

The Commissioner of Central Vs. Challenger Rubbers (P) Ltd.,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Mar-22-2006

Reported in : (2006)(108)ECC597

Judge : S Peeran, J T T.K.

Appellant : The Commissioner of Central

Respondent : Challenger Rubbers (P) Ltd.,

Judgement :

1. The issue in all the three Revenue appeals are same and hence they are taken up together for disposal as per law. The Commissioner (Appeals) has disposed of three appeals by different OIA Nos. 11, 12 & 13/2003-CE dated 31.03.2003 by setting aside the demands confirmed by the Additional Commissioner by three different Orders in Original. The appellant in all the three cases is identical. The findings rendered in OIA No. 11/2003 dated 31.03.2003 in paras 5 and 6 are reproduced herein below: 5. I have carefully considered the impugned order, the grounds of appeal, submissions made at the time of hearing and all other evidence on record. The demand of duty of Rs. 81,085/- on suppressed production of tread rubber and its clandestine removal, was based on the shortage of raw materials - raw rubber of 2930 kgs on 19.8.99. The lower authority had determined the suppression of production and clandestine removals from 1.2.95 to 17.8.99, as 'Nil' based on consumption of sulphur and corresponding production of finished goods. The physical stock of raw materials was ascertained by the preventive unit and found differences in stock i.e. shortage of raw rubber of 2930 kgs, based on which it was calculated that 8371 kgs of tread rubber was manufactured and cleared without payment of duty. The duty on this of Rs. 81,085/- was demanded and confirmed by the lower authority. The appellants claimed that the inputs purchased are subject to job work with other manufacturing ingredients, namely mixing of chemicals and production of rubber compound. The documentary evidence such as sales tax delivery note dtd. 10.8.99 and Bill No. 306 dtd. 10.8.99 was produced to indicate the purchase of raw rubber of 3000 kg and sent for job work. The materials for mixing the rubber compound were sent to the job worker under challan No. 104 dtd. 31.8.99 and the processed goods were returned to manufacture on 27.9.99. The same was accounted in the stock register and subjected to manufacturing process of finished goods. These records were not considered by the lower authority. In this case there is no convincing evidence adduced to establish unaccounted production, clandestine removal, evasion of duty etc. A judicious arbitrator may expect other corroborative evidence like installed capacity of factory, raw material utilization, labour employed power consumed, goods actually manufactured, packed, cash transactions etc. for inviting the penal action under relevant rules, which is absent in the instant case. The manufacture of tread rubber is possible only with the mixing of various raw materials in definite proportion and ratios. The investigation failed to produce any evidence of shortage of other raw materials proportionally. The lower authority had in fact concluded that suppression of production from 1.2.95 to 17.8.99, based on consumption of sulphur as 'Nil'. It is not justified to conclude that based on shortage of another raw material noticed on 19.8.99, the appellant suppressed production and evaded payment of duty. This in my opinion makes demand of duty and imposition of penalty in the impugned order infirm and unsustainable. The order of confiscation and release of the goods on payment of redemption fine of Rs. 4000/- is not justified as the investigation has not

produced any evidence on record to show that the excess stock ascertained was intended for unaccounted production and clandestine removal to evade payment of duty. The contention of the appellant that the production was continuous process and the production occurred in the night shift of 17.8.99 could not be entered in the RG1 register as the records were seized by the officers appears to be correct. They plead that they were denied the chance to record the production entries on 18.8.99. The investigation had not produced any evidence to prove that the goods were intended for illicit removal. The confiscation of goods on which duty liability discharged is not proper and correct in law.

The Hon'ble High Court of Kerals in the case of George Varughese v. Collector of Central Excise held the following; Normal production of tread rubber arrived at by taking into account only the amount of sulphur found short- Factors such as installed capacity of factory, labour employed, power consumed, raw material utilization etc. not taken into consideration by Collector. Failure to advert to proper material or relevant evidence vitiates order of the tribunal The ratio of the above case is ipso facto applicable in the instant case. The Order of confiscation of goods and imposition of redemption fine are not justified in this case and the same are set aside. The ingredients required for imposing penalty under Section 11AC being wilful suppression of facts etc. to facilitate removal of excisable goods without payment of duty are apparently absent in this case. There are no evidence placed before me to the effect that the appellant violated provisions of the Central Excise Act & Rules so as to attract penal provisions. Therefore, the penalties imposed by the lower authority under Section 11AC & Rule 173Q are set aside.

2. The Revenue is aggrieved with this order and contends that there was shortage of raw materials and that itself is a sufficient ground for confirming the demands. The learned SDR refers to the entire grounds of appeals including the citations noted herein and prays for setting aside the Orders-in-Appeal and confirm the Orders-in-Original.

3. The learned Counsel submits that even if the grounds are considered, the demands cannot be confirmed. It is his submission that the shortage of one single raw material will not be a ground to confirm the demands as for the production of rubber, the raw material is not Sulphur alone but the raw materials are raw rubber, carbon black, stearic acid, zinc oxide, process oil, accellarator and other chemicals. It is his submission that mere shortage of raw rubber and carbon black itself cannot lead to the conclusion that the final product has been manufactured. It is his submission that Revenue has not examined any other corroborative evidence with regard to removal of final products by clandestine sale. The transporters are not being examined nor the purchasers have been examined by the Revenue. There is no receipt of funds and flow back. It is his submission that even the electricity consumption for excess production has not been examined. Therefore, the Commissioner (Appeals) was justified in his order in holding that the charge of clandestine removal has not been established. He contends that similar proceedings were initiated against almost all the rubber manufacturers. The tribunal examined similar appeals as in the case of Quality Rubber Ltd. 1995 (11) RLT 445 and clearly laid down that consumption of electricity is a major factor for confirming demands. In some cases, the Tribunal had remanded the matters to examine the issue of excess consumption of electricity. The Commissioner, after due examination, dropped all the proceedings. He contends that against the similar sister unit of the appellant, similar charges were dropped and duties confirmed in OIO. The commissioner (Appeals) had examined the case and dropped the proceedings and in some cases, he has confirmed the demand. The Revenue and the Party had come up in appeals and this bench, after due consideration allowed the party's appeal and dismissed the revenue appeal by Final Order No. 1283 and 1284/2005 dated 25.07.2005. He places a copy of this order. It is his submission that the evidence being common and the Tribunal has already found lack of evidence and has set aside the demand and dismissed Revenue appeals by Final Order Nos. 1283 & 1284/2005, prays for following the ratio of this order.

