

C.C.E. and C. Vs. Ravasco Transmission and

C.C.E. and C. Vs. Ravasco Transmission and

SooperKanoon Citation : sooperkanoon.com/40787

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-14-2005

Judge : J Balasundaram, Vice-, A M Moheb

Appellant : C.C.E. and C.

Respondent : Ravasco Transmission and

Judgement :

1. The Commissioner of Central Excise Mumbai confirmed Rs. 22,06,515/- towards duty on Ravasco Transmission & Packaging Pvt. Ltd., imposed an equal amount of penalty, imposed a penalty of Rs. 50,000/- on its Director and imposed a penalty of Rs. 50,000/- on M/s. R.R. Traders under Rule 209A for aiding the abetting the company above named. Hence these appeals by the affected persons.

2. The Revenue is also aggrieved by the order of the Commissioner Revenue, therefore is also in appeal.

5. The Id. Advocate appearing for the respondent has a preliminary objection. He avers that the impugned order passed by Commissioner of Central Excise Mumbai, was examined by Central Board of Excise & Customs under the powers vested with it under Section 35E(1) of the Central Excise Act, 1944 in order to satisfy itself as to the legality and propriety of the said order. It was not satisfied that the impugned order was legal and proper. It thereupon directed the Commissioner to apply to CESTAT for the correct determination of certain points

arising out of the said order. The said Board forwarded its review order to the Commissioner of Central Excise & Customs Mumbai who passed the impugned order. However the appeal to the Tribunal was preferred by Commissioner of Central Excise Surat-II in whose jurisdiction the respondent fell.

The Id. Advocate submitted that Surat Commissioner is not the person who was authorized by the Board to file an appeal against the order passed Mumbai Commissioner. It was contended that under Section 35E(1) of the Central Excise Act, 1944 at the relevant time only the adjudicating authority can make an application to the appellate Tribunal who thereupon can treat the application as an appeal under Section 35B. In the present case the Board has authorized the Commissioner of Central Excise Mumbai who passed the impugned order to make an application to the Tribunal but such an application was made by Commissioner Surat-II who was not an adjudicating authority. He argued that the Tribunal can not entertain such an application and deal with it as an appeal. He pleaded that on this ground alone the appeal of the Revenue needs to be rejected at the threshold.⁶ In support of this contention, the Id. Advocate, relied on the decision of the Tribunal in *G.T.C. Industries Ltd. v. CCE, New Delhi*. The Tribunal held that direction to file appeal by Board has to be issued to the Commissioner who passed the order as adjudicating authority and not to the Commissioner who has jurisdiction over an assessee's factory. The Tribunal rejected the contention of the appellant in the case before them that the Board should direct the Commissioner who has jurisdiction over the factory in preference to the officer who adjudicated the case to file an appeal. The Id. Advocate argued that in the present case has the Board rightly directed the adjudicating officer (Commissioner Mumbai) to file an appeal; that he alone could have filed it; that the appeal filed by Commissioner Surat is without authorization and therefore deserves to be dismissed as not maintainable.

7. The Id. SDR Shri Ajay Saxena however argued that the Board was aware of the fact that the respondent was operating in the jurisdiction of Commissioner Surat and that was the reason why it communicated the Review order to the Chief Commissioner Vadodara under whose jurisdiction Commissioner Surat, fell as could be seen from the endorsement on the Reviewed order. He submitted that this communication should be taken as an authorization of the Board to

Commissioner Surat.

He submitted that Commissioner Surat has rightly filed an appeal; in terms of the authorization under Section 35E(4) of the Act. In the alternative he submitted that the Tribunal may direct the Commissioner Mumbai who adjudicated the case to file an appeal. He forcefully argued that the fact that a Commissioner other than the one who adjudicated the case, filed the appeal should not result in the dismissal of the appeal itself. He submitted that it is a rectifiable error. It is argued that throwing the baby with the bath waters is neither desirable nor is warranted in this case. After all, the Board has followed every provision of the Act while reviewing the order and it is at best a technical lapse which could be rectified if the Tribunal directs the proper authority to file an appeal.

