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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-05-2006

Reported in : (2006)(112)ECC629

Judge : N T C.N.B.

Appellant : Oswal Knit India Ltd.

Respondent : Cce

Judgement :

2. The case is before me upon remand by Hon'ble High Court of Punjab & Haryana at Chandigarh under order dated 10.7.06. The remand order may be read: Accordingly, we set aside the order of the Tribunal and remand the matter for fresh decision on merits accordance with law. The parties are directed to appear before the Tribunal for further proceedings on 14.8.2006.

3. The facts of the case are that appellants were manufacturing ready made garments for several years, and those garments being exempt from Central Excise duty, they were not required to take Central Excise licence also. With effect from 1st May 2001, certain kinds of readymade garments became liable to Central Excise duty. Even before that, on 2nd March 2001, the appellant had written a letter to the jurisdictional Supdt. informing that "we presume that we are exempt from the Central Excise duty". Subsequently, some correspondence took place between the parties. Finally on 16.7.2001, Excise officers visited the appellant's factory and seized readymade garments worth about Rs. 24 lakhs. On the same

day, the appellant deposited the duty in regard to the seized stock. Subsequently, show-cause notice dated 6th November 2001 was issued proposing confiscation of the seized stock and imposition of penalties. Rule 25 and 26 of Central Excise Act and Section 11AC of Central Excise Act were invoked. The appellant contested the proposals; but failed in adjudication. The Assistant Commissioner confiscated the goods under Rule 25 but gave the appellant an option to redeem them on payment of a fine of Rs. 5 lakhs. A penalty equivalent to the duty involved on the goods was also imposed under Rule 25 of Central Excise Rules read with Section 11AC of the Central Excise Act. A penalty of Rs. 20,000/- was imposed on Dinesh Gupta, Director of the appellant.

The matter was taken up before Commissioner (Appeals). The ld.Commissioner held that "no penalty is imposable upon the appellant No.1 under Section 11AC. However, penalty is imposable upon them under Rule 25." Penalty was reduced to Rs. 2 lakhs. The penalty on the Director was set aside. Thus, the only issue that survives for consideration in the present appeal is whether the penalty imposed on the appellant manufacturer under Rule 25 is sustainable. The impugned order is silent on the confiscation of seized goods. Therefore, the question is as to what is the position of confiscation and redemption fine.

4. The submission of the ld. Counsel is that the order is not sustainable in the light of the law laid down by the Hon'ble Supreme Court in the case of Amrit Foods v. CCE reported in 2005 (190) ELT 433 (SC). The contention of the ld. Counsel is that while dealing with the parallel provisions under Rule 173Q of Central Excise Rules, the Hon'ble Supreme Court ruled that, when a rule contained several clauses, the authorities must specify the clause under which the proceedings are taken and in the absence of such a specific reliance on a relevant sub-rule, the order is not sustainable. Specific reliance is made by the ld. Counsel on the following observations in the judgment: The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under Rule 173Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither the show-cause notice nor the order of the Commissioner specified which particular clause of Rule 173Q had been allegedly contravened by the appellant. We are of the view that the finding of the

Tribunal is correct. Rule 173Q contains six clauses the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of the 173Q. This not having been done the Tribunal's finding cannot be faulted. The appeal is, accordingly, dismissed with no order-as to costs.

5. The ld. Counsel would point out that Rule 25 is successor to Rule 173Q and that Rule contained four clauses, the contents of which are different, and neither the show-cause notices nor the adjudication and appeal orders specify the clause of the rule that is being relied upon.

It is being contended that in the absence of reliance been made on specific provisions, the assessee cannot make out what the case against him is and effectively raise. It is being pointed out that the appellate authority also cannot deal with the order in the absence of such specific reliance on a particular clause of the Rule.

6. The ld. Counsel also would point out that in the facts of the present case, no confiscation and imposition of penalty could be justified, inasmuch as the appellant had already written to the department stating its belief that tax is not attracted and if the department was of a different view, it should have informed the appellant accordingly directing it to take registration and pay duty.

No such action was taken by the department. Instead of belated action was taken to seize goods which were still lying in stock. The submission of the ld. Counsel is that Central Excise duty is payable on goods only at the time of their removal from the place of production and no assessee could be faulted for not paying duty on stock in hand.

7. The ld. DR would point out that the assessee is a large manufacturer and, therefore, would have been aware of the legal provisions and its failure to take registration and keep account could be treated only as part of an effort to evade payment of duty. He would also contend that since no registration had been taken, intention to evade payment of duty should be treated as established. He would also urge that the case he remanded with the direction to the lower authorities to

indicate the specific provision of rule which the department was relying upon.

8. The law on the requirement for specifying the particular provision in a rule remains settled by the judgment of the apex Court in the case of Amrit Foods. In the present case, penalty has been confirmed under Rule 25 of Central Excise Rule. That rule contains four clauses each contemplating a different situation, though Clause (d) is in relation to "any of the provisions of these rules" and thus, perhaps, covering even the rules attracted under the earlier clauses. It is basic to a legal proceeding that the respondent party be made aware of the charge against if so that it can understand the same and raise a valid defence. In the present case, authorities had proceeded under Section 11AC read with Rule 25. Section 11AC is attracted only when duty has not been paid. The Commissioner clearly held that that section is not attracted. Then the question arises, bereft of Section 11AC, what is the substance of the charge. Neither the notice, nor the order bring out the position, I may read the Commissioner's finding on penalty: Appellant No. 1 have taken the plea that penalty under Section 11AC is not imposable upon them as Show Cause !Notice was not issued under Section 11A(1) nor decided under Section 11A(2). I observe that in the instant case although the appellant No. 1 manufactured excisable goods without obtaining Central Excise registration but no Show Cause Notice raising demand of duty short paid, not paid or erroneously refunded was issued nor any demand has been confirmed under Section 11A(2). The Hon'ble Tribunal in the case of Dhillon Kool Drinks v. CCE has held that applicability of Section 11AC is dependent on the determination of the amount of duty liability under Section 11A(2), in the absence of such determination, no penalty can be imposed under Section 11AC. Therefore no penalty is imposable upon the appellant No. 1 under Section 11AC. However, penalty is imposable upon them under Rule 25.

Penalty imposed upon appellant No. 1 is reduced to Rs. 2 lacs from Rs. 3,91,015/-.

9. The above finding does not at all bring out which of the clauses in Rule 25 is guiding him in confirming the penalty. Specific Rule apart, the order also does not state as to what is the offence. Thus, the impugned order does not contain a clear

finding about the law violated and for that reason it cannot be sustained in view of the ruling contained in the judgment of the Hon'ble Supreme Court in the case of Amrit Foods case.

10. In the result appeal of the assessee succeeds and is allowed after setting aside the impugned order.

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