

Modipon Ltd. Vs. Collector of Centrl Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-15-1996

Reported in : (1996)(84)ELT323TriDel

Appellant : Modipon Ltd.

Respondent : Collector of Centrl Excise

Judgement :

1. The appellants have challenged the confirmation of duty amount of Rs. 38,587.41 in respect of alleged clandestine removal of 52 cartons of Nylon filament yarn and polyester yarn. As a result of the allegations made in the show cause notice, the Collector has also imposed a penalty of Rs. 40,000/- under the various provisions of Central Excise Rules.

3. The short facts which lead to the proceedings are that the officers visited the appellants' factory on 26-9-1988 and checked stocks of finished excisable goods as also records maintained by the said unit.

It is stated in the show cause notice that stocks were found stored in 10 store rooms, the local Range Superintendent and his staff were also called to associate with the Officers of HP I Branch. The factory was working under physical control and they were said to have maintained EB-4 registers. The finished stock (including the finished production of 25-9-1988) was checked with the physically available stock in the Bonded Store Rooms by counting the number of cartons. As there was no uniformity of weight in the packages and as the stock in balance was

heavy, an average weight per package was taken on the basis of counting. It is stated in the show cause notice that this formula was agreed to by the assessee. However, this aspect of the matter is strongly disputed and the assessee in their reply have contended that they have never agreed for any basis for the purpose of counting. It is stated in the show cause notice that the factory expressed its inability to get the total weight of the stock in balance checked in view of the heavy stock in hand and in view of the shortage of man power on their part, as also involvement of lot of scriptory work in arriving at the weight of the packages in balance. It was found that stocks had been duly packed in cartons but godownwise stock cards were not available with the unit. The stocks were counted on three occasions. On the first occasion it was found 9 cartons of nylon filament yarn weighting 172.8 kgs in excess; on second count it was found short by 35 cartons of nylon filament yarn (Textured) weighting 476.0 kgs. On third occasion it was found short by 8 cartons of polyester yarn weighting 204.8 kgs. It is also stated that counting was done on three occasions. On the first occasion, the officers found 9 cartons in excess. On the second occasion they had found 72 cartons to be short, while on the third occasion they have found 52 cartons to be short. Hence, by the show cause notice it has been alleged that these quantity of goods are said to have been cleared clandestinely and they were called upon to show cause as to why they should not be penalised and duty demanded. The statement of one Shri K.O. Kaushik, Law Officer had been recorded who had categorically stated that in his opinion there should not be any shortage in godowns that they would examine and submit a detailed explanation. On the very next day of the counting done by the department, the appellants had sent a detailed letter dated 28th September, 1988. In this letter they asked for the copies of the calculation sheets and other notings made by the raiding team godownwise in respect of three counts to enable them to verify at their end and to satisfy the officers as to whether there was any shortage.

The officers did not advert to this letter sent immediately on the next date of the counting done by the raiding team. However, the show cause notice was issued without reference to this letter. Therefore, in the reply to the show cause notice they have raised several contentions and, inter alia, it has been submitted by them that the officers had taken an arbitrary weight per cartons of each of the variety.

They have submitted that an idea of total quantum of stock, even assuming that the average weight per carton of various cartons is correct, can be had which is 5548 cartons + 19.2 kg. per carton + 9734 cartons x 13.6 kg.