8. We observe that the Id. SDR was bravely fighting a losing battle. It is now well settled, (GTC decision of the Tribunal Supra settled the issue) that the Board has to direct only the adjudicating authority to file an appeal as per Section 35E(1) of the Act as it stood in 1999. It is only in 2001 Section 35E(1) was amended whereby the Board could have directed any other Commissioner to file an appeal. The Id. SDR's plea that the error can be rectified even now is not tenable as at that point of time (1999) the Board is not empowered to authorize any Commissioner other than the one who adjudicated to file an appeal. The suggestion that as to who should file an appeal is only procedural is also unacceptable. What is laid down in Section 35E(1) at the relevant time is not procedural. It is substantive in nature. We are unable to agree with the Id. SDR that at this stage the defect can be rectified.

The Board has rightly directed Commissioner Mumbai who adjudicated the case to file an appeal. He did not do so for one reason or the other.

What seemed to have happened is that Commissioner Mumbai was conferred with powers to adjudicate a case falling within the jurisdiction of Commissioner Surat. The latter thought that he was the one to file an appeal irrespective of who adjudicated the case. The Tribunal in the case of GTC (supra) does not support this view.

9. We therefore reject the appeal of the Revenue as the one filed by someone without authorization. Simply stated Commissioner Surat does not qualify himself to be an aggrieved person. The appeal is accordingly dismissed.

11. The appellant company manufactures Transmission Belts/Flat Belt falling under Chapter 40 of CETA. It was alleged to be removing excisable goods to fictitious firms without payment of duty. Despite the fact that the appellant crossed the SSI limit he continued to avail of the benefit of SSI exemption. Statements were recorded, and document seized basically revealed that the manufacturer indeed removed goods without payment of duty, did not account for the finished goods and raw materials (on which credit was taken). The appellant company also seemed to have disposed off excisable goods through a family concern, R.R. Traders (sale proceeds amounting to Rs. 99,000/- were seized from the trader). On the basis of investigation conducted a show cause notice was issued alleging that the appellant company evaded Rs. 46,42,013/- towards duty. The various annexure (I to VI) to the show cause notice give the details of duty evaded.

12. Investigation revealed (there is no serious challenge to these revelations) that the appellant company was removing goods without payment of duty on the strength of internal gate passes (IGPs). Some of the IGPs could be connected with the Lorry Receipts (LRs) issued in respect of the consignments removed by the appellant under them. The LRs indicated the price of the goods and the addresses of the consignees. The Commissioner had taken the price indicated on the LRs as cum duty price and calculated the assessable value by giving suitable deductions. In some cases IGPs could not be connected to any LR. The Commissioner rejected the contention of the appellant that in such cases (only IGPs and no LRs) clandestine removal was not established. He proceeded to determine the value of consignments covered under such IGPs by adopting the formula based on the statements of the Director of the company and its Manager. He arrived at the assessable value of all goods mentioned in Annexure-I to the show cause notice to be Rs. 96,75,248/-.

13. The Id. Advocate assailed the method adopted by the Commissioner in arriving at the value. He submitted that while the price shown on the LRs formed

the basis for arriving at the assessable value in respect of some goods, a different method was adopted for arriving at the value of goods removed under certain IGPs where there were no corresponding LRs. He argued that the assessable value of the goods can't vary on the fact that a LR is available or not. He submitted that the double standard adopted by the Commissioner resulted in inflation of assessable value with attendant consequences. It was further submitted that the Commissioner did not discuss as to why he considers the price arrived at on the basis of the formula suggested by the Director and the Manager did not call for any deduction towards excise duty, dealers margin and other post manufacturing expenses. The Commissioner took the price supplied by DGAE (the investigating agency) as the assessable value without giving any reason as to why he considers so. The Id. SDR however argued that in the case of clandestine removals a reasonable method consistent with declared law has to be adopted as was done by the Commissioner. He strongly supported the method adopted by the Commissioner.

