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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-29-2005

Reported in : (2006)(194)ELT245TriDel

Judge : R Abichandani

Appellant : Navkar Wires Pvt. Ltd.

Respondent : Commr. of C. Ex. and Cus.

Judgement :

1. Both these appeals are directed against the order of the Commissioner (Appeals II), Indore by the rival parties to the extent that the order goes against them.
2. In Appeal No. E/1213/04, the order of the Commissioner (Appeals) is challenged to the extent that it confirms the order-in-original of the Joint Commissioner demanding Central Excise duty for 28 invoices out of 107 invoices. The said appellant also challenges the imposition of penalty equal to the duty calculated in respect of 28 invoices which is confirmed by the Commissioner (Appeals). Recovery of interest is also challenged by the said appellant.
3. In the Appeal No. 3056/04, the Revenue challenges the order of the Commissioner (Appeals) to the extent that it set aside the demand in respect of 89 invoices out of 107 invoices on the ground that no packing slips were found corresponding to those invoices as were found in respect of 28 other invoices

showing excess removal of goods.

Revenue has also challenged the order of the Commissioner (Appeals) to the extent he has set aside the order of the adjudicating authority confiscating the goods (bare copper wire and bare aluminium wire) seized in the factory premises under Rule 173Q(1) and also reduction in mandatory penalty imposed by the adjudicating authority.

4. The facts briefly stated are that when the Preventive officer visited the factory premises of two consignees of the appellant and conducted physical verification, they found excess stock of raw material and unaccounted stock of finished goods. The commercial assistant of the unit admitted excess quantity of raw materials over the purchase bills/invoices. They, therefore, visited the premises of the appellant who had supplied the goods to the factory premises of the appellant-assessee. They found, on physical verification, excess stock of bare copper wire (586.400 Kgs) and bare aluminium wire (1403 Kgs.) This excess quantity was seized under a panchnama. On further scrutiny of the record, it was found that the appellant clandestinely manufactured and removed the goods in question, to the customers, during December, 1996 to December, 1997 by showing only a half of the quantity in the invoices vis-a-vis packing slips, which for the later period of January, 1998 to January, 1999 was only 1/4th of the quantity shown in the invoices vis-a-vis the packing slips. According to the Revenue, the appellant removed 19116.01 Kgs of the goods in question and short paid the excise duty amounting to Rs. 3,50,483/- in contravention of the provisions of Rule 9(1) of the Central Excise Rules. The Joint Commissioner, on the basis of the material on record came to a finding that the goods which were seized in the premises of the appellant were manufactured by them and were lying unaccounted in excess of the balance recorded in the RG 1 register and held that since the appellant had indulged in removal of other goods manufactured by them in a clandestine manner, these unaccounted goods were kept with a view to remove them in future also in a clandestine manner. He, therefore, confiscated these goods with an option to the appellant to redeem them on payment of fine of Rs. 50,000/-. The adjudicating authority confiscated also the goods which were seized in the factory premises of original noticee Nos. 2 and 3. That part of the order was confirmed by

the Commissioner (Appeals) and since there is no appeal filed against the Revenue by noticee Nos. 2 and 3, no question arises in the present appeal in connection therewith.

5. The adjudicating authority on the basis of 28 packing slips, which corresponded to invoices issued by the appellant as listed in Annexure A to the show cause notice, has held that the excess quantity of goods was clandestinely removed by the appellant without paying the excess duty thereon. Even as regards remaining 89 consignments, relying upon the statement of an employee of the appellant and the commercial assistant of the original noticee Nos. 2 and 3, who were consignees of the appellant, that the goods in excess of those indicated in the invoices were removed, came to a finding that there was clandestine removal on pro rata basis in respect of those 89 invoices. Thus, for all the 117 invoices the demand of duty was confirmed, out of which the Appellant Commissioner has set aside the demand in respect of 89 invoices and confirmed for 28 invoices for which corresponding 28 packing slips were recovered from the consignees along with the invoices. Mandatory penalty of Rs. 3,50,483/- was imposed on the appellant under Section 11AC read with Rule 173Q with an option to pay the penalty of 25% of the amount as per proviso to Section 11AC by the Adjudicating Authority which came to be reduced to Rs. 70,788/- by the Commissioner (Appeals). Interest was also ordered to be recovered from the appellant on the amount confirmed to be recovered in terms of Section 11AB.6. The learned Counsel appearing for the appellant-assessee contended that there was no co-relation, even in respect of 28 invoices with a packing slip, because there was no mention in the packing slips about the invoices and vice versa. It is also submitted that no demand could be made on a pro rata basis in respect of remaining 89 invoices on the basis of excess calculated for the said 28 invoices. He submitted that order of confiscation of the goods has been rightly set aside by the Commissioner (Appeals) when goods were merely lying in the factory and there was no evidence to prove any intention to clandestinely remove them. There could not have been any confiscation of such goods solely on the ground that no entry was made in the register. He also submitted that the appellant-Commissioner should have reduced the penalty further under Section 11 AC by exercising its discretion as it was not compulsory to impose a maximum permissible penalty.