per carton + 6720 cartons x 25.6 kg. per cartons = 4,10,936 kgs. On the basis of this calculation, they stated that there was absolutely no physical weightment done of so much of quantity of the product in the limited time when the so-called physical verification was carried out, They have categorically denied that the average weight taken per carton for each of the variety is in any way an acceptable approximation of the weight per carton. Therefore, they submitted that the figure arrived at is arbitrary figure. They have not agreed for any formula as alleged in the show cause notice. They have also stated that they were not given an calculation sheets which they had demanded by their letter dated 28-9-1988. They had brought out various defences in their reply to counter the allegations of clandestine removal. The reply is of 11 pages. The Learned Collector has given a brief finding and has not given any finding on these issues raised by the appellants in reply to the show cause notice. The Learned Collector has held in para 9 that: "It is understood that when the counting was done three times as submitted by the party in their defence reply dated 25-6-1989 and difference came out, why they did not try to reconcile the discrepancy by again recounting their stock. Therefore, the allegations made by the Central Excise Department, that 52 cartons were found short which had been alleged to have been removed clandestinely is proved. Moreover the contention of the party that they did not agree to average weight taken during physical verification is not acceptable when their authorised signatory had signed the verification chart showing the discrepancy in the stock and physical shortage of 52 cartons. Here firstly the question arose whether there was shortage of 52 cartons proved and which were counted many times, then only the question of average weight would arise. I thus find that there was actual shortage of 52 cartons of aforesaid varieties and the allegation to this effect is proved." 4. I have heard the Learned Advocate, Ms. Malini Sood for the appellants and the Learned SDR, Shri P. Dass for the Revenue.

5. At the outset, the Learned Advocate submitted that the unit is under physical control and that the officers have been posted on duty round the clock for the

purpose of supervision, checking and also for verifying both the entry and stock registers and removal of the goods.

It is the contention of the Learned Advocate that the Collector ought to have given a detailed finding to various submissions raised by them in their reply to the show cause notice. However, the same has been brushed aside, without given any reasoning and hence the order is unsustainable on this count itself. The Learned Advocate pointed out that there has been excess stock found on first counting and on other two occasions figures did not tally. The assessee had protested and also had not agreed to the average method adopted by them. They had asked for the calculation sheets on the very next day and the department has failed to supply and also prove the burden of clandestine removal, which is on them as the factory is in their physical control. Therefore, the Learned Collector has wrongly come to the conclusion that the party has failed to reconcile the discrepancy.

She has also pointed out to that the stocks have been stored in 10 store room and it was not an easy task to have carried out the checking and the manner in which the departmental officials have proceeded hastily, shows that this shortage could be only a calculation mistake.

The Learned Advocate also pointed that there has been no instance against them of any charge of any wrongful or clandestine removal and that the assessee are paying 60 to 70 crores of duty per annum. She also relied on the ratio of the following judgments on the proposition that the department has to prove clandestine removal and mere shortage of physical stock without evidence is no ground to confirm duty. *Leather Chemicals & Industries Ltd. v. Collector of Central Excise* *Ashwin Vanaspati Industries Pvt. Ltd. v. Collector of Central Excise* 6. The Learned Counsel submitted that they had taken stock for subsequent years and during each year they had found 52 cartons in excess. Such calculation sheets were produced to the department and the copies have been annexed along with the appeal memo. It is her contention that despite these excess of 52 cartons found being brought to the notice of the department yet the Learned Collector has not considered these plea and not referred to it in his finding.

7. The Learned DR submitted that the appellants had been supplied with the calculation sheet along with a covering letter, by the Deputy Collector on 26-5-1989, much after the date of issue of show cause notice. On this point the Learned Advocate submitted that what was given was a consolidated stock figure but not the calculation sheet and work sheet on which the company representative had applied his signature on the sheets.

8. The Learned DR further submitted that the physical control of a unit does not mean that all the actions of the assessee are required to be controlled and checked. The officers on duty are required only to check the daily entries in the stock registers and the removals made and they are not required to remain at the gate all the time to supervise the clandestine removals. It is his contention that it was in the knowledge of the law officer and this physical stock was verified in the presence of literate staff and the shortage of goods would only lead to an inference that there has been a clandestine removal with an intention to evade duty. He submitted that the assessee should have carried out the checking on their own and should have produced their own results and having not done so, to dispute at a later stage that the average counting done by the department is not acceptable. Therefore, he submitted that the finding arrived at by the Learned Collector is required to be sustained. He submitted that the citations are all distinguishable as in those cases the department had not been able to show the details of raw materials said to have been used in the manufacture of the goods while in the present case the production details have been recorded in the stock registers.

