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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jan-20-2004

Reported in : (2004)(93)ECC40

Judge : Author: J R Kait

Appellant : Sundaraganapthy Spinning Mills

Respondent : Cce

Advocate for Pet/Ap. : Shri. P.K. Parameswaran

Judgement :

1. This appeal is directed against the Order-in-Appeal No.79/2002-CBE(GVN) dated 22.3.2002 passed by the Commissioner of Central Excise (Appeals), Trichy by which the Commissioner has rejected the appeal of the appellants and upheld the order of the original authority whereby the original authority had confirmed a duty demand of Rs. 97,080 under Section 11A of the CE Act, 1944 and imposed a combined penalty of equal amount under Section 11 AC and 173Q of the CER, besides confiscating 10 bags of cotton yarn on cones weighing 500 kgs and valued at Rs. 45,000 with option to redeem the same on payment of fine of Rs. 10,000. He has also imposed a penalty of Rs. 7,500 on the transport company with whom the goods had been entrusted for transport and from whose premises the goods were confiscated.

2. Brief facts of the case are that on a surprise visit by the officers of the Preventive group to the premises of one M/s Almatheswara Lorry Service, they found 10 bags of cotton lying for the purpose of transportation without any supporting documents such as lorry receipt/way bill etc. The officers therefore effected seizure of the same under a mahazar on a reasonable belief that the goods had not suffered duty at the time of clearance from the factory viz. M/s Sundaraganapathy Spinning Mills (P) Ltd., the appellants herein.

Statement was recorded from the Director of the appellants wherein inter alia he has stated that he happened to know that the officers visited their mills on the previous day evening to verify the Central Excise records, with regard to despatch of 10 bags of cone yarn from their mill to the Transport Company. To a question by the officers, he stated that they had sent 10 bags of cotton cone to the Transport Company on 8.12.98. He has also admitted that there was shortage when compared with physical stock and the reason for the shortage was that invoice No. 68 was prepared and kept for his signature which pertain to him and this invoice was kept undetached from the book but the goods were sent without invoice. Statement was also recorded from the partner of the Transport Company who confirmed the receipt of 10 bags of cone without proper documents. He has also stated that he was not aware whether the goods had suffered duty. It was noticed on further investigation that the appellants had purchased raw material cotton and clandestinely manufactured and cleared cotton yarn to the turn of Rs. 28375 kgs. It was in these circumstances that show cause notice was issued to the appellants which culminated in the order of adjudication passed by the original authority whereby he has confirmed the demand of duty and imposed penalty against which the appellants preferred appeal before the lower appellate authority who rejected their appeal and hence this appeal.

3. Shri P.K. Parameswaran, learned Counsel for the appellants referred to the written arguments made by the appellants wherein it is inter alia stated as under:
(a) As regards the allegation that 10 bags of cone yarn despatched by the appellants to the Transport Company without payment of duty is only a presumption and assumption of the Department and not to be relied for establishing clandestine removal in the absence of corroboration in the form of

seizure of goods or invoice or purchase of raw material. The said goods seized from the Transport Company had no marks, description, packing Sl No. and the name of manufacturer etc. In such a situation, the allegation that the said goods related to the appellants cannot be accepted without any corroborate evidence of invoice and the only evidence is the statement of the transporter.

(b) Penalty is imposable under Rule 173Q(1) (1)(D) of CE Rules, 1944, for removal under cover of invoices without debiting the duty in PLA and not and Section 11 AC of the CE Act, 1944 as held in the case reported in 2001 (133) ELT 492 (Tri-Del).

(c) As regards the charge of non-accountal of the 20,385 kgs of raw material, the allegation is that the department had a sample verification merely by getting a letter from Mr. M. Palanivel M/s Soundaram Traders, Ellapalayam stating that 6485 kgs of cotton sold through market committee in form 15 and have not been taken by them, this kind of evidence is weak when the department can very well establish getting confirmation through the market committee. It cannot be established merely by receiving a letter from the party without considering other business transaction such as payment, debit note, or credit delivery challan etc and, therefore, the onus is on the department to prove the allegation with concrete evidence.Indore Steel and Iron Mills Ltd. v. CCE, Indore, 2001 (133) ELT 493 wherein it was held that penalty is imposable under Rule 173Q(l)(b) for removal under cover of invoices without debiting the duty in PLA and not under Section 11AC.Brims Products v. CCE, Patna, 2001 (130) ELT 719 wherein it was held that no positive evidence to establish clandestine removal adduced by the department when quantity of allegedly removed is based on transport company's records.Bharat Berg Ltd. v. CCE, Kanpur, 1998 (101) ELT 410 wherein it was held that intention to evade duty to be concluded on examination of raw material registers and other records. Case remanded.Prempreet Textie Industries Ltd. v. CCE, 2001 (134) ELT 691 wherein it was held that charge of clandestine removal of yarn mainly on the basis of some entries in a private register is not sustainable when it has not been established by the register maintained.CCE, Patna v. Universal Polythene Industries, 2001 (130) ELT 228 wherein it was held that clandestine removal and clearance is a serious charge and is required to be discharged by the Revenue by production of sufficient and tangible evidence.

