

Mr. Sanjeev Malik, Director, Mr. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-13-2005

Reported in : (2006)(106)ECC140

Judge : R Abichandani, S T T.V.

Appellant : Mr. Sanjeev Malik, Director, Mr.

Respondent : Cce

Judgement :

1. The applicants seek waiver of pre-deposit of the amounts of duty and penalty imposed by the Commissioner under the impugned order.
2. The present appeals arise after the earlier remand by the Tribunal and the passing of the impugned order by the Commissioner. The learned consultant appearing for the applicants, submitted that there have been two remands in the past by the Tribunal in the same matter, and that this is the third time that the applicants have approached this Tribunal. He submitted that, initially when the applicants had approached the Tribunal in 2001 against the order of the Commissioner, Interim Stay was granted on the condition of pre-deposit of Rs. 15 lakhs, which came to be modified by order dated 04.01.2001 to Rs. 1.5 laKhs having regard to the financial hardship of the applicants. The learned consultant then pointed out that, thereafter when the applicants approached the Tribunal again after the first remand and making of the order by the Commissioner, when the pre-deposit was waived, since the applicants had earlier deposited Rs. 1.5

lakhs as per the modified order. He, therefore, submits that the applicants may not be required to make any pre-deposit in this matter. He also submits that the company is facing financial hardship and there has not been any change in its earlier circumstances.

3. In our opinion, the contention is wholly misconceived. as can be seen from the order dated 04.01.2001, modifying the earlier order of pre-deposit of Rs. 15 lakhs, it was not disputed by the learned SDR that the plant & machinery in the factory of the applicants were seized on 20.09.1998. From this, the Tribunal observed that the production was hampered by the act of seizure reported to the Department, and that in such a situation, they need not doubt the genuineness of the financial hardship put up by the applicants. Now the position has admittedly changed, because, the plant & machinery which were seized on 20.09.1998, have been released long back, as admitted before us. We notice from the balance sheet, which is pointed out to us, that there are assets of Rs. 1.6 crores with the company. It is, therefore, not possible to take the earlier Interim Stay order as a precedent for waiving the entire amount payable under the impugned order.

4. It was contended by the learned consultant for the applicants, that there was an inconsistency between the show cause notice and the observations made in paragraph 90 of the impugned order. Reference was made to paragraph 14 of the show cause notice for pointing out that, it was alleged therein that, the DTA unit did not produce and clear any goods as shown by the assessee in the statutory records maintained in respect thereof, and that the goods shown as produced and cleared from DTA unit were, in fact, produced in the EOU on the imported machine. It was also alleged that the registration for the DTA unit had been obtained by the assessee for using that unit as a facade for covering up the illegal activities of the EOU with an intent to evade payment of duty on the goods produced and cleared from the EOU by wilfully mis-stating and suppressing the facts, and that the so-called DTA unit was virtually non-existent. In; paragraph 90 of the impugned order, which according to the learned consultant is inconsistent, it has been stated that, as regards the claim of the assessee about allowing them the modvat credit in respect of duty paid by them on the inputs used in the manufacture of PET bottles and preforma, the authority found that the entire

quantity of raw materials on which duty credit of Rs. 12,74,897/- was claimed, had been consumed in 17,59,693 PET bottles, and that the demand in respect of these goods which was claimed to have been manufactured and cleared in the DTA unit was set aside by the Tribunal and, therefore, the assessee was not entitled to take credit.

In the present case, we are not concerned with those 17,59,693 bottles and, therefore, the conflict which is sought to be brought out is non-existent, since we are concerned with clearance of 13,18,407 bottles, which are alleged to have been cleared. This is clear from the facts stated in paragraph 77 of the impugned order in which it has been observed that, CESTAT on 09.05.2002 finally rejected the ROM filed by the Department and the matter was thereafter taken for adjudication of the case of clandestine manufacture and removal of 13,18,407 PET bottles only. It appears that in the ROM application, the case of the Department was that, the quantity clandestinely manufactured and cleared was of 31,14,646 PET bottles and not 13,18,407 PET bottles.

However, since that ROM application came to be rejected, we are not concerned with the removal of bottles other than 13,18,407 PET bottles, in respect of which the impugned order has been passed.

5. The learned Commissioner has come to the conclusion on the basis of the record in paragraph 89 of the impugned order, that the wastage claimed by the assessee as 31.25% was abnormal, and that from the record it appeared that the wastage was only 6.5%. It was held that statutory records and RT-12 returns did not indicate emergence of waste, as claimed. In paragraph 91 of the impugned order, considering the claim of the assessee regarding sale of 10 lakh bottles in domestic area, it was found that as against the permission of 10 lakh bottles, the assessee had clear 2,16,250 bottles in legitimate manner and had cleared 13,18,407 bottles clandestinely. He rejected the contention that the EOU during the period 1.5.1997 to 1.6.1908 was working under the Notification No. 8/97 and, therefore, the question of removing the goods clandestinely did not arise and found that the clearances shown from EOU were not effected under the said Notification, but were effected on payment of 50% of the aggregate of customs

duties and hence they had motive to indulge in the malpractices to evade duty of excise, which they were paying on the clearances effected from the EOU.⁶ It was contended by the learned consultant appearing for the applicants, that the applicants were not allowed to cross-examine the concerned persons. This aspect has been adequately considered by the learned Commissioner in paragraph 95 of the impugned order and for reasons, which, prima facie, appear to be correct, he did not find it necessary to accede to the request.

7. From the balance sheet we have noticed that there are assets of more than Rs. 1.6 crores, as pointed out to us. According to the learned consultant, the company is not functioning even after the release of plant & machinery. As observed above, the financial hardship was considered in the earlier appeal on the footing that plant & machinery were seized. Now, they have been admittedly released, and there are ample assets available from which the amounts due to the Revenue can be released. Even now, according to the learned consultant company is not functioning and, therefore, in our opinion, there is every possibility of the assets being eroded or siphoned away. The learned consultant submits that, the machinery is in Customs Bond and, therefore, cannot be sold. Those questions will arise at the time of execution and not at this stage and, therefore, we are not inclined to go into the question as to under what circumstances the Revenue authorities can realize the duties from the assets.

8. For the foregoing reasons, in our opinion/this is not a fit case for waiver of the amount payable under the impugned order. These applications are, therefore, rejected. The learned consultant for the applicants seeks eight weeks time for making the pre-deposit.

9. Time is granted upto 16.02.2006 for depositing the duty and penalty amounts payable under the impugned order, failing which the appeals will stand dismissed.

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