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**Cce Vs. Standard Niwar Mills**

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**SooperKanoon Citation** : sooperkanoon.com/37355

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

**Decided On :** Dec-13-2004

**Reported in** : (2005)(181)ELT280TriDel

**Judge** : A T V.K., P Bajaj

**Appellant** : Cce

**Respondent** : Standard Niwar Mills

**Judgement** :

1. This appeal has been filed by the Revenue against the impugned order of the Commissioner (Appeals) who has reversed the order in original and set aside the duty and penalty against the respondents as confirmed by the adjudicating authority. The learned SDR has contended that duty and penalty has been wrongly set aside against the respondents by the Commissioner (Appeals), in the face of ample evidence to show that respondents had collected duty from the buyers but not paid to the Government. He has further argued that there is no time limit for involving Section 11-D of the Act for affecting recovery of Govt dues.

2. On the other hand, the learned Counsel has reiterated the correctness of the impugned order by contending the Section 11-D has got no application to the case of the respondents as per the allegations made in the show cause notice and even otherwise also after a period of more than 5 years, no duty demand could not be raised by the Revenue.

4. The bare perusal of the show cause notice shows that the respondents bad been charged with the allegations of having indulged in the clandestine manufacturer and removal of excisable goods i.e. made up textile items and processed cotton fabric, in the manufacture of which they are engaged, during the period April 1996 to June, 1996. They did not discharge the duty liability in respect of these goods and cleared the same in a clandestine manner whereas they collected the duty from the buyers. They violated the provisions of Rules 9, 173-B for having cleared the goods in a clandestine manner without payment of duty and without putting printed numbers on the invoices. The show cause notice was served on them on 3.2.04.

5. From the bare perusal of allegations made in the show cause notice, it is evident that it is a case where the respondents had indulged in clandestine removal of goods during the period April to June 1996. The duty payable by them on the goods was at the rate of 10% but it was not paid by them. In such a situation, only the demand for duty, for having cleared the goods in clandestine manner without payment of duty, could be raised from the respondents. The fact that they had allegedly realised the duty from their buyers in respect of the goods removed by them in a clandestine manner without payment of duty, did not permit the Revenue to invoke the provisions of Section 11-D of the Act. In other words, the duty which the department did not demand and recover under Section 11-A within even the extended period of limitation, from the respondents could not be realised by applying Section 11-D of the Act. The provisions of section 11-D can be invoked against an assessee where there had been assessment or determination of duty in accordance with the provisions of Central Excise Act and Rules and as a sequel to such assessment/determination, it was found that amount in excess of duty, so assessed or determined, had been collected by him from the buyers, as is clear, from the bare reading of this section which was amended retrospectively from 22.9.91. In the instant case, there had been neither assessment nor determination of duty, of the goods cleared in a clandestine manner by the respondents in accordance, with the Act or the Rules, The argument of the learned SDR that the assessment should be deemed to have taken place under the self-assessment procedure, specially when the respondents issue the invoices to the buyers, cannot be accepted. Mere issuance of the

invoices by the respondents to the buyers while clearing the goods did not result in the assessment of the duty specially when the respondents had not paid any duty whatsoever while issuing the invoices. It is a case of total non-payment of duty by the respondents by clearing the goods in a clandestine manner and this is what had been even alleged in the show cause notice also. By no stretch of imagination, it can be said that by clandestine removal of goods without payment of duty, the respondents had collected more duty than what they paid to the department, in terms of Section 11-D of the Act. Here, they had not paid any penny towards duty to the department while clearing the goods and as such, the question of their receiving more than what they had paid to the department by way of duty did not arise. Therefore, Section 11-D has got no application to the case of the respondents.

6. In fact, we find that recovery of duty under Section 11-A read with even proviso, had become time barred as the department failed to issue the show cause notice even within the extended period of five years. In order to cover up that lapse, the resort has been taken to the provisions of Section 11D by the Department , which in our view, is not permissible under the law. Even if it is taken that no time is fixed for invoking the provisions of section 11-D, still it is of no avail to the department as the section itself has not application to the case of the respondents, as observed above.

7. In the light of the discussions made above, we do not find any illegality in the impugned order and the same is upheld. The appeal of the Revenue is dismissed.

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