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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-22-1990

Reported in : (1993)(66)ELT207TriDel

Appellant : Rubicon

Respondent : Collector of Central Excise

Judgement :

1. These appeals are directed against the common impugned Order C. No.V/16A/15/2/84-Cx. Adj. dated 26-2-1983 passed by the Collector of Central Excise, Cochin.

2. The first appellant Rubicon is a Partnership firm of which the appellants Nos. 2, 3 & 4 are the partners while the appellant No. 5 was an employee of the firm. The appellants are engaged in the manufacture of tread rubber, falling under the then Central Excise Tariff Item No.16(2) for the period covered under the impugned order. The Collector who adjudicated the proceedings originally passed an order dated 20-11-1986 demanding the duty amounting to Rs. 21,80,309.59 on the charge that the appellants had manufactured and removed goods for the period 1-4-1981 to 13-2-1984 contravening the provisions of excise law and accordingly penalties were also imposed on firm as well as on partners in addition to imposition of redemption fine. When the order was questioned by the appellants before the Tribunal on the point of denial of principles of natural justice, the Tribunal remanded the matter to the Adjudicating authority for reconsideration of the issue after affording the appellants an opportunity of cross-examination of the

witnesses sought for in their petition dated 12-5-1986. After giving an opportunity to the appellants and on consideration of the submissions and evidence the Collector passed this impugned order confirming the demand of Rs. 18,31,378.01. He has also confiscated the land, building, plant and machinery of the appellant's factory with an option for redemption fine of Rs. 25,000/-. Further he imposed a penalty of Rs. 2 lakhs on the appellant firm and a penalty of Rs. 25,000/- on each of the partners. In addition penalty of Rs. 5,000/- was imposed on employee (EC. Mathachan). Aggrieved by the impugned order the appellants have come second round before the Tribunal.

3. We have heard Sri C. Chidambaram, learned Consultant, for the appellants and Shri Parbhat Kumar, learned J.D.R. for the respondent.

4. The dispute relates to valuation, quantum of clearance in evading the duty for the period 81-82, 82-83 and 83-84 and consequently imposition of fine and penalties.

5. The Collector while determining the assessable value of the clearances made during the period in question has adopted the price at which the Rubicon Rubbers, Madras has resold the tread rubber purchased from appellant company (Rubicon, Thuruthy) as the assessable value and on that basis determined the duty liability on the ground both these were related. The contention of the appellant that Rubicon Rubber and Rubicon are distinct and separate entities were negatived by the Collector. Shri Chidambaram contended that they are separate legal entities as "Rubicon" is the Partnership concern where as "Rubicon Rubber" is the sole trading concern. Further he said that this issue is not relevant in this case in view of the fact that major portion of sales nearing 68% was to others who are not related persons and that approved price by the Department is the price at which the sales were made to those parties would constitute the basis for determination of the assessable value nd not the resale price of Rubicon Rubber. This aspect was not dealt with by the Collector in the impugned order though it was specifically taken by the appellants. Major sales was to totally unrelated persons at the price of Rs. 17 per Kg. for first quality and Rs. 10 per Kg. for second quality in respect of those sales which determines assessable value.

6. We concur with the appellants' counsel on this issue that Department was not justified in taking resale price of the alleged related person as basis in determining the assessable value when there was no dispute in respect of price of sales to independent persons during the relevant period. In the case of Indian Oxygen Ltd. v. Collector of Central Excise 1988 (36) E.L.T. 723 (S.C.), Supreme Court categorically held that since the ex-factory price is ascertainable, such ex-factory price shall be the basis for determination of value under Section 4 of the Central Excises and Salt Act and other charges from factory gate to the place of delivery cannot be added. Following the ratio of the decision we held that price of the sales to others (major portion) constitutes the assessable value and not the value adopted by the Department.

Accordingly, addition of differential value is to be deleted.

7. On the point of non-accountal production and clandestine removal Shri Chidambaram submitted that entire case has been built up solely on the basis of the statement recorded from one Shri Balan on 14-2-1984 and 17-2-1984 containing particulars of production allegedly by the appellant firm and cleared without payment of duty. Shri Balan was not an employee on the date of raid as he was suspended from the Company for indiscipline on 24-1-1984 which was much earlier to the date of inspection. In his first statement he described the aforesaid private account as one "Private Account Book" without mentioning that any of the partners had seen this private account or initialled it. But in subsequent statement the signature of partners particularly the signature of partner James John was introduced for the first time. Shri Chidambaram contended that statement and private accounts maintained by Shri Balan could not be relied upon as he was suspended employee and inimical towards appellant firm. Further the learned Consultant said that Collector erred in relying upon the private account without corroborated evidence and that too when the signature was in dispute without referring for the opinion of the handwriting expert inspite of specific request made by the appellants. Collector proceeded on the presumption that it was the signature of partner James John. In this connection Shri Chidambaram relied Upon the ratio of the decision in the case of Usha Micro Processors Controls Ltd., Faridabad v. Collector of Customs, New Delhi 1988 (10) ECR 23 and contended