4 Shri A. Jayachandran, learned JDR appearing for the department contended that this is a case where deliberate attempt has been made by the appellants to evade payment of duty by not making entries in the statutory records regarding receipt of raw material and the plea of the appellants that they have returned the goods which were not entered in the records are not supported by any acceptable evidence. Hence, the authorities below have rightly demanded duty and imposed penalty. As regards the various case law cited by the learned Counsel, the learned JDR has submitted that those case laws are not applicable to the facts and circumstances of the present case as in the present case, the department has proved the charge against the appellants.

5. I have considered the submissions made by both the sides, and gone through the case records and perused the various case laws cited by the party. I observe that the charge levelled against the appellants is that they have not accounted for a total quantity of 28825 (i.e. 20385 + 7990) kgs of raw material (cotton) and by utilization of this much quantity of raw material, they have clandestinely manufactured and cleared 24,119 kgs at the rate of 85% realization. The appellants were also found to have removed 10 bags of cotton yarn to the transport company for onward despatch. The appellants have contested the claim of the Department stating that the non-accountal of the raw material was because the alleged unaccounted quantum was returned to those persons from whom the goods were purchased. They have also produced some letters from certain sellers of the cotton stating that the appellants have returned the goods to them. The original authority had dealt with their contention in this regard holding that after a lapse of nearly one-year and half they had come up with few letters as evidence for the return of the goods, and their claim in this regard cannot be accepted as the parties to whom they have earlier claimed to have returned the goods are different from those to whom they had claimed to have returned the goods later, as found during investigation by the department as noted by the original authority in para 22 of his order.

I note from the Order-in-Original that the appellants had claimed that a quantum of 3241 kgs of cotton were returned to M/s Soundaram Traders and they promised to furnish evidence for having returned the same within a period of seven days. But subsequently the said M/s Sundaram Traders have given a categorical denial that they had received back cotton from the appellants. Further, as rightly held by the original authority, the appellants have neither produced any documentary evidence such as transport documents/invoices etc. for having returned the cotton which were un-accounted for, nor details of payment received back and cash vouchers etc in support of their plea for having returned the goods. Had the goods been returned to the sellers, there was no reason why the appellants could not produce any documents to support their claim for return of the goods. Not a scrap of paper by way of evidence has been produced by them to support their claim. What prevented them from producing any evidence is not understandable and the logical conclusion that followed is that there was no such return of the goods as claimed by them. As regards the 10 bags of cotton yam seized from the Transport Company, the statement of the partner Shri M.Suresh Kumar of the Transport Company is corroborated by the statement of the Director of the appellants Shri V. Sivakumar to the effect that the appellants had sent 10 bags of cotton yarn loaded in a bullock cart for onward despatch to their buyers and the transport company has not been informed whether the goods had suffered duty. In view of the above, I am of the considered opinion that the evidence on record bring home the charge against the appellants that they have clandestinely manufactured and cleared cotton yarn with a view to evade payment of duty. The various case laws cited by them do not come to their rescue as they are not similar to the facts and circumstances in this case as could be seen from the citation noted above. Therefore, I uphold the order of the authorities below insofar as the demand of duty on the goods and confiscation of the goods is concerned. So far as the imposition of redemption fine is concerned, I observe that the value of the goods seized was Rs. 45,000 for which the quantum of redemption fine imposed is Rs. 10,000 which is rather on the higher side and I reduce the same to Rs. 4,500 (Rupees Four Thousand) (sic).

6. As regards the combined penalty under Section 11AC and Rule 173Q is concerned, the appellants have cited the decision in the case of Indore Steel and

Iron Mills Ltd. v. CCE, 2001 (133) ELT 493 wherein it was held that for removal of the goods under the cover of invoices without debiting duty in PLA, penalty is imposable under Rule 173Q and not under Section 11AC. I note that in the present case, the appellants have not accounted for the raw material which they have received and used such unaccounted raw material for manufacture and clandestine removal of the goods and thus they have suppressed material fact from the Department. Provisions of Section 11 AC therefore has been rightly invoked. However, the original authority has imposed a combined penalty both under Section 11AC and Rule 173Q and the quantum is equal to the duty demanded. This Tribunal has been taking a consistent view that penalty under both the provisions should be apportioned. However, for this limited purpose of apportioning the penalty, I do not want to remand this matter. Therefore, I take the penalty imposed on the appellants as imposed under Section 11AC. However, I am inclined to think that in the facts and circumstances of the case, ends of justice would be served, if the penalty is reduced to Rs. 25,000 (Rupee Twenty five thousand) and I order accordingly. Except for the modification in the quantum of penalty and redemption fine as noted above, the appeal is otherwise dismissed.