4. The learned DR again reiterates the revenue grounds and prays for setting aside the OIA.5. On a careful consideration, we notice that in large majority of cases pertaining to clandestine manufacture and removal of rubber in similar units, the Tribunal has set aside demands on the ground that Revenue cannot proceed to confirm demands on the basis of shortage of one or two raw materials. The Tribunal has laid down that the

Revenue ought to have investigated on the aspect pertaining to higher consumption of electricity and other aspects pertaining to clearance to purchasers, transporters, statements and purchase of other materials.

For lack of corroborative evidence, the parties' appeals have been allowed and revenue appeals on such dropping of proceedings have been dismissed. In the present case, the Revenue has followed the same pattern of investigation as in M/s. Abba Rubber case. M/s. Abba Rubbers and the Commissioner both had appealed against a similar order passed by the Commissioner and the Additional Commissioner. The Tribunal, after due consideration, set aside the demands and allowed, the assessee's appeal and dismissed the Revenue appeal by Final Order No.1283 & 1284/2005 dated 25.07.2005. The portion of the order from paras 2 to 4 are reproduced herein below: 2. We have heard both sides in the matter. Learned Counsel submits that the dropping of demands was on a very clear cut findings. In para 6 of the impugned order, the Commissioner has noted that for manufacture of the main item, the assessee has to procure besides raw sulphur, the main ingredient i.e. raw rubber. The same was not found short or having excess raw materials in the books. The Commissioner has clearly accepted the assessee's plea that there was no purchase of other required materials and there was also no excess electricity consumption and dropped the proceedings. He prayed for confirmation of this order by dismissing the revenue appeal. He says the same finding should have been applied with regard to the allegation of confirmation of demand of Rs. 1,50,548/-. On the allegation of shortage of raw materials, he pointed out that there was excess production. The finding recorded by the Commissioner himself in para 7 that for manufacture of tread rubber and pre-cured tread rubber which involve combination of various other raw material in the correct proportion. The revenue has not taken these factors including the excess electricity consumption factor and use of carbon black for production of goods. He has also noted that the sulphur is not the main ingredient. The main ingredient is the raw rubber and carbon black. Having held so, he should not have confirmed the duty demand of Rs. 1,50,548/- solely on the basis of the entries which have not been made in the statutory registers.

With regard to the excess found, the explanation given was that the pre-cured tread rubber and repairable strips had been received as replacement and that had been sufficiently explained by production of documents which should have been accepted. He submits that the penalty of Rs. 10,000/- under Rule 173Q is also not leviable. He relied on the ruling rendered by this Tribunal in large number of similar cases booked against rubber industries. He referred to the latest order rendered in the case of Devi Rubber Products and Ors.

v. CCE, Cochin 2001 (145) RLT 1023 wherein the Tribunal has clearly held that the allegation of clandestine removal cannot be upheld on sole basis of consumption of one raw material i.e. sulphur. He submitted that raw rubber is a controlled commodity and cess is leviable. The same cannot be purchased clandestinely as it is not available in the open market. Therefore the allegation of clandestine removal is not sustainable in the light of the judgment cited and also in the absence of excess electricity consumption.

Learned DR defended the order on the basis of the findings recorded by the Commissioner. He also prayed for allowing the revenue appeal.

3. On a careful consideration, we notice that the Commissioner has himself dropped the proceedings with regard to the demand of Rs. 3,22,025/- holding that mere consumption of sulphur is not sufficient to confirm the charge of clandestine removal. He has clearly held that for manufacture of pre-cured rubber, the assessee has to purchase raw rubber and carbon black. The revenue has not produced evidence of its procurement, and no evidence regarding the sale of goods clandestinely to purchasers has been brought forth, the higher electricity consumption has also not been found.

Therefore the finding recorded by the Commissioner for dropping the demand is a correct order. There is no merit in the Revenue appeal and the same is rejected. The finding recorded by the Commissioner on this point should have been applied with regard to the confirmation of demand of Rs. 1,50,548/ which pertain to excess produced tread rubber and slips which were found in the premises.

The appellants had clearly explained with evidence that this material had come for replacement and evidence

had been produced.

4. We have carefully gone through the records and accept the plea of the appellants that to confirm clandestine removal, there should be evidence of procurement of raw material of raw rubber and carbon black. The same is not forthcoming. There is no evidence of excess consumption of electricity. Therefore, the ratio of the Devi Rubber Industries(supra) applies to the facts of the case. The confirmation of demand of Rs. 1,50,548/- is required to be set aside including penalty of Rs. 10,000/- under Rule 173Q of the Act with consequential relief if any.

6. On consideration of the above findings, we are of the considered opinion that the findings recorded in the above order clearly apply to the present facts of the case. There is no material alteration in respect of additional evidence in this case. The Revenue has also not produced any records and any admissions of the parties with regard to the clandestine manufacture and removal. There is no merit in the Revenue appeals and the same are dismissed.

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