9. I have carefully considered the submissions made by both the sides and have perused the records. The Law Officer while giving the statement had categorically stated that in his opinion there should not be any shortage in the godown. He had further stated that he will have to examine the matter and would submit a detailed explanation. On the very next date the assessee had sent a detailed letter asking the department to give copies of calculation sheets and other notings made by the team godownwise, to enable them to examine the matter. However, this is not furnished till date.

10. The Learned DR pointed out to the letter of the Deputy Collector dt. 26-5-1989 enclosing an Annexure. This Annexure merely gives the figures godownwise in respect of each items. This is contested to by the party and it is argued that they have not been furnished with calculation sheets on which their officials had put their initials.

This issue has not been dealt with by the Learned Collector in his order. The show cause notice alleges that as the stocks were very heavy and it was not possible at that stage to take the total weight of the stock in balance, in view of the heavy stock in hand and in view of the shortage of manpower on their part, therefore, they adopted some short cut basis for taking the verification of the stock. This aspect has been contested very vehemently by the assessee in their reply to the show cause notice stating that they never agreed for any short method of taking weighting of the stock and they have given their own detailed work out on their average basis, and contested the basis on which the department has proceeded. They have stated that if their procedure is adopted it would give a correct calculation and the stocks would be to an extent of 4,10,936 kgs. This would result in stocks being in order.

This is a very crucial point raised by the assessee, which was bond to have been looked into by the Learned Collector. However, I notice that the Learned Collector has not dealt with this point also. The assessee has also raised several pleas in their reply at pages 3 to pages 11 of the reply to the show cause notice. It is noticed that none of these contentions has been adverted to by the Learned Collector. The finding arrived at by the Learned Collector is arbitrary and without due application of mind. In cases where serious allegations of clandestine removal is made, it is incumbent on the officials making such an allegations to proceed on strong basis and on the basis of reliable, cogent and verifiable evidence. In this case no statement of any person has been recorded. On the first count they have found excess, on the second count they have found shortage of 79 and on the third count there is a shortage of 52 cartons. The inference that can be drawn from this, is that the counting procedure itself is defective and invalid.

It could be said that the said officials who were counting the cartons might have missed while counting on one occasion or might have taken more on another occasion. Therefore, this could be only an error resulting in excess at one time or shortage during second time and during the third count still less shortage was noticed. Therefore in circumstances where there are inaccurate figures arriving at each and every count, the department should have proceeded on some other basis, other than on mere counting figures. The department has not adopted any reliable method in the present case and no material is on record to show that there has been any clandestine removal. The assessee had raised serious objections pertaining to the averaging method adopted by the department. This has been brushed aside by the department and no reply to this has been given to them till after the issue of show cause notice. Therefore, a doubt arises as to whether the figures given to them along with the letter dated 26-5-1989 is the real working sheet.

The contention of the assessee is that the working sheets were taken godownwise and the signatures of their officer was taken on those sheets. In the absence of those sheet being made available to the assessee and the same not being made available also before me, therefore, it is not possible to come to a definite conclusion that the figure of shortage arrived at, is a correct figure and conclusive evidence, to hold that there has been clandestine removal. The factor that the assessee has been paying Rs. 60 to 70 crores duty per annum and that there has been no case of clandestine removal and that they are under physically controlled cannot be brushed aside so easily especially in absence of any corroborative evidence placed by the department. At best, the conclusion that can be arrived at is that while counting stock of 22,000 cartons in 10 godowns: Some arithmetical, or clerical or human error might have arisen while stock counting, and shortage may be due to that only. Therefore, I am not inclined to accept the finding arrived at by the Learned Collector in view of lack of cogent, clear and acceptable evidence on record. There is no clear finding given by the Learned Collector. In the present case the Learned Collector has also not given any finding to impose penalty of Rs. 40,000/-. I also notice from the cited rulings that the Tribunal has been taking a consistent view that onus of prove of clandestine removal is on the department in cases of physical control, that proof is lacking in the present case.

11. In that view of the matter, the impugned order is set aside and the appeal is allowed.

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