Sanjay Insecticides Pvt. Ltd. Vs. Cce

Sanjay Insecticides Pvt. Ltd. Vs. Cce

SooperKanoon Citation : sooperkanoon.com/37019

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-04-2004

Judge : A M Moheb

Appellant : Sanjay Insecticides Pvt. Ltd.

Respondent : Cce

Judgement :

1. The appellants are manufacturers of Pesticides falling under Chapter 3808.10 of the Central Excise Tariff Act, 1985. The visit by the Central Excise officers to their unit on 21.8.2000 revealed that the appellants have removed a total of 58 consignments on the strength of delivery challan without the support of Central Excise invoices. The appellants also did not make entries in the RG 1 Register in respect of these consignments. The total duty evaded is Rs. 4,06,13/- (as in the original order: the figure should be Rs. 4,06,135/- editor) The explanation given is that the excise clerk who has been working with the appellants has suddenly resigned and therefore the Central Excise invoices were not made. In so far as non-maintenance of the R.G.1 register the appellants plead that even though the statutory register was not maintained they kept the record of production. It is also pleaded that they would have discharged the duty involved at the end of the fortnight. It is further pleaded that in any case they have paid the duty involved i.e. Rs. 4,06,135/- on 28.8.2000 even before the issue of show cause notice. They had sufficient balance in their RG 23 Part-II to cover this amount and so there was no intention to clear without payment of duty. The Ld. Consultant appearing for the

appellants argued that no penalty under Section 11AC can be imposed on an assessee who has discharged the duty even before the issue of show cause notice. He relied on the Larger Bench decision in the case of Commissioner of Central Excise, Delhi-III, Gurgaon Vs. Machino Montell (I) Ltd. [2004 (168) E.L.T. 466 (Tri.-LB)]. In regard to penalty imposed General Manager and the Director he argued that while the General Manager was in charge of the factory the director is not concerned with the day to day activities of the unit. No penalty should have been imposed on either of them under Rule 209A of Central Excise Rules.

2. The Ld. DR Shri R.K. Chandan vehemently contested the plea that penalty is not imposable when duty is paid before issue of show cause notice. He submitted that the decision in the case of Machino Montell (I) Ltd. does not cover the case where the assessee removes the goods without payment of duty in deliberate contravention of the Act and rules. In any case the Larger Bench has relied on Rashtriya Ispat Nigam Ltd. Vs. Commissioner of Central Excise [2003 (161) E.L.T. 285 (Tri.

Bang.)] where the issue was non payment on the captively consumed goods. This case stands on a different footing. He also relied on the decision of the Tribunal in the case of Nitco Tiles Ltd. Vs.

Commissioner of Central Excise, Mumbai-II [2004 (165) ELT 50 (Tri.

Mumbai)] where the Tribunal held that when a composite penalty such as penalty under Section 11AC and Rule 173Q is imposed, the matter can be remanded to the original authority for determining the quantum of penalty under Rule 173 Q of Central Excise Rules. He further relied on the decision of the Tribunal in the case of Philips India Ltd. Vs. CCE, Mumbai [2003 (156) ELT 432 (Tri. Mumbai)] wherein the Tribunal held that when Section 11AC and Rule 173Q were in force penalty could have been imposed under either provisions and hence the question of apportionment of penalty does not arise. In view of these decisions he argued that penalty can be imposed in case of clandestine removal even if duty is paid before issue of show cause notice.

3. I have considered the rival contentions. From the facts of the case it is clear that the appellants did remove excisable goods without payment of duty. The plea that the excise clerk was absent and therefore no excise invoice was made can hardly be a defence. The extenuating circumstance in this case is that appellants paid the duty involved even before the issue of show cause notice. The Ld.

Consultant's plea is that in view of the decision contained in Machino Montell (I) Ltd. a Penalty under Section 11AC is not imposable. He also argued that penalty under Rule 173Q also is not imposable in view of the decision contained in Rashtriya Ispat Nigam Ltd. Even though the Ld. DR attempted to distinguish the decision in the Machino Montell (I) Ltd. by contending that if does not cover situations where the goods were removed clandestinely I observe that he Tribunal in the above cited case does not make any distinction between one type of evasion and the other. Simply stated the decision covers all cases where duty is paid before the issue of show cause notice. Following the ratio of these decisions I hold that penalty under Section 11AC read with Rule 173Q is not imposable. I therefore set aside the penalty under Section 11AC read with Rule 173Q. The demand for duty is not contested.

Penalties under Rule 209A on the General Manager and the Director are also set aside in view of the above discussions. The appeals are thus allowed.