

Simplex Industries Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-07-2005

Judge : R Abichandani, S T T.V.

Appellant : Simplex Industries

Respondent : Commissioner of Central Excise

Judgement :

1. During the hearing of the applications for interim stay, the learned Counsel for the appellants and the learned authorised representative for the department, submitted that the appeal itself can be finally disposed of in the light of the contentions canvassed by both the sides. We have, therefore, taken up the appeal itself for final disposal.

2. The grievance of the appellant is that the Commissioner did not consider the claim of the appellant under Section 3A(4) of the Central Excise Act, 1944 and failed to determine the actual production as contemplated therein, for the purpose of redetermining the amount of duty payable by the assessee with reference to actual production at the rates specified under Sub-section (3) of Section 3A.3. There is no dispute over the fact that the appellant had not opted to pay the lump sum amount as contemplated under Sub-rule (3) of Rule 96ZO framed under the said rules. Since such an option was not exercised under Sub-rule(3) of Rule 96 ZO, it remained open for the manufacturer to avail of the benefit, if any, under Sub-section (4) of Section 3A of the said Act, which reads as under: (4) Where an assessee claims that the actual production of notified goods in his factory is lower

than the production determined under Sub-section (2), the Commissioner of Central Excise shall, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in Sub-section (3).

4. Sub-section (4) of Section 3A requires the claim to be made by the assessee to the effect that actual production of notified goods in his factory is lower than the production determined under Sub-section (2) of Section 3A. On that being done, it is incumbent upon the Commissioner to determine the actual production and redetermine the duty amount payable by the assessee after giving an opportunity to the assessee to produce evidence in support of his claim. According to the learned Counsel for the appellant, the necessary material in support of such a claim made by the appellants was produced before the Commissioner. However, the Commissioner instead of redetermining the amount of duty payable by the assessee under Section 3A(4), has confirmed the demand on an erroneous reading of the said provision.

5. It appears from paragraph 11 and 12 of the impugned order that after referring to the provisions of Sub-section (4) of Section 3A, the Commissioner observed that in spite of that provision, the noticee have never disputed the capacity fixed by the Commissioner, and that, had they been aggrieved against the capacity fixed by the Commissioner, they should have approached the department, taking recourse to Sub-section (4) to Section 3A for redetermination or should have at least challenged the said fixation by way of appeal. He then proceeded to observe that there is no provision to fix the duty liability based on actual production claimed by an assessee in the entire spectrum of compounded levy scheme.

6. It appears from the record that the appellant had sent a letter on 31.3.98 to the Assistant Commissioner in the last para of which, a specific request was made that the claim of the assessee for actual production of notified goods in their factory, which was lower than the production determined should be considered. Again in their application dated 24.9.98, the assessee had written to the Commissioner to consider their claim for abatement of duty and also in respect of

determination of actual production and redetermination of the amount of duty payable on actual production as reflected in the 'subject' of that communication. In the particulars of claim, the assessee had summarized factors for giving abatement in duty as also the figures of lower production. It was mentioned that since the production in the plant was lower due to factors mentioned at 'item F' there was no duty payable by the appellants, having regard to the actual duty paid by them. Again on 8.5.99, similar communication was sent. On 20th September, 2000 also similar claim was put up.

7. The learned Commissioner while summarizing the defence of the appellant in Para 4 of the impugned order observed that the appellant had claimed re-determination of annual capacity as well as determination of duty payable on actual production by their letter dated 24.9.98. He also noted the contention canvassed on behalf of the appellant, to the effect that the appellant had never opted for compounded claim and wanted to pay duty on the basis of actual production, and in Para 11 of the impugned order, he dismissed the claim by simply observing that in support of their demand, they have come up with variety of reasons responsible for lesser production and that most of them were based on humanitarian grounds and most irrelevant in the context of rules on the subject. He did not consider the claim which was required to be considered for determining the actual production, as required by the provisions of Sub-section (4) of Section 3A of the Act. It appears from the observations made in paragraph 12 of the impugned order by the learned Commissioner that no effort was made to ascertain whether the evidence produced by the assessee in support of his claim made under Sub-section (4) of Section 3A was reliable and whether the actual production of the notified goods was lower than the annual capacity which was determined. Merely because the claim for abatement as well as claim for redetermining duty under Sub-section (4) of Section 3A were made in the same communication that did not absolve the learned Commissioner for considering the claim which is relatable to Sub-section (4) of Section 3A separately, and give a finding whether the appellant was entitled to such claim, having regard to the nature of evidence produced by the appellant in support of that claim. The matter will, therefore, have to be considered by the learned commissioner afresh on the appellants' claim to the extent that it relates to the provisions of Sub-section (4) to Section 3A of the Act.

With a view to safeguard the interest of revenue, the learned Counsel for the appellant has stated that the appellants will deposit Rupees Twenty five lacs only, within eight weeks from today with the Commissioner for reconsideration of the matter pursuant to this order of remand.

8. We accordingly set aside the impugned order and direct that on the appellants' depositing Rupees twentyfive lacs within eight weeks from today, the Commissioner will hear the matter afresh and after giving an opportunity of hearing to the appellants take an appropriate decision thereon in accordance with law and in light of the observations made in this judgment, expeditiously, preferably within two months from the date of appellant's depositing the aforesaid amount of Rupees twenty-five lacs. This appeal is accordingly, allowed. The stay application stand disposed of in view of this order allowing the appeal.

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