that in terms of the ratio of the Supreme Court in the case of State of Delhi v. Pali Ram reported in AIR 1979 SC 14, the Adjudicating Authority could have at least effected a comparison of the disputed signature with the admitted signature in terms of Section 73 of the Evidence Act. Next he submitted that in cross-examination the said Balan has admitted that the figures reflected in the Register recovered from his possession where Department solely relied upon the private account seized from the said Balan but also gathered sufficient material evidence to prove clandestine removal and based on that corroborated evidence quantum of clandestine removal was determined. He drew our attention to the other evidence, charges and basis shown in the Show Cause Notice as well as in the finding of page 12 to 13 of the impugned order wherein it was stated that details of despatches which were shown from the railway parcel services, Alwaye as Annexure-II to the Show Cause Notice that these despatches were not accounted in the RG-1 register. Certain invoices seized from Southern Roadways, Perumbavoor and ABT Parcel Services, Perumbavoor have also been found unaccounted in the RG-1 Register. This piece of evidence was not countered with evidence except mere objecting that anybody can book goods in the name of any person as the Transport Agencies do not insist the real ownership. The production shown in the Workers Chart seized is tallying with the seized production and sales register. Further the clearance of tread rubber as per the seized production and sales register tallies with the Bank Transactions from SBT Perumbavoor and with invoices seized from the Parcel Agencies. JDR said that if there is minor discrepancy in arriving at the exact figure and calculations it does not absolve the liability of the appellants as it was substantially proved by the Department. Further the stand taken by Balan that seized registers and books contained the sale figures in respect of other units also was only an afterthought and however, the burden lies on the appellants to prove that Balan was working with the unit and particulars of production were inclusive of other unit also. He said that transaction cannot be proved with mathematical precision when it was concluded with sufficient material evidence that so much quantum was clandestinely removed the inferences arising from the circumstances had shifted the onus on the party to prove to the contrary. He relied upon the ratio of the decision of the Supreme Court in the case of Collector of Customs, Madras and Ors. v. D. Bhoormull

reported in 1983 (13) E.L.T. 1546 and said that the same ratio was followed by this Tribunal in the case of Poonam Plastic Industries v. Collector of Customs 1989 (39) E.L.T. 634.

He justified the imposition of fine and penalties in view of the fact that this case has been detected by the Department on search and duty was evaded to the extent of Rs. 18,31,3787-, 9. Shri Chidambaram while replying submitted that decision in the case of D. Bhoormull (supra) is not applicable to the facts of this case as that case had dealt with smuggled goods under Customs Act. Under Excise Law the burden lies squarely on the Department to prove non-accountal of production and clandestine removal of the goods. Further he pointed out that appellants' unit is small scale industry and was entitled to the benefit of exemption under Notification Nos. 80/80 dated 19-6-1980, 73/81 dated 25-3-1981 and 83/83 dated 1-3-1983 for the periods 81-82, 82-83 & 83-84. This exemption was allowed only for the year 83-84 under Notification No. 83/83 but the same was not considered by the Collector for the previous years under corresponding notifications. In respect of imposition of fine and penalties, he pointed out that after it was remanded from the Tribunal, while duty liability has been reduced from Rs. 21,80,309.59 to Rs. 18,31,378.01, instead of reducing the penalty proportionately Collector doubled the figure from Rs. 1,00,000/- to Rs. 2,00,000/- without any valid reason. Regarding imposition of penalty on partners, he contended that penalty under Rule 173Q on the appellant firm as well as on individual partners was not justified.

10. On a careful consideration of the submissions made by both sides, we observe that it is not the case of party that alleged private book maintained by Balan did not contain the production figures of the appellants' unit but that were inclusive of production particulars of the other units also, but it was not substantiated. Further on going through the impugned order and records the Department has not relied solely on the private account but it made use of the same with other corroborated evidence to determine the quantum. The partner of the appellant firm, K.F. Subas admitted as per his statement dated 25-2-1984 that the production of tread rubber is very much higher than the quantity shown in the seized production and sales registers maintained by the appellants under Excise law. The conclusion arrived at

by the Collector in determining the quantum of production based on numerous factors, viz., despatches and invoices seized from Transport Agencies not accounted in RG-1 Register production shown in the Workers Chart and other material evidences in addition to entries found in the private account seized from Balan. After going through these details as can be seen in page 13 of the impugned order, we do not find any infirmity on this issue in determining the quantum of stock not accounted and removed without payment of duty. However, on point of eligibility of benefit of exemption under respective notifications for the years 81-82 and 82-83, we do not find any valid reason for not allowing when it was granted for the year 83-84 under Notification No.83/83. Accordingly, the demand of duty has to be worked out modifying the order after extending the benefit of exemption for the previous years.

11. As regards imposition of fine and penalties in the view we have taken on point of valuation and applicability of exemption notification for the previous years, we feel that these penalties have to be reduced and modified proportionately. In the circumstances, we reduce penalty to Rs. 1,00,000/- as against imposition of penalty of Rs. 2,00,000/- on appellant firm. Redemption fine levied under Rule 173Q in lieu of confiscation of seized tread rubber is reduced to Rs. 2,000/- as against Rs. 4,000/-. We set aside redemption fine levied under Rule 173Q in lieu of confiscation of land, building, plant and machinery etc. used for manufacture and personal penalties levied on partners as well as on employee of the firm. The impugned order is modified accordingly.