Commissioner of Central Excise Vs. Deepak Kumar JaIn and Deepak Kumar

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-31-2007

Reported in : (2007)(122)ECC340

Judge : R Abichandani

Appellant : Commissioner of Central Excise

Respondent : Deepak Kumar JaIn and Deepak Kumar

Judgement :

1. The Revenue has challenged the order of the Commissioner (Appeals) made on 9.6.2005 partially allowing the two appeals of the respondents.

2. The respondent No. 1 is the sole proprietary concern of the respondent No. 2. The respondent was engaged in the manufacture of gutka (pan masala containing tobacco). On 14.3.2001, the Central Excise Officers seized Deepak brand gutka weighing 6.995 kgs. involving Central Excise duty of Rs. 1434/-. In a follow up action, quantity of 10.50 kgs. of gutka was seized as it was lying unaccounted in the factory of the respondent. Gutka packets (paper pudiyas) weighing 17.860 kgs. were also seized. The sole proprietor of the respondent No.1 admitted the sale of gutka packets and deposited Rs. 25,875/- on 19.3.2001. He admitted that he had not paid any duty in respect of gutka in paper pudiyas and that no record was maintained in respect thereof. According to the Revenue, manufacture and clearance of sweet supari and clearance of raw tobacco from the premises of the respondent was never intimated to the department. On the basis of the material on

record, the adjudicating authority came to a finding that the assessee had shown production of gutka in statutory records much less than the actual production and cleared it without payment of excise duty. It was found that the assesee had willfully planned to show the manufacture of "sweet supari" from the betalnuts purchased from the market, even though, the assessee had no facility for manufacturing "sweet supari".

The assessee did not have machinery nor did he engage labour for the manufacture of "sweet supari". Even the essential ingredients required for manufacturing of sweet supari were not purchased. The department was never informed about the manufacture and sale of "sweet supari" and no permission for second set of sales invoices was obtained. Moreover, sales tax leviable on "sweet supari" was never paid and production of "sweet supari" was stopped from April 2001 soon after the seizure of gutka. Even though huge profits were shown during the years 1999-2000 and 2000-2001 from the sale of "sweet supari", the production of gutka had suddenly increased after the case was booked against the respondent. It was also found that the assessee had not willfully entered 198.50 kgs. in his books of accounts and had used the same in the manufacture of 'gutka'. It was found that the respondents had manipulated the books of accounts and shown the profit earned from 'gutka' as if it was profit earned from the manufacture and sale "sweet supari" and sale of raw tobacco as such. The adjudicating authority came to a finding that 2785.880 kgs. of 'gutka' valued at Rs. 5,77,176/- was cleared without payment of Central Excise duty amounting to Rs. 2,33,223/-. The said demand was, therefore, confirmed and penalty of like amount imposed on the assessee. The penalty of Rs. 5,000/- was separately imposed on the proprietor under Rule 209A of the Central Excise Rules 1944.

3. The Commissioner (Appeals) by observing that the department failed to put forth any corroborative evidence regarding "non-manufacturing" of "sweetened supari" and further use of the raw 'supari' in the manufacture of 'gutka', held that the charge of suppression of production and clandestine removal of gutka was not proved and, therefore, the respondent cannot be held liable to pay Central Excise duty.

4. The learned authorized representative for the department pointed out from the record that the Commissioner (Appeals) has not applied his mind to various contentions which were raised on behalf of the Revenue and has not even considered the factual aspects which indicated that the story about the manufacturing sweetened "supari" was a sheer concoction and a red herring to illicitly manufacture and remove gutka.

5. From the record it appears that the Commissioner (Appeals) has not properly appreciated the important facts and circumstances of the case and appears to have taken a lopsided view for holding that there was no corroborative evidence regarding non-manufacturing of sweet 'supari'.

The assertion regarding manufacture of sweet 'supari' was made by the respondent -assessee. Therefore, there was no question for the department to corroborate that fact which was required to be proved by the assessee. The Commissioner (Appeals) did not consider the impact of several circumstances on the assertion of the assessee that betalnut was used for manufacturing sweet 'supari' which did not attract duty.

The sole proprietor of the assessee did not even remember from whom he had purchased the raw material and the customers to whom he sold the final product sweetened 'supari'. The assessee had shown manufacture and sale of sweet 'supari' and clearance of raw tobacco from its premises under second set of invoices during the year 1999-2000 and 2000-2001 without informing the department about the manufacture of sweetened 'supari', which declaration was required to be made under Rule 173B of the Central Excise Rules, 1944. He also did not take note of the fact that on physical verification of the stock, no sweet 'supari' was found in the factory of the assessee. As against this, excess unaccounted stock of finished product 'gutka' as well as unaccounted stock of raw 'supari' were detected. It appears that the Commissioner (Appeals) did not appreciate the significance of the fact that during the year 2000-2001 the respondent - assessee has purchased 238.4 kgs. of tobacco from M/s Chhabra Trading Company but it had shown only 40 kg. in the statutory record and used the remaining 198.4 kgs.

of tobacco in the manufacture of 'gutka' which was alleged to be clandestinely removed; The Commissioner (Appeals) though seemingly aware of the contentions which are reproduced in the impugned order has omitted to appreciate the nature of evidence on record and based his finding mainly on the ground that the department did not produce corroborative evidence regarding the assessee not manufacturing sweet supari and for use of raw 'supari'. It was incumbent upon the Commissioner (Appeals) to take into consideration the reasoning given by the adjudicating authority and to give a finding on the question of clandestine removal of 'gutka' in the background of the facts established from the evidence on record. The matter is therefore, required to be considered and decided afresh by the Commissioner (Appeals). The impugned order is, therefore, set-aside and the matter is remanded to the Commissioner (Appeals) for considering it afresh and deciding the same in accordance with law, after hearing both the sides.

Both the appeals are accordingly allowed by way of remand.