6.1 Learned Counsel for the appellant-assessee placed reliance on the following decisions in support of his contentions :Oudh Sugar Mills Ltd. v. Union of India 1978 (2) E.L.T. (J172) was cited for the proposition that where the finding of the goods 'not being accounted for' was arrived at without any tangible evidence and was based on inferences involving unwarranted assumptions, the finding was vitiated by an error of law.State of Madhya Pradesh v. Bharat Heavy Electricals that the Supreme Court in the context of the provisions of Section 7(5) of the Madhya Pradesh Sthania Kshetra Me Mal Ke Pravesh Par Kar Adhinyam of 1976, relating to entry tax which corresponded to Section 11AC of the Central Excise Act held that penalty stipulated under Section 7(5) was only the maximum amount which could be levied and the assessing authority has the discretion to levy a lesser amount.Bhillai Conductors Ltd. v. CCE, Raipur 2000 (125) E.L.T. 781 (Tri.) was cited for proposition that simple failure to make entry in the register do not attract penal action under Rule 173Q(1) and where there was a composite case of contravention of Rule 53 and 173G, no confiscation could be done under Clause (d) of 173Q(1) of the Rules in absence of any finding a mens rea against the department.

7. The learned Authorised Representative for the department submitted that there was ample evidence on the basis of which it could have been inferred that even 89 invoices, for which there were no corresponding packing slips recovered, did not reflect the full quantity of goods which was removed and that the statement of Shri Parihar who was an employee of the appellant indicated that invoices reflected only 1/4th of the quantity that was actually removed. It was submitted that from the fact that 28 packing slips showing excess/removal of excisable goods without payment of duty proved the tendency of the appellant was of showing much lesser quantity in the invoices and would constitute a valid basis for an inference that even the 89 other invoices showing excess goods were sent to the consignees, who were originally noticee Nos. 2 and 3 and whose assistant had admitted that they received excess goods from the appellant. The learned Authorised Representative for the department supported the reasoning adopted by the adjudicating authority and submitted that there was no warrant for disturbing the order-in-original which was based on material on record and passed for cogent reasons.

7.1. The learned Authorised Representative for the department placed reliance on the following decisions in support of his contentions : (1) The decision of this Tribunal in Blue Blends (India) Ltd. v. CCE, Ahmedabad was cited to point out that in a case where the goods, in fully finished condition, were unaccounted for under the statutory rules, the Tribunal held in Para 5 of the order that they were liable to be confiscated. The Tribunal held that liability in terms of Clauses (a),(b) and (c) of Sub-rule (1) of Rule 173Q did not depend upon mens rea by relying on the judgment of Bombay High Court in Kirloskar Brothers Ltd. v. Union of India .Media Video Ltd. v. CCE, New Delhi where 7281 video cassettes were found unaccounted lying in the factory premises and no sufficient or cogent reason was afforded by the appellant for not entering these goods in the statutory records, it was held that the ratio laid down in Bhillai Conductors (supra) was of no help to those appellants. The Tribunal found that their intention for not entering in statutory records could safely be gathered from the act and conduct that they intended to remove the goods in a clandestine manner without payment of duty and that this conclusion was corroborated from the fact that they did not dispute clandestine removal of 40,000 video cassettes involving the duty of Rs. 23,31,428/-. It was also held that the provisions of Rule 173Q could have otherwise be invoked in view of the law laid down by the Bombay High Court in Kirloskar Brothers Ltd. which had to take precedence over the Tribunals' judgment.

(3) The decision of Bombay High Court in Kirloskar Brothers Ltd. v. Union of India was cited for proposition that liability in terms of Clauses (a),(b) and (c) of Sub-rule (1) of Rule 173Q did not depend upon mensrea.

