

Commissioner of Central Excise Vs. Goa Bottling Co. Pvt. Ltd.,

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Court : Mumbai

Decided On : Jun-09-2008

Judge : S.A. Bobde and ;R.C. Chavan, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 35(H) and 173E; Central Excise Rules, 1944 - Rule 173E and 173E(20)

Appeal No. : Misc. Civil Application No. 37/2002

Appellant : Commissioner of Central Excise

Respondent : Goa Bottling Co. Pvt. Ltd., ;shri M.R. Prabhu Gaonkar and Shri N.P. Prabhu Gaonkar

Advocate for Def. : M.S. Usgaonkar, Sr. Adv. and ;Sudesh Usgaonkar, Adv.

Advocate for Pet/Ap. : J. Vaz, Central Government Standing Counsel

Disposition : Appeal dismissed

Judgement :

1. The appellant Commissioner of Central Excise, Goa applied to this Court Under Section 35(H) of the [Central Excise Act, 1944](#) to direct the Appellate Tribunal to refer to the High Court the following question of law arising from the order of the Tribunal:

Whether Tribunal is empowered to over ride the power of Commissioner, conferred by legislation under Rule 173E of Central Excise Rules, 1944 to fix up the production norms that too based on the formula disclosed by the assessee during inquiry under Sub-rule (20) of the Rule 173E, 1944.

2. The controversy in the case does not really give rise to the question which the Commissioner applied for framing Under Section 35(H) of Central Excise Act. The facts are : That in pursuance of a raid, the Commissioner of Central Excise confirmed the demand of Rs. 4,21,448.43/- and penalty of Rs. 1 Lac and another penalty of Rs. 10,000/- in respect of the unit of the respondent M/s. Goa Bottling Company. The Commissioner came to the conclusion that the figures of sales in the R.G. 1 Register which was submitted by the assessee to the Excise Department, was lower than the figures mentioned in the Sales Manager's report i.e. S.M.R. submitted by the Company to its franchiser. After considering the view, in such discrepancy, the Commissioner came to the aforesaid conclusion.

3. In appeal by the respondent M/s. Goa Bottling Company, the CEGAT reversed the order of the Commissioner. The CEGAT took the view that essentially the commissioner had confirmed the demands on the basis of theoretical ratio of production between raw material and finished product and that in earlier case such as Parle Beverages Ltd. and Ors. v. CCE 1994(114) ELT 872, it is held that it is not possible to sustain the demand of duty issued to manufacturers of the beverages, arrived at only by applying the theoretical ratio. The CEGAT further observed that applying such a theoretical formula would mean applying Rule 173E which reads as follows :

RULE 173E. - Determination of normal production - (1) Any officer duly empowered by the [Commissioner] in this behalf may fix the quantum and period of time when the production in the assessee's factory was considered normal by such officer having regard to the installed capacity of the factory, raw material utilisation, labour employed, power consumed and such other relevant factors as he may deem appropriate. The normal quantum of production during a given time so determined by such officer shall form the norm. The assessee shall, if so required by the said officer, be called upon to explain any shortfall in production

during any time, as compared to the norm. If the shortfall is not accounted for to the satisfaction of the said officer, he may assess the duty due thereon to the best of his judgment, after giving the assessee a reasonable opportunity of being heard.

(2) The officer empowered as aforesaid may revise the norm as determined by him at any time, if after such further inquiry as he may consider necessary, he has reason to believe that any factor affecting the production of the factory, has undergone a material change :

[Provided that the norm as determined by the officer empowered as aforesaid shall not be revised to the disadvantage of the assessee unless such assessee has been given a reasonable opportunity of being heard.]

4. Reverting to the facts of the present case, the Tribunal came to the conclusion that in fact there were instances where the R.G.1 Register showed a higher quantity than the quantity shown in the S.M.R. vide para. 4 of the order and going by that line of reasoning it would, therefore, mean that the manufacturer has deliberately maintained a record which makes it liable to a higher duty. The CEGAT also referred to specific instances arising out of present case. Thus, the order of the Commissioner has been set aside by the CEGAT.

5. Thereupon, as stated earlier, the Commissioner applied to this Court for directing the Tribunal to refer the aforesaid question. Now it must be noticed at once that reference to Section 173E of the [Central Excise Act, 1944](#) was made by the CEGAT only for the purpose of pointing out that applying any notional figure of production would mean applying Rule 173E. In fact, there does not appear to be any evidence of the Commissioner having applied Rule 173E in the present case. The observation of the CEGAT was only made to point out the error in the argument on behalf of the Commissioner. The Construction of Rule 173E does not, therefore, strictly fall for consideration and is not determinative of real controversy in the case. It is obvious that the power to fix the norms of the production under Rule 173E is conferred on the Commissioner only and the CEGAT has not in any way interfered with such a power. In fact it does not even appear that the Commissioner has exercised such a power in the present case or

in relation to the factory of the respondent.

6. In this view of the matter, we find no merit whatsoever in the appeal. We answer the reference in the negative and dismiss the appeal. No order as to costs.

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