

Commissioner of Central Excise Vs. Siddharth Tubes Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-18-2004

Reported in : (2004)(96)ECC83

Judge : A T V.K., M Bohra

Appellant : Commissioner of Central Excise

Respondent : Siddharth Tubes Ltd.

Judgement :

1. The issue involved in this appeal, filed by Revenue, is whether a second show cause notice for demanding Central Excise duty can be issued to an assessee on gathering additional 2. Mrs. Charul Baranwal, learned SDR, submitted that M/s. Siddharth Tubes Ltd., manufacture M.S. Black Pipes and Galvanised M.S. Pipes; that in the price list filed by them, they had claimed deductions on account of post removal expenses (PRE in short) and sought permission for provisional assessment under Rule 9B of the Central Excise Rules; that a show cause notice, dated 24-12-1997 was issued to them for denying the permission for provisional assessment and for recovering the duty on account of PRE for the month of November, 1997; that subsequently five more show cause notices were issued for demanding duty on account of PRE for the period from December, 1997 to 14-3-1999; that the Assistant Commissioner adjudicated three show cause notices under a common Order-in-Original Nos. 7-9/99/1A/AC, dated 29-14999 rejecting the request for provisional assessment and confirming the demand of duty on the ground that the amount shown as post removal expenses was not inclusive of

freight and actual delivery charges as claimed by the Respondents since the same were being charged separately over and above the post removal expenses; that the Commissioner (Appeals) rejected their appeal under Order-in-Appeal No.338/CE/BPL/2001, dated 4-5-2001; that the fourth show cause notice has also been adjudicated under Order-in-Original No. 100/2000/11A/AC, dated 28-1-2000; that remaining two show cause notices are pending adjudication. She, further, mentioned that meanwhile the Central Excise Officers checked the statutory and private records of the Respondents on 4-12-1998 and found that in the sales orders sent by their Head Office for the dispatch of the finished goods, different prices were being charged from the customers whereas in the Excise invoices, the duty was being paid on one assessable value and was much lower as compared to the prices charged from the customers and the Respondents have undervalued their products with an intent to evade duty; that the scrutiny of the invoices and sales orders for the period November, 1997 to 14-3-1999 also revealed that with a view to mislead the Department and with an intent to evade the payment of duty, the difference between the value arrived on the basis of the actual price charged from the customers and those declared to the Department had been termed as "PRE"; that PRE was not related to any of the expenses incurred by the Respondents after removal of the goods from the factory; that statements of their customers were also recorded which revealed that they had purchased finished goods from the Respondents as per the negotiated rates and all the expenses beginning from unloading charges at their godown up to final sale were borne by them (customer); that, therefore, a show cause notice, dated 26-5-2000 was issued to the Respondent for demanding duty amounting to Rs. 2,56,00,182/- short-paid during the period from 8th November, 1997 to 14-3-1999 besides imposing penalty and interest; that the Commissioner, Central Excise under the Order-in- Original, dated 30-1-2001 confirmed the demand of duty and imposed penalty holding that they wrongly claimed deductions on account of PRE; that the Tribunal, vide Final Order Nos. 295-98/2001-A, dated 8-8-2001 [2001 (133) E.L.T. 323 (Tri.)] remanded the matter to the Commissioner with the direction to examine whether the matters stood adjudicated by the Assistant/Deputy Commissioner and, if so, the same could not be adjudicated again as principle of res judicata would apply. She mentioned that the

Commissioner, under the impugned Order, has held that in both cases, before the Assistant/Deputy Commissioner and the Commissioner the quantum of post removal expenses remained the same; difference in duty amount was due to the fact that in the earlier cases PRE was considered on cum-duty basis which was not so in the earlier case and as such there was no difference as far as the period and amount of PRE was concerned; that the Commissioner has observed that the basic ground of adjudication orders in the two proceedings were similar and the principle of res judicata would apply in respect of the adjudication order by the Commissioner; that the Commissioner has accordingly dropped the demand and has directed the Assistant Commissioner to adjudicate the remaining two show cause notices.

3. The learned SDR submitted that the Commissioner has erred in holding that the proceedings before him are hit by bar of res judicata; that the ground for recovery of duty are entirely different inasmuch as the request of the respondent for allowing provisional assessment and deduction on account of PRE which were disallowed as they were unable to substantiate the nature of those charges; that in the impugned proceedings the case has been booked by the Preventive as they unearthed that the Respondents were receiving extra considerations from their buyers which was being disguised as PRE; that the scope of the enquiry has widened as new facts have come to light; that the subsequent facts definitely warrants that the Commissioner should give his findings on these facts and adjudicate the demands which are still pending with the lower adjudicating authority, impose penalty and demand interest for the entire amount. She relied upon the decision in the case of Peico Electronics and Electricals Ltd. v. C.C.E., Pune, 1994 (71) E.L.T. 1053 (T) wherein the Tribunal has held that res judicata is not applicable when new facts come to light; that this decision has been upheld by the Supreme Court as reported in 2000 (116) E.L.T. A72 (S.C.).

4. Countering the argument Shri Bipin Garg, learned Advocate, submitted that the same matter admittedly has been adjudicated by the Deputy Commissioner and the matter is now pending in appeal before the Hon'ble Tribunal; that the show cause notice cannot be issued second time for demanding the duty for the same period and in respect of the same matter; that in Peico Electronics cases the

Tribunal has only held that issues already concluded can be re-opened in subsequent proceedings for another period of time if emerging fresh materials give a new dimension to the matter.

5. We have considered the submissions of both the sides. It has not been controverted by the Revenue that the facts in both the proceedings - before the Assistant/Deputy Commissioner and the Commissioner - relates to the demand of duty on the post removal expenses. It has also not been denied by the Revenue that the period involved also in both the proceedings is same. The Revenue's contention is that the grounds for recovery of duty are, however, entirely different. The question is whether the show cause notice can be issued on the same issue and for the same period twice on different grounds. The answer is in negative.

Firstly, if the Revenue's contention is accepted, there will be no end inasmuch if Revenue unearths some more material after their search and scrutiny on 4-12-1998 (say in the year 2000) which provides different ground, a third show cause notice can also be issued. Secondly, it is a fact that the Respondents claimed deductions on account of post removal expenses in their price list and also requested for provisional assessment. The Department issued show cause notice for denying both the requests - Provisional Assessment and deductions on account of PRE. It is presumed that Department must have issued the show cause notice only after conducting some enquiry/investigation. The matter does not end here. The department goes on issuing five more show cause notices covering a period of more than 16 months to the Respondents. The show cause notice has been issued to the Respondents even after conducting the search and investigation as the period covered by the show cause notices is up to 14-3-1999 and last two show cause notices were issued on 6-7-1999 and 2-9-1999 whereas the officers had checked the records of the Respondents on 4-12-1998 and recorded statement in December, 1998, February to April, 1999. We also observe that the first adjudication Order was passed by the Assistant Commissioner on 29-1-1999 when the Revenue has already started the investigation again against the Respondents and second adjudication order was issued much afterwards i.e. 28-1-2000. In both the proceedings, what is being denied is the deduction on account of post removal expenses on the ground that these were charged separately

over and above the post removal expenses (in the first proceedings) and in the second proceeding on the ground that PRE were nothing but the differential amount charged from the customers on account of difference in the varieties. As the matter stand adjudicated (in respect of 4 show cause notices) two more show cause notices are pending adjudication, no new show cause notice for demanding duty can be issued by the Revenue. We, therefore, reject the appeal filed by the Revenue.

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