

Commissioner of Central Excise Vs. Star Enterprises

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-14-2004

Reported in : (2005)(179)ELT310TriDel

Judge : A T V.K., P Bajaj

Appellant : Commissioner of Central Excise

Respondent : Star Enterprises

Judgement :

1. The Revenue has filed this appeal against Order-in-Appeal No.96/2004 dated 27-2-2004 by which the Commissioner (Appeals) has set aside the penalty against M/s. Star Enterprises.

2. When the matter was called no one was present on behalf of the Respondents in spite of notice being sent to them. However, they have submitted Cross Objection. Therefore, we heard Shri H.C. Verma, learned D.R. and considered the Cross Objection submitted by the Respondents.

The learned D.R. mentioned that M/s. Star Enterprises manufacture Hot Rolled products which are chargeable to Central Excise duty on the basis of Annual Capacity of Production under Section 3A of the Central Excise Act; that on the basis of declaration dated 22-8-97 filed by them the Commissioner under letter dated 29-8-97 determined the Annual Capacity of Production on provisional basis; that subsequently the Respondents under their letter dated 1-9-97 informed about

the change in 'd' value and submitted revised declaration for fixation of Annual Capacity of Production; that the Commissioner determined their capacity as 1053.020 M.T. w.e.f. 1-9-98 on provisional basis; that the Respondents also opted to avail the payment of duty under Sub-rule (3) of Rule 97ZP of the Central Excise Rules, 1944; that as per the said Sub-rule the manufacturer was required to pay the duty by the 10th of each month; that they had paid the duty short by Rs. 1,44,956/- for the period April, 98 to March, 99; that accordingly the Dy. Commissioner under Order-in-Original No. 253/2000 dated 30-10-2000 confirmed the demand of duty and imposed penalty of equivalent amount on the Appellants; that on appeal, filed by the Respondents, the Commissioner (Appeals) under the impugned Order has given a finding that the Respondents had paid another Rs. 49,362/- which was not considered by the Adjudicating Authority; that he, therefore, directed the Respondents to pay the remaining amount of Rs. 95,594/-; that the Commissioner (Appeals), however, set aside the penalty on the ground that the Annual Capacity of Production was only fixed provisionally by the competent authority and as such penalty is not justified. The learned D.R. submitted that as per the provisions of Rule 96ZP(3) penalty is imposable, if an assessee does not make payment of the appropriate amount of duty within the stipulated period; that it has been held by the Allahabad High Court in the case of Pee Aar Steels (P) Ltd. v. CCE, Meerut, 2004 (170) E.L.T. 406 (Allahabad) that the penalty equivalent to the amount of duty short paid by them is imposable on the Respondents.

3. The Respondents have submitted in their Cross Objection that nonpayment of duty under provisional order and its recovery is not related to final duty liability determined; that the recovery/demand proceeding is action subsequent to the final fixation of duty liability; that therefore, the Commissioner (Appeals) has correctly and legally held that penalty is not imposable.

4. We have considered the submissions of both the sides. It is not in dispute that the Respondents were liable to pay Central Excise duty on the basis of Annual Capacity of Production determined by the competent authority. The competent authority has determined the Annual Capacity of Production on the basis of parameters of their mills submitted by them. The Commissioner has provisionally

fixed their capacity production and accordingly they are liable to pay duty. The issuance of provisional order determining the capacity and fixing the duty liability does not mean that the assessment was provisional as provided under Rule 913 of the Central Excise Rules, 1944. It is also not on record that the provisional order determining their duty liability was challenged by the Respondents. Accordingly they were liable to discharge the duty liability as per the said order. Fourth proviso to Sub-rule (3) of Rule 96ZP of the Central Excise Rules, 1944 clearly provides that where a manufacturer fails to pay whole of the amount of duty payable for any month by the 10th day of such month he shall be liable to pay a penalty equal to the amount of duty outstanding from him at the end of such month or Rs. 5000/- whichever is greater. As the Respondents had not discharged the duty liability completely the penalty is imposable. However, it is not required that the penalty equivalent to the amount of duty should be imposed as the rule prescribes the maximum amount of penalty and not the only penalty which is to be imposed. Such a view was held by the Supreme Court in the case of State of M.P. v. Bharat Heavy Electricals, 1998 (99) E.L.T. 33 (S.C.). A penalty of Rs. 20,000/- will meet the ends of justice. We, therefore, impose a penalty of Rs. 20,000/- on the Respondents. The Appeal of the Revenue is allowed in the above terms and Cross Objection is also disposed of accordingly.

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