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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-26-2006

Judge : M Ravindran

Appellant : Benara Auto (P) Ltd.

Respondent : Cce

Judgement :

1. This application for Restoration of appeal is directed against the final order dated 28.12.2005, which dismissed the appeal of the appellant for non-prosecution. It is the submission of the advocate for the applicant that he could not be present on that day as the hearing was not intimated and he had to go out of station. The reason given by the applicant is a justifiable and hence the order-dated 28.12.2005 is recalled and the appeal is restored to its original number. The appeal itself is taken up for disposal.

2. The relevant facts that arise for consideration is that the officers of the Central Excise visited the factory of the appellant and conducted stock taking. It was found by the officers that there was a stock of 1171 pcs of finished goods unaccounted in the RG 1 register.

The said goods were seized and the officers conducted further investigation. On conclusion of the investigation a show cause notice was issued demanding duty on the allegation that the appellant had removed clandestinely finished goods, which was worked out based on the reconciliation of the raw materials purchased

and consumed in the factory of the appellant. Appellant contested the show cause notice on the ground that the demand is not sustainable as there is no evidence of any clandestine removal. Adjudicating authority confirmed the demand of duty and also imposed a penalty on the appellant. The appeal preferred by the appellant to first appellate authority was rejected on the same ground. Hence this appeal by the appellant.

3. The learned advocate appearing for the appellant submits that the demand has been worked out on the presumptive grounds. It is also his submission that the revenue has not adduced evidence in any form of clandestine removal, hence the impugned order is liable to be set aside. It is his submission that the appellant manufactures the plain shaft bearings only for export and has no local clearances till date.

He draws my attention to this fact by pointing out the order-in-appeal that allowed their appeal against the confiscation of the seized goods.

4. The learned Departmental Representative on the other hand submits that the reconciliation of the raw materials purchased and consumed to that of the closing stock indicated that the production as was recorded by the appellant was on the lower side. It is his submission that it was for the appellant to produce the evidence that he had not clandestinely removed any goods.

5. Considered the submissions made by both sides and perused the records. I find that the investigations in the appellant's case was initiated due to the excess stock of finished goods found in the factory of the appellant during the visit of the officers. The authorities issued a separate show cause notice for the confiscation of the said goods found excess. The confiscation was set aside by the appellate authority vide his order-in-appeal No. 612/ CE/ APPL KNP/04 dated 28.10.2004 on the ground that the appellants never cleared their goods for home consumption. On a specific query, the DR was not able state that the revenue had preferred appeal against order-dated 28.10.2004. In the current proceedings before me the lower authorities in the same investigation have confirmed the demand of the duty. It is necessary to read the show cause notice for demand of duty, which is reads: Further, it is presumed that the opening stock (=) the purchases of the raw

material during the above referred period should correlate with the stock in balance as on the date of the visit of the officers to the manufactory (=) the clearances effected by the said party during the period under reference, i.e.

but the position worked out in the instant case comes as under, which shows that there is a difference of finished excisable goods as compared to the raw material out of which the finished goods would have been manufactured and cleared clandestinely by way of suppressing their production in contravention of the provisions of Central Excise Act, 1944 and the Rules framed thereunder: It can be seen that the show cause notice has been issued to the appellant on a presumptive ground that the reconciliation of the raw materials indicates that the appellant should have produced more quantity of plain shaft bearings. The lower authority has not considered the fact that the production of any goods depends upon the quality of the raw material, the plant utilization, and rejection during the manufacturing process and wastage due to burning and invisible losses. It cannot be so simplistic that the reconciliation of raw materials will indicate the actual production and duty has to be demanded on such a quantity. Further, the allegation of clandestine removal has to be corroborated with some kind of plausible and positive evidence. The confiscation of the unaccounted goods has been set aside, which in itself indicates that the appellant had no intention to remove the said goods clandestinely. If there no antecedents of any clandestine removal, the revenue has to adduce some kind of evidence to suggest evasion of duty by clandestine removal. In this case there is total lack of evidence, to even suggest remotely, that the appellant had clandestinely removed the goods. Hon'ble Supreme Court in the case of Oudh Sugar Mills Ltd v. Union of India as reported at 1978 (2) ELT (J172) (SC) had settled the law in an identical issue. Their lordship have held as under: Offence - Clandestine production and aremoval -Allegations based only on calculations of raw material fed into the process or on working of the machinery as noticed during test inspection - No tangible evidence on record - Finding of non-accountal vitiated by error of law, being based only on inferences involving unwarranted assumptions -Rules 9(2), 173Q and 226 of Central Excise Rules, 1944.

I find that the ratio of the apex court in the case of Oudh Sugar Mills Ltd.'s case squarely covers the issue being agitated in the present case before me.

6. Accordingly, respectfully following the judgment of the Hon'ble Supreme Court, the impugned order is set aside and appeal is allowed.

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