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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-20-2005

Judge : K Kumar, S T Chittaranjan

Appellant : Rivaa Textile Inds. Ltd.

Respondent : Commissioner of C. Ex. and Cus.

Judgement :

1. The issue relates to illicit removal of processed fabrics. The appeals have been filed by the appellants against the demand of Excise duty of Rs. 24,28,284/- (Rupees Twenty four lakhs twenty eight thousand two hundred eighty four only) + Rs. 1,38,314/- (Rupees One lakh thirty eight thousand three hundred fourteen only) = Rs. 25,76,598/- (Rupees Twenty five lakhs seventy six thousand five hundred ninety eight only) and imposition of penalty of Rs. 25,00,000/- (Rupees Twenty five lakhs only).

2. Briefly stated, facts of the case are: The appellants are the processors of man made fabrics. On 16-9-96, the Officers of Central Excise visited the godown-cum-business premises of the appellants. The Officers allegedly recovered the register alleged to have been maintained by one Shri S.D. Tiwari containing the details of lotwise receipts of processed man made fabrics received from the appellant's factory and number of sarees obtained after cutting and packing against respective lot numbers shown in the register. The Officers also allegedly recovered computerized date-wise receipts from Shri S.U.Sharma, General Manager of P.F. The Show Cause Notice dated 27-3-2001 was issued asking the

appellants to pay duty of Rs. 25,76,598/- (Rupees Twenty five lakhs seventy six thousand five hundred ninety eight only) on account of illicit removal. Excise duty of Rs. 1,60,77,219/- (Rupees One crore sixty lakhs seventy seven thousand two hundred nineteen only) on the differential value of man made fabrics processed cleared by them undervaluing the same and asking to impose the penalty, interest etc.

The matter was adjudicated by the Commissioner and consequent to the adjudication order, the duty of Rs. 25,76,598/- (Rupees Twenty five lakhs seventy six thousand five hundred ninety eight only) was confirmed on alleged illicit removal invoking the extended period for the reason of suppression of facts and wilful misstatements. As regards the demand of Central Excise duty of Rs. 1,60,77,219/- (Rupees One crore sixty lakhs seventy seven thousand two hundred nineteen only), the Commissioner in para 39 of the impugned order has stated as under: As the issue has been settled by CEGAT finally in favour of noticees, there is no point in proceeding with this aspect of this show cause notice.

The demand for the aforesaid amount was dropped by the Commissioner and no appeal was filed against this order as mentioned in para 37 of the impugned order.

3. The learned Counsel, inter alia, at the outset contended that since the demand of Rs. 1,60,77,219/- (Rupees One crore sixty lakhs seventy seven thousand two hundred nineteen only) related to the period 1995-96 and 1996-97 and therefore, the Show Cause Notice was issued dated 20-4-1998; whereas in the present case, the period relates to 24-6-96 to 13-9-96 and the Show Cause Notice has been issued dated 27-3-2001.

The demand is hopelessly time barred, because the full facts were in the knowledge of the Department when the Show Cause Notice dated 20-4-1998 was adjudicated upon and the period in the present appeal is very well covered in the Show Cause Notice dated 20-4-1998. Therefore, the question of invoking the extended period does not arise in the matter. He submitted that the extended period cannot be invoked; that no evidence has been brought on record to prove the charge of illicit removal; All records of inward and outward processed fabrics in Parag House have been maintained by the Accounts Department of the Company.

The inward details of grey fabrics and outward details of processed fabrics had been maintained by the Company, Parag Industries Limited; that no authenticity of alleged record register has been proved by the Department and that the so called register was maintained by the Contractor and the appellants have no concern with the same and the Contractor was entrusted in making the entries therein through the labourers employed by him. The entries made by the labourers in the register cannot be called to be sufficient to establish clandestine removal.

4. Kashmir Vanaspati Private Limited : He submitted that the present case is based on the surmises and conjectures and is also based on the register allegedly recovered from the contractors and labourers and no tangible evidence has been marshalled by the Revenue.