14. We have examined the rival contention. On the face of it, it appears that the Commissioner adopted two different methods for arriving at the assessable value of the same goods. There is considerable force in the appellants' pleadings in this regard. The Commissioner is required to give reasons as to why he considers the price arrived at on the basis of the formula is not a cum duty price.

The appellant also claims that the Director and the Manager of the Company were asked to give an inflated price in their statements. The Commissioner is required to deal with these contentions. He will have to give reasons as to how the assessable value arrived at on the basis of the formula compares well with the assessable value arrived at by him in the case of goods where LRs were available. Assessable value of all clandestinely removed goods should be arrived at by adopting an uniform approach. The issue of determination of correct assessable value of goods mentioned in Annexure I to the show cause notice therefore needs to be remanded to the Commissioner. We accordingly, do so. The appellant admits that all goods covered under the IGPs were removed without payment of duty. In such an event whether there is a LR for the goods so removed or otherwise value will have to be arrived at by adopting the price at which the goods

are sold as cum duty price.

The Commissioner is directed to do so.

15. The appellant does not contest the demands confirmed by the Commissioner in respect of amounts shown in Annexure III and IV to the show cause notice. In other words the Commissioner's finding that Rs. 7,760/- and Rs. 12,041/- is payable by the appellant company is not contested.

16. In regard to the amount indicated in Annexure V (Rs. 2,51,664/-) it was argued that this demand pertained to shortage of finished goods and inputs at the time of stock taking. The Id. Advocate argued that the shortage occurred because of unaccounted removals admitted by them.

Demand for duty on the shortages amounted to taxing the same goods all over again. It is also argued that the Commissioner did not deal with the averments made before him and in the reply to the Show Cause Notice. Para 103 of the Order-in-Original disposed off appellants contentions perfunctorily.

17. We perused the order. The Commissioner does not appear to be dealing with the averments made before him. His observations that there is no satisfactory explanation is abrupt. He is required to examine the contention in detail and give findings as to why the explanation is not satisfactory. We remand this issue of shortage of finished goods and inputs to the Commissioner to examine the contentions of the appellant afresh.

18. In regard to penalty imposed under Section 11AC it was argued that the appellant company deposited Rs. 40,50,000/- even before the issue of the show cause notice and therefore no penalty can be imposed under that Section. This averment will have to be examined. We observe that since duty in regard to goods mentioned in Annexure I and V has to be redetermined the issue whether penalty is imposable if so the quantum of penalty also needs to be determined by the Commissioner in the remand proceedings. The decision of the Larger Bench of the Tribunal in the case of Machino Montell Ltd. 2004 (62) RLT 709 (T) LB) be kept in mind while deciding whether penalty has to be imposed in this case under Section

11AC.The appeal of R.R. Kalra abates as he passed away. Death Certificate in proof thereof is tendered by the Id. Advocate. This appeal is dismissed as abated.

Commissioner imposed a penalty of Rs. 50,000/- under Rule 209A for aiding and abetting the offence committed by M/s. Ravsko. Since that appellant's case is being remanded the appellants' liability to penalty under Rule 209A may also be examined in renamed proceedings. The Commissioner may determine the quantum of penalty on R.R. Traders keeping our observation on the liability to penalty on the main offender and the total duty evaded by him.

(2) Ravsko Transmission Packaging Pvt. Ltd. appeal is partly allowed. Admitted duty liability confirmed. Matter remanded for fresh consideration in regard to assessable value of goods mentioned in Annexure I and the correct quantity of inputs & finished goods found short mentioned in Annexure V of the show cause notice.

21. The Commissioner to whom the matter is remanded will accord reasonable opportunity to the appellants to put forth their case before him before determining the various issues involved.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com