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Siemens Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-16-1999

Reported in : (1999)LC229Tri(Mum.)bai

Appellant : Siemens Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. These two Appeals E/207/95-Bom & E/208/95-Bom have been filed by the assessees appellants against the decision of Collector of Central Excise & Customs (Appeals) made in Order-in-Appeal Nos. A-419/94 & E/A-417/94 issued on 7-12-1994 confirming the orders passed by the Additional Collector of Central Excise & Customs, Nasik.

2. Issue involved in these both appeals are whether the assessee can plead limitation in terms of provisions of Rule 57-1 (as it then stood) knowingly the time to reckon from the date of such credit and not the time which has been calculated by the lower authorities.

3. The assessee appellants are engaged in the manufacture of excisable goods falling under Chapters 84, 85 & 90 of the Schedule to the Central Excise Tariff Act, 1985. They were availing Modvat credit facility the appellants it would appear, filed declaration from time to time under Rule 57G to enable the appellants to avail credit of duty paid on the inputs used in the manufacture of the final products. In 1988 Rule 57-1 of the Central Excise Rules, there was amended to enable them

assessing officers to recover credit wrongly availed of within six months from the date of such credit availed of. This Rule 57-1 in 1995 was amended so as to read that the assessing officer could recover the amount wrongly availed of credit within six months from the last date on which Rule 57-1 is written is to be filed under the returns under RT12. We are not concerned with the provisions of rules contained in Rule 57-1 after amendments made in 1995. In these two cases we are concerned with the rules as it stood from 6-10-1988. The assessees case is that the show cause notice issued in this case did not invoke the provisions of Section 11A of the Central Excise Act at all. It only states that why the credit wrongly availed of could not be disallowed. The two lower authorities in these cases have sought to justify the demand on the ground that they were the assessment made provisionally, therefore seeking recourse to Section 11A of the Act was right.

4. Shri Prakash Shah, the ld. Counsel with his lucid and clear arguments invited my attention to the legislative history of Rule 57-1.

He stated two prepositions before me :- Firstly he states that the rule as it amended in 6-10-1988 reckons the time limit as six months from the date of availing of suchrredit here the credit has been availed in May 1990 and July 1990. The show cause notices have been issued on in one case i.e. in Appeal E/207/95-Bom on 4-2-1991 and in Appeal E/208/95-Bom on 30-11-1990.

He contends therefore that both the show cause notices were time barred because they were not issued within six months for availing of the credit: That if the department's case is that it is provisional assessment the department's case has to fail because a show cause notice did not proceed on that basis and without finalising of the provisional assessment in any event demand could not have been made.

5. I have considered the interesting rival submissions made by both parties. After considering the rival submissions I am of the view that I have to agree with Shri Prakash Shah in one case namely they take Appeal No. E/207/95 credit was availed of in July 1990, show cause notice has been issued on 4-2-1991 in (E/208/95-Bom) credit was availed at serial Nos. 2, 3, & 4 on May 1990 and show cause notice has been issued on 30-11-1990. The six months time indicated on

the rule has been elapsed. The rule as it stood in 1998 reads that where the credit of duty paid on inputs has been taken on account of an error, comission or misconstruction, on the part of the officer or a manufacturer or an assessee the proper officer may within six months from the date of such credit, serve notice on the manufacturer or the assessee who has taken such credit requiring price to show cause why he should not be disallowed such. In this case the notice has been issued credit admittedly after expiry of six months time had already expired.

6. I have to deal with the argument of ld. JDR. In the impugned order, the Collector had gone into the considering of the nature of the obligations whether it is criminal or civil and relied on the judgment of the Supreme Court in the case of Gujarat Travancore Agency v.Commissioner of Income Tax - 1989 (42) E.L.T. 350. In my view the Collector has himself erred in law and facts in seeking to recourse to nature of the penalty proceedings. Show cause notice did not proceed on these basis. They did not speak of nature of the proceedings they only sought to recover modvat credit wrongly availed of. The limitation is one of the important factors which the assessing authority has to look into this point which has been lost sight of.

7. One more point needs mentioned here. Shri Prakash Shah argued before me, in both the cases where provisional assessment have only been made.

Therefore the department had power to recover wrong availment of credit only when the final assessments are made. It is a correct argument I afraid the assessing authority lost sight of the fact that the demand cannot be made unless the liability has been crystallised. A demand is only a preliminary step before assessment. After assessment becomes the final stage the liability of the assessee is crystallised or formalised after observing the rules of natural justice. The department has issued a notice in these cases knowingly the basis of provisional assessment.

It does not speak any words of the finalising assessment, I am therefore of the view that argument of Shri Patwari has to be accepted in this case. I therefore set aside the impugned orders and allow the appeals of the assessees with consequential relief.

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