Cce Vs. Kohli Industries

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-07-2005

Reported in : (2006)(196)ELT49Tri(Mum.)bai

Judge : A Wadhwa, S T S.S.

Appellant : Cce

Respondent : Kohli Industries

Judgement :
1. Revenue is in appeal, aggrieved by the order of the Commissioner of Central Excise (Appeals) upholding the confirmation of the amount of duty by lower authorities but setting aside the imposition of penalty of Rs.35000/- on the assessee.

2. The grounds, taken up by Revenue, are that the Apex Court in the case of Z.B. Nagarkar v. Union of India and Ors. (Civil Appeal No.4294/1999) held "It is difficult to accept the argument of the appellant that levy of penalty is discretionary. It is only the amount of penalty which is discretionary," and further Central Board of Excise & Customs has issued Circular no. 387/90/98-JC dated 9.5.2000 based on the above mentioned decision of the Supreme Court, which would be binding all Central Excise officers.

3. After hearing he Ld. D.R., the grounds taken and considering the matter, since no one appeared for the Respondent, we find : (a) Commissioner of Central

Excise (Appeals) is not bound by the orders issued by the Central Board of Excise & Customs, and can come to an independent conclusion based on law and the facts before him, since he is a quasi judicial officer.

(b) Commissioner of Central Excise (Appeals), as it appears from the order impugned, as regards penalty held that the appellant had removed the goods, after following the proper Central Excise procedure and on payment of duty and there was no mala fide to evade payment of duty. Hence penalty imposed under rule 173Q of the Central Excise Rules, 1944 was not maintainable. Since the penalty imposed under rule 173Q itself is not being upheld and the findings of the Commissioner are not in challenge in the grounds before us, we cannot apply the decision in the case of Z.B. Nagarkar v. Union of India (supra) as urged in the appeal. If Rule 173Q provisions could not be invoked, the question of exercise of discretion is not called for.