Hence the ratio in Kashmir Vanaspati completely covers the case in favour of the appellants. He submitted that no corroborative evidence has been brought on the record to prove clandestine removal. He submitted that in the absence of corroborative evidence such as installed capacity of the factory, raw materials utilisation, labour employed, power consumed, goods actually manufactured and packed etc.

to prove alleged clandestine production of goods and removal of same from the factory, will not entitle demand of duty only on the basis of entries in a private note book. *Gurpreet Rubber Industries Industries v. CCE Chandigarh* reported in 1996 (12) RLT 569 (CEGAT - NB). He submitted that the production has increased due to installation of extra chamber; decrease in the wages per length metre showing better efficiency; cost of power decreasing to Rs. 0.59 paise compared to Rs.0.61 paise in the previous year; the cost of raw material per length metre coming to the tune of Rs.4.67 in comparison to the previous year of Rs. 4.71. All these figures are available in the balance sheet seized by the investigating authorities.

6. Similarly, he also relied on the case of *Sasidhara Dyers* 2000 (117) E.L.T. 813 (Commr. Appeals) and *Kothary Products v. CCE* 1999 (31) RLT 67 (CEGAT) to the effect that unless the note is authenticated by the private record, it cannot be relied as legal evidence.

7. In the case of Deepak Tandon, reported in 1999 (33) RLT 52 (CEGAT), holding that the demand of duty on the basis of entries in cutting register is held unsustainable in the absence of independent evidence corroborating the same. *Deena Paints v. CCE, New Delhi* 2001 (43) RLT 805 (T); the burden of proving the clandestine removal wholly lies on the Department.

10. *KR Steel Union Private Limited* : He submitted that evidence sought in the Show Cause Notice is unreliable as the same is based on the conjectures and surmises, since the entire case of the department was based on the alleged register. The appellants had sought for cross-examination of the Panchas which was denied by the Commissioner; that illicit clearances are alleged to have been conducted on 16/17-9-96 and the officers of the Department visited the factory premises on 20-9-96 for follow-up action and drew factual Panchnamas on 20-9-96, as per the Show Cause Notice. The Officers detained certain goods on the ground that they being substituted fabrics on 21-9-96. Again they visited on 12-12-96 and drew on factual Panchnamas and recorded the statement during the period from 16/17-9-96 to 12-12-96. Show Cause Notice dt. 14-3-97 has culminated in the order dated 23-12-98 and *Parag Industries Limited* have opted for KVSS certificate dated 23-3-99 is available at page 164 of the appeal file.

Therefore, the period in dispute was well within the knowledge of the Department and the Show Cause Notice should have been issued within six months from the first factual Panchnama dated 16/17-9-96 i.e., latest by 15-3-97. Therefore, the learned Counsel contended that the Show Cause Notice dated 27-3-2001, in the present case, having been issued more than four and half years after the first factual Panchnama, is hopelessly time barred. To support his contention, the learned Counsel has relied upon the following decisions: case, the Hon'ble Tribunal held that the onus of proving reliability of the account books disowned by the manufacturers lies on the department and the extended period of limitation is inapplicable. *S.D. Kemexc Industries v. CCE, Calcutta* the case, the Hon'ble CEGAT has held that after receipt of the report of the Chemical Examiner on 17/18-10-1985, the Department has taken their own time to issue Show Cause Notice dated 25-11-1996 and accordingly held that the demands are time barred. *J.S.L. Industries Ltd. v. CCE., Ahmedabad* 1999 (109) E.L.T. 316 (T)., In

the case, the Tribunal held that Show Cause Notice issued on 6-9-1989 in respect of the period 1-4-1983 to 31-3-1986 under Section 11A as time barred because the Department has received the information through the assessee's reply dated 1-9-1987, but still delayed the issue of Show Cause Notice. *Jalla Industries v. CCE.*, Mumbai-II the Hon'ble CEGAT held that where the Department had knowledge and even then delayed the issue of the Show Cause Notice, the provisions relating to extended period could not be invoked by the Department. *Sharp Industries Limited v. CCE.*, Mumbai-III In the case, the Tribunal held that the demand is time barred as the Department did not take any action on the test report of samples communicated to the assessee on 27-2-1991, but initiated action for short levy on the basis of a further test report of samples drawn in January 1998.

