in their factory by the officers of the Central Excise on 27-8-1999, excess stock of polybags weighing 3,295.3 kgs., was detected. This fact was admitted by Sudhir Bhatia, partner of the respondents in his statement at the spot. Similarly, various inputs detailed in the order-in-original, were found lying unaccounted in the factory premises and Sudhir Bhatia again conceded this fact in his statement.

4. The adjudicating authority after service of the show cause notice and getting the reply of the respondents, ordered confiscation of the unaccounted goods, imposed redemption fine and penalty through order-in-original as detailed therein. The Commissioner (Appeals) has modified that order by setting aside the confiscation and redemption fine. He has, however, upheld the penalty of Rs. 5,000/-.

5. In the face of the above referred facts, in my view, the impugned order of the Commissioner (Appeals) cannot be legally maintainable. He has lost cite of the ratio of law laid down in Kirloskar Brothers v.Union of India [1988 (34) E.L.T. 30 (Bom.) = 2002 (83) ECC 497] wherein the Bombay High Court has clearly ruled that even in a case of non-accountal of the goods, the provisions of Rule 173Q can be invoked.

The confiscation of the unaccounted goods can be ordered and mens rea is not required to be proved. The ratio of law laid down in the case of Balls and Cylpebs Ltd. v. C.C.E., Allahabad, 1997 (92) E.L.T. 496, and other cases referred by the Commissioner (Appeals) in the impugned order could not be made applicable to the case of the respondents in view of the above referred judgment of the Bombay High Court. The penalty imposed by the adjudicating authority under Rule 173Q also could not be changed to, under Rule 226 by the Commissioner (Appeals) in view of the discussion made above. Consequently, the impugned order of the Commissioner (Appeals) is set aside and the order of the adjudicating authority is restored. The appeal of the Revenue is allowed.