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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-06-2000

Reported in : (2001)(74)ECC193

Judge : A T V.K., P Chacko

Appellant : Jay YushIn Ltd.

Respondent : Cce

Judgement :

1. The appeal has been filed by M/s Jay Yushin Ltd. being aggrieved with the Order-in-Original No. 38/98 dated 31.12.98 passed by the Commissioner Central Excise, Delhi-III, confirming the demand of Rs. 55,91,225 and imposing a penalty of equal amount Under Section 11AC of the Central Excise Act, holding that the cost of the component, received by them free of cost and used in the manufacture of final product, should be included in the assessable value of the final product.

2. We heard Shri A.R. Madhav Rao, Ld. Advocate for the appellant and Shri Sanjeev Srivastava, Ld. D.R. for the Revenue. The Larger Bench of the Tribunal on a reference made vide Misc. Order No. 26/2000 A dated 11.5.2000, has answered the reference as under: (a) Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme.

(b) Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence.

(c) With particular reference to modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods.

(d) We express our opinion in favour of the view taken in the case of M/s International Auto Products (P) Ltd. (supra) and endorse the proposition that once an assessee has chosen to pay duty, he has take (sic) all the consequences of payment of duty.

3. The Larger Bench also held that "to the extent the appellants had stated in their price list declaration that no extra consideration had been received from the suppliers of the components despite the known fact that the said components were received free of cost, the allegation of suppression of facts in terms of the proviso to Section 11A(1) has to be held to have been established; that there will be no illegality in invoking the extended period of limitation Under Section 11A(1) in a case like this ." Accordingly the demand of duty amounting to Rs. 55,91,225 confirmed in the impugned Order Under Section 11A(1) of the Central Excise Act by invoking extended period of limitation is upheld.4. Shri Madhav Rao, Ld. Advocate submitted that the Appellate Tribunal, in the case of Escorts JCB Ltd. v. C.C.E., New Delhi 1999(35) RLT 9(CEGAT) has held that "the limit fixed therein (Section 11AC of the AC) is the maximum limit and it is not mandatory that in all cases maximum should imposed as penalty. Authority is having a discretion to impose lesser penalty", that the decision has been followed by the Tribunal in the cases of T.T.K Prestige Ltd. v C.C.E., Bangalore 2000(38) RLT 312 (CEGAT) and Agriculture Equipment Co. v. C.C.E., New Delhi 1999(35) RLT 317(CEGAT). He also relied upon the decision in International Auto Products (P) Ltd. v. CCE, Jamshedpur 1999(35) RLT 58(CEGAT) wherein the amount of penalty was reduced in similar facts.

On the other hand, Shri S. Srivastava, Ld D.R. has emphasised that the facts in all the cases relied upon by the Ld. Advocate are different from the facts in the matter before us; that the quantum of penalty depends on the gravity of offence committed by the assessee; that in the cases relied upon by the appellants, the situation was not found to be grave and accordingly the amount of penalty was reduced; that in the case of Escorts JCB, (Supra) there was only misdeclaration and fact of insurance was suppressed and no other benefit was derived by the manufacturer; that in Agriculture Equipment case, the penalty was reduced taking into consideration the entire facts and circumstances of the case and the cooperation extended by the appellants to the authorities. The Ld. D.R. had also mentioned that the Larger Bench has held in their own case, on reference, that the provision of Section 11AC are applicable; that the assessee was aware of the fact that cost of the material was includible in present case in view of the Supreme Court decision in Ujagar Prints case; that the duty short paid was Rs. 55.91 lakhs; that the modvat credit availed of was utilised to pay duty on other products and accordingly there was a deliberate attempt on the part of the appellants.

5. We have considered the submission of both the sides. The penalty is certainly imposable on the appellants as the goods were cleared without payment of proper duty. The appellants have taken a plea that since the components were supplied free of cost, they were under the bona fide belief that the cost of such items was not to be taken into account.

They have also paid the entire duty involved on 8.7.97, on being informed of the position by the Department. Thus following the ratio of the decisions relied upon by the learned Advocate for the appellants, we are of the view that ends of justice will meet if the appellants are ordered to pay a penalty of Rs. 30 lakhs only. We order accordingly.

But for this modification, the appeal is rejected.

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