11. The contention of the learned Counsel that the time limit for the issue of Show Cause Notice, in the present case, is six months and that the alleged register was seized in September 1996 and the statements of the Directors were recorded during the period from 17-9-1996 to 12-12-1996, the demand is hopelessly time barred; that no investigation had been done by the Department to bring on record any material corroborating the entries in the register and the statements that the allegation in the Show Cause Notice is nothing but a colourable exercise of the quasi judicial powers; that since the Department could not find any scapegoats to cover up its failures in investigation, they had baselessly on a misconceived perception raised the demand against the appellants without any basis; with regard to charge of under valuation, the learned Counsel has submitted Annexure 'C' (had been annexed) with the Show Cause Notice and the said annexure seeks to correlate the grey fabric challan of the processed fabrics and have arrived at the figures of Rs. 1,28,105/- (Rupees One lakh twenty eight thousand one hundred five only). But this demand has been included in the Show Cause Notice presumably because of the higher demand of duty based on the selling price of the processed fabric as per the balance sheet charged under valuation is based on selling price of cut and packed fabrics by the processed fabric being contrary to settled law, is illegal. (*Ujagar Prints v. UOI* 1989 (39) E.L.T. 493 (S.C.)). It is held that since the appellants had paid the duty as per the formula laid down in the trade notice of Surat Commissionerate, which was based on the CBEC order

dated 31-12-1993, therefore, there is no question of any wilful misstatement or suppression of facts with intent to evade duty resulting invocation of extended period of limitation.

12. The earlier appeal filed by the appellants before Hon'ble CEGAT reported in Parag Industries P. Ltd. v. CCE, Surat-I , which has been decided in favour of the appellants also stands in the way of the Department invoking the extended period of limitation, particularly when the Department has not filed any appeal against the said order. Besides, the fact of the settlement in the KVSS. as per the certificate dated 23-3-1999 as at Page No. 164 mentioned above, also stand in the way of Department to invoke the extended period; The learned Counsel specifically drew our attention to para 28 of the impugned order where in the Commissioner had recorded as under: On the basis of the details, the Officers verified the lot register of Parag Industries Ltd. and on the comparison of the entries lot price wise with each other, it was noticed that most of the lot entries, the fabrics of which to have been shown as receipt at Parag House were found pending in the factory premises of PIL (processed house).

13. We have carefully heard both the sides. Considering the submissions made by both the sides, perusal of the records and the case laws relied by the learned Counsel, we find that when the Officers had visited the factory premises on 28-9-96 for follow-up action and have drawn factual panchnama on 20/21-9-96, detained certain goods on 21-9-96 and recorded the statement during the period 16/17-9-96 to 12-12-96, the Show Cause Notice dt. 14-3-97 culminated in the order of the Tribunal and the prosecution of the case was settled on 23-3-99 as at page 164 of Show Cause Notice on 27-3-2001 for the period in dispute (i.e., 24-6-1996 to 13-9-96) must be on the expiry of six months; i.e., the Show Cause Notice should have been issued latest by 15-3-1997. Hence, the demand is hopelessly time barred. Therefore, even without going into further merits of the case, we can hold that the demand is barred by limitation. However, it would be pertinent to mention that so far as under-valuation is concerned, it has already been mentioned that the duty was paid as per the Trade Notice issued by the Surat Commissioner, which was based on the CBEC order dated 31-12-1993. The learned Counsel has already submitted that imposition of penalty is totally illegal

as no specific clause of Rule 173Q(1) of CER of 1944 has been mentioned. We fully agree with the contention of the learned Counsel that in the absence of the specific contravention, imposition of penalty is totally vague and not sustainable. We, therefore, set aside the impugned order and allow the appeals filed by the appellants.

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