8. It appears from the record that as regards 28 invoices, there was cogent evidence to establish excess removal of goods as worked out in Annexures A and B to the show cause notice. Those 28 invoices and the corresponding packing slips were recovered from the consignee, that is original noticee Nos. 2 and 3. It transpires from the statement of Venkat Krishna Iyer, commercial assistant of the noticee Nos. 2 and 3, recorded under Section 114 of the said Act, that, excess raw material was supplied as mentioned in the packing slips enclosed with these bills. In this view of the matter, there was sufficient corroboration to the fact reflected from the said 28 invoices and corresponding 28 packing slips about the excess

quantity of material of excisable goods supplied to the original noticee Nos. 2 and 3 by the appellant, as worked out in Annexure A and B to the show cause notice. As regards the remaining 89 invoices, on going through the statement of Shri Mohan Singh Parihar, production in-charge of noticee No. 1, as referred to in the show cause notice and the orders made by the authorities below, it becomes clear that he did not make any specific admission in respect of the said 89 invoices. Even the assistant of the original noticee Nos. 2 and 3 did not make any admission of receipt of excess goods from the appellant in the context of 89 invoices. The statement of Shri Mohan Singh Parihar was general in nature showing that excess goods were removed and the invoices reflected only 1/4th of the quantity removed.

On the basis of such general statement, it is difficult to infer that even in respect of 89 invoices for which no corresponding packing slips were found, there was excess removal of goods on any pro rata basis keeping in view excess reflected from the 28 packing slips and their corresponding invoices. No such conjecture would be permissible in absence of any evidence to show removal of the goods in the context of 89 invoices for which the Commissioner (Appeals) has set aside the Adjudication order.

9. As regards the impugned orders setting aside the confiscation of finished goods, which were not noted in the RG 1 register, it becomes clear from the record that the show cause notice had alleged breach of Rules 53 and 173G. In *Bhillai Conductors* (supra), it has been held that where contravention of Rules 53 and 173G was alleged, the case would be covered by Clause (d) of Rules 173Q(1) and in such a case, an order of confiscation not supported by any finding of mens rea against the party cannot be sustained inasmuch as mens rea is sine qua non for invoking Clause (d). There is no conflict in the ratio of this decision and ratio of the decision of the Bombay High Court in *Kirloskar Brothers Ltd.* (supra) in which it is laid down in context of said Clauses (a),(b) and (c) of Rule 173Q(1) that they did not depend upon mens rea.

In *Media Video Ltd.* (supra), the Bench of this Tribunal has distinguished the *Bhillai Conductors* case on the ground that on the facts of the case, the observation that provisions of Rule 173Q could otherwise be invoked in view of the law laid down in

Kirloskar Brothers Ltd., does not in any manner affect the ratio of decision in Bhillai Conductors as reflected in Paragraphs 44 and 45 of the judgment.

10. The facts of the present case are directly covered by the ratio of decision in Bhillai Conductors case since contravention of Rules 53 and 73G was also alleged in the present case, which would attract Clause (d) of Rule 173Q(1) of the said rules, requiring mens rea. Therefore, in absence of the requisite guilty mind contemplated by Clause (d), the goods could not have been confiscated. The learned Authorised Representative for the department contended that breach of Rule 173Q(1)(b) does not require mens rea. It is clear from the show cause notice that there was no reference to the provisions of Rule 173Q(1)(b), but the breach was specifically alleged in the context of Rules 53 and 173G. Under Rule 53, it is incumbent on the manufacturer to maintain a stock account and make entries in that account daily as provided therein including of the quantity manufactured. Rule 173G relates to the procedure to be followed by the assessee for keeping an account current, while Rule 173Q(1)(b) refers to the contingency where producer, registered person of a particular warehouse or a registered dealer does not account for any excisable goods manufactured, produced or stored by him. The decision in Bhillai Conductors Company, therefore, squarely applies to facts of the present case, in view of the allegations in the show cause notice about contravention of Rules 53 and 173G, further reference to Rule 226 in the show cause notice will not make any difference in this position.

11. In the present case, the evidence discloses from 28 invoices and the corresponding packing slips, that the appellant had fraudulently removed excisable goods by preparing false invoices showing lesser quantity. Therefore, there was absolutely no warrant for interfering with the penalty of Rs. 77,788/- which correspond to the demand of Rs. 77,788/- which has been upheld by the Commissioner (Appeals). Even on the aspect of interest, there is no valid reason to interfere with the impugned orders. For the foregoing reasons, both the appeals are dismissed.