

Commissioner of Central Excise Vs. Ebers Pharmaceuticals

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-05-2005

Reported in : (2005)(187)ELT61Tri(Mum.)bai

Judge : J Balasundaram, Vice, A M Moheb

Appellant : Commissioner of Central Excise

Respondent : Ebers Pharmaceuticals

Judgement :

1. The Revenue's is aggrieved by the order of the Commissioner of Central Excise (Appeals) who has accepted the respondent's contention that the absence of show cause notice is fatal to the demand of differential duty.
2. None appears for the respondents in spite of notice; hence we heard the Department Representative and perused the records. This is a case of provisional assessment. The Commissioner (Appeals) has relied upon the Apex Court decision in Collector v. Kosan Metal Products (1988 38 ELT 573 (SC) holding that when excise duty has not been levied or paid or had been short levied or short paid or erroneously refunded, a demand for recovery of such amount must be made under Sec. 11A of the Central Excise Rules and not by short entry on the monthly RT. 12 return under Rule 173-I of the Central Excise Rules. However the Kosan Metal Products judgement is not in the context of provisions assessment. In the context of provisional assessment the decision of the Apex Court reported in 1997 (91) ELT 497 (SC) in Serai Kella Glass Works Pvt. Ltd. v. CCE, Patna is

correctly. The Supreme Court has held that in the case of demand as a consequence of finalisation of assessment, no show cause notice under Section 11A is required to be issued and as per Rule 173-F read with Rule 173-I of the Central Excise Rules, the assessee has to pay the deficiency in duty assessed by proper Rules, the assessee has to pay the deficiency in duty assessed by proper officer. The Supreme Court has further held that if any short levy, non levy or erroneous refund is detected after final assessment, only then proceedings under Sec. 11A can be taken after issuing a show cause notice. Following the judgement in the case of Seria Kella Glass Works Pvt. Ltd., we hold that the Revenue is correct in their contention, set aside the impugned order and allow the appeal.

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