**Commissioner of Central Excise Vs. Gupta Synthetics**

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**SooperKanoon Citation** : sooperkanoon.com/34091

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

**Decided On :** Feb-11-2004

**Reported in** : (2004)(94)ECC295

**Judge** : P Bajaj

**Appellant** : Commissioner of Central Excise

**Respondent** : Gupta Synthetics

**Judgement** :
1. In this appeal, the Revenue has questioned the validity of the impugned Order-in-Appeal vide which the Commissioner (Appeals) has reversed the Order-in-Original by setting aside the duty demand and the penalty. Learned JDR has reiterated the correctness of the Order-in-original vide which duty and penalty were confirmed by the adjudicating authority on account of shortage of raw material and the finished goods found in the factory premises of the respondents by the officers of the Central Excise on 27.9.2001 at the time of their visit.

He has also contended that the Commissioner (Appeals) has ignored the fact that the panchnama was attested by Sanjay Gupta, Manger and authorised Signatory of the respondents without any objection regarding the actual weighment of the stock and that the duty was debited at the spot itself without any objection by the respondents. He has further contended that the ratio of law laid down in Bhilai Conductors (P) Ltd. v. CCE, Raipur, 2000 (69) ECC 192 (T): 2000 (125) ELT 781 relied upon by the Commissioner (Appeals), has got no application to the present case and it has been wrongly made basis for reversing the order-in-original. Learned JDR has also relied upon the ratio of law laid down in Mayur Industries v. CCE, New Delhi, 2. On the other hand, the learned Counsel has contended that no weighment was carried out in order to ascertain the actual shortage of the raw material and the finished goods and that the alleged shortage was based on assumptions and presumptions. He has also contended that Sanjay Gupta, Manager no where admitted the shortage in his statement and that the panch witnesses also stated before the adjudicating authority that no actual weighment of the goods was carried out. The Counsel has also referred to the ratio of law laid down in Malwa Cotton Spinning Mills Ltd. v. CCE, Chandigarh-I, 2003 (87) ECC 200 (T): 2003 (54) RLT 164.

3. I have heard both the sides and gone through the record. The perusal of the record shows that the officers of the Central Excise paid surprise visit to the factory of the respondents on 27.9.2001. After the verification of the raw material and the finished goods they recorded shortage of 543 kgs. of PC waste I (raw-material/input) and 451 kgs of finished goods. They prepared the panchnama in that regard in the presence of Sanjay Gupta which was attested by him and other panch-witnesses. At the time of putting signatures on the panchnama, Sanjay Gupta never raised any objection that the actual weighment of the goods were not carried out. He also did not even mention under his signatures that the panchnama was not correctly prepared and that his signatures were obtained under coercion on it. The subsequent version of the panch witnesses, forwarded by the respondents along with their reply to the show cause notice which was filed after the service of the show cause notice, that the actual weighment was not done, could not be attached any legal value, especially when the correctness of the panchanama had not even been challenged in the reply to the show cause notice by the respondents themselves. All that had been alleged by them therein is that no actual weighment was carried out. The fact that Sanjay Gupta in his statement no where admitted the shortage, is of not much significance especially when he had not disputed the correctness of the contents of the panchnama which was signed by him at the spot.

4. Apart from this, there is nothing on the record to suggest if after the visit of the Central Excise officers, the respondents ever immediately made any representation to the higher officers disputing the correctness of the contents of the panchnama by alleging that no weighment of the goods was carried out, to arrive at the actual shortage of the raw material and the finished goods. Rather, the duty involved on the shortage of raw material and the finished goods was debited by the respondents at the spot on the date of checking itself.

The contention of the Counsel that the said debit was made under protest cannot be accepted at all for having not so alleged, even in the reply to the show cause notice, Mere writing of the words 'under protest' in their own record without bringing this fact to the notice of the Department, is not sufficient to conclude that the debit was made under protest. This circumstance that the duty involved on the short found raw material and the finished goods was debited goes a long way to corroborate the correctness of the panchnama. Otherwise, there was no occasion for the respondents to make the debit entry on that very date itself. It is not their plea, for having not taken in the show cause notice, that the debit entry was made under coercion or threat held out by the Department. Therefore, the plea of the respondents that there was no actual shortage and it was only based on the assumptions and presumptions cannot be accepted. Learned Commissioner (Appeals) has ignored all the above referred facts and circumstances. It so appears that he was working under the belief that it was a case of confiscation of the goods on account of non-accountal and that is why he has referred to the ratio of law laid down in Bhilai Conductors P Ltd. (supra). This shows that the Commissioner (Appeals) did not apply his mind to the facts of the case and the issue involved.

The ratio of law relied upon by the learned JDR in Mayur Industries (supra) wherein it has been observed that when the partner of the assessee admitted the shortage and voluntarily deposited the duty amount, the plea that no physical verification was carried out, could not be accepted, is fully attracted to the facts of the present case detailed above.

5. In view of the discussion made above, the ratio of law laid down in Malwa Cotton Spinning Mills (supra) referred by the Counsel, is not at all attracted to the facts of the case -- that was a case where denial of the modvat credit was involved and the same was denied on the alleged shortage of the goods. But it was admitted in the order under appeal by the Commissioner (Appeals) that bales and bags were counted and average weight was worked out to arrive at the shortage. It was for these reasons that the Bench observed that for want of any actual weighment of the stock lying in loose as well as in bale forms, the quantity of the excess or the shortage of the stock could not be arrived at. But such is not the position in the present case.

6. In view of the discussion made above, the impugned order of the Commissioner (Appeals) cannot be maintained and deserves to be set aside.

7. The learned Counsel has however, lastly contended that penalty equal to the amount of duty should not have been imposed by the adjudicating authority being not permissible under the Rules. But in my view the contention of the Counsel cannot be accepted. In a case of evasion of duty, the law/rules permits imposition of penalty equal to the amount of duty. I do not find that the imposition of penalty of Rs. 2624 is in any manner exhorbitant, on the respondents.

8. Consequently, the impugned order of the Commissioner (Appeals) is set aside. The Order-in-Original of the adjudicating authority is restored. The appeal of the Revenue stands accepted.