M.J. Electricals Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-22-2000

Reported in : (2001)(95)LC142Tri(Mum.)bai

Judge : J S Murthy

Appellant : M.J. Electricals

Respondent : Cce

Advocate for Pet/Ap. : Shri. D.H. Shah

Judgement :

1. This is an appeal filed by the above appellant against the above captioned Impugned order dated 18.3.1999 praying for quashing and setting aside the same, and to hold Rs. 59082.87 was correctly debited in RG23A Part II and necessary credit may be given, and it should not be recovered, and for any other order deemed fit.

1. The brief facts are appellant manufacturing P.D. Pumps under chapter heading 8410.17, 8503.00, 8513.00, 8501.00 of Tariff Act 1985, under Central Excise License Registration No. 25/EM/71. It has utilised the balance credit of Rs. 59082.87 on 19.2.1989, which equally stands lapsed as on 1.4.1987 under Notification No. 84/87 dated 31.3.1987 in RG23A Part II (Modvat account) and violated Rule 56A(2) of Central Excise Rules. Superintendent Central Excise Range VIII Division issued show cause notice on 5.4.1989 to show cause why it

should not be recovered or reversed from the appellant, under Section 11A of Central Excise Act. Appellant replied it on 2.6.1989. He did not appear for Personal Hearing held on from 19.8.1991 to 29.11.1994 for 6 times. On going through the available material on record, Asstt. Commissioner adjudication Central Excise, Divn. VIII ordered for reversal/recovery of credit of Rs. 59082.87 on 5.12.1994, deciding the issue of availment and utilisation of Proforma Credit on inputs, on the admission in the reply to show cause notice and appellant has not stated or substantiated with documents that the above duty demanded was for final product of inputs or raw materials of the accumulated credit balance.

In the appeal preferred by appellant, Commissioner (Appeals) has confirmed the above order in the Impugned order holding that the credit available was lapsed on 1.4.1987 under notification No. 84/87 dt.

31.3.1987 in the statutory books and it cannot be resurrected by whatever means, as admitted by appellant. Case laws cited are distinguished on facts, the appellant's claim is non existing credit, case laws talk about different situations for which some reason or other, assessee may not have been able to utilise the credit, and mere technicality should not come in the way of claiming genuine credit available. Hence this appeal.

2. Shri. D.H. Shah, learned Counsel for appellant has argued. In E/398/89-A demand was for Rs. 1,19,396.76 Ps. It was dismissed under Rule 20 of Cegat procedure Rules on 12.8.1997. Proforma Credit was availed prior to 31.3.1986. Balance in RG23 Part II of Rs. 59082.87 was debited in modvat account, along with stay order amount. By RT12 return, department has come to know of it. It should have lapsed. For wrongful availment of Modvat Credit, no show cause notice was initiated. It was only a paper entry. Stay order is silent about debited towards pre-deposit amount. No question of reversal. Order in original cannot be obeyed. Rs. 59082.87 is not debited towards duty demand, which is already realised by department. There is no proper appreciation in appeal. The learned JDR has argued that, there is debit entry, and amount was utilised, and liable to pay excess.

3. Point for consideration is whether there are sufficient and satisfactory grounds to disturb the impugned order. My finding is in the affirmative.

4. Perused the show cause dated 5.4.1989, according to which only contravention of R56A(2) of Central Excise Rules is alleged on the ground appellant has utilised balance credit of Rs. 59082.87 Ps. on 19.2.1989, which was actually stands lapsed on 1.4.1987 as per notification No. 84/87 dated 31.3.1987, which is a wrong proforma credit and misused for the payment of Rs. 1,19,396.76 demanded under the show cause notice dated 16.12.1987 by the range Superintendent confirmed by Collector (Appeals) on 23.10.1989 by the appellate order.

The goods manufactured was not covered by benefit under Rule 56A of Central Excise Rules. The appellant's reply in that regard is dated 2.6.1989, the above facts are reiterated. There is a clear admission that from 1.4.1987, appellant is not eligible for benefit1 of Rule 56A, as goods manufactured are no more covered under the said Rule. Proforma credit available cannot be availed for duty payment on goods cleared after 31.3.1987. There is a denial that Notification No. 84/87 bars the availment and utilisation of balance amount of Proforma credit standing as on 31.3.1987, on the ground it lapsed. It is not provided in the above notification (as to lapsing of balance at credit). There is no bar under any Rule or provision that it cannot be utilised to pay the Excise duty on the goods, manufactured and cleared before 31.3.1987.

Department demanded the duty on the goods manufactured in the year 1986-87 i.e. up to 31.3.1987, of Rs. 1,11,724.00 and for the part of the year 1987-88 of Rs. 7622.66, Rs. 59082.87 is debited to pay the Excise duty, payable on the goods manufactured before 1.4.1987 and proforma credit was duly allowed and, amount standing in the account as on 31.3.1987 is deemed to have been lawfully utilised before 31.3.1987, although it was debited on 19.2.1989. It is an established law that when exemption from payment of duty is withdrawn, goods manufactured within the withdrawal date are eligible for benefit of exemption, though cleared after that date. On the above dates, order-in-original is passed as observed above. The appellant has never appeared in the 6 personal hearing given, and substantiated his stand. The lacunae pointed out in the order-in-original is not met

with by the appellant.

No reason is forthcoming for this omission even now. Infringement of R56A(2) is upheld. The appellant has not taken any stand in the reply to show cause notice which is developed in the later stage.

5. Before Commissioner (Appeals) the appellant appeared and filed written submission on 7.12.1998, where in page 2 he has stated that -"after obtaining the stay order by Tribunal by pre-depositing of Rs. 25,000/- for the recovery of Rs. 1,19,396.76 appellant also debited Rs. 59082.87 lying in the balance as on 31.3.1987 in their RG23A II account, against the said duty, on 19.2.1989, which was not accepted by the department". The appellant has not submitted anything about it before Tribunal, and naturally it was subsequent to passing of stay order, and did not arise for consideration. The contention in the written submission that the ground on which order-in-original was passed, was not raised in show cause notice is not correct as both show cause notice and appellant's reply reflects it as observed in Para 4.

When the debit entry was made long after 31.3.1987 i.e. on 18.2.1989, appellant had to establish, as observed by Assistant Commissioner in the order-in-original. No presumption can arise in that regard. There was no say of appellant before him by his reply or oral submission that debit of Rs. 59082.87 was not accepted by department. So also before Tribunal in the stay stage.

6. Fifth Proviso to Rule 56A(2) is relied on in support of the above debit entry to pay the duty amount Rs. 1,19,396.76, contemplating that the said action is an adjustment, on the ground of subsequent variation of duty due to any reason, which neither Superintendent, nor Assistant Commissioner can disallow such adjustment, which is contrary in Rule 56A. in the case of CCE, Bhubaneswar v. Orient Paper Mills is relied on, squarely covering this case. It is also contended that demand of Rs. 59082.87 is already covered in Rs. 119396.76, confirmed by Commissioner (Appeals), which was stayed by the Tribunal, on pre-deposit of Rs. 25000/-. Separate demand does not arise.

Substitute right of appellant under Rule 56A cannot be taken away by the department. Debit entry is proper, and credit may be permitted to be raised. The appellant was heard by Commissioner (Appeals), and Impugned order as above is passed.

7. From the arguments of both sides, and the material available in record, it is seen that Rs. 59082.87 is a part of earlier demand of Rs. 1,19,396.76, confirmed by Commissioner is not in dispute. Apart from complying stay order, appellant has voluntarily has debited the amount.

The effect of Notification No. 84/87 dated 31.3.1987 as to lapsing of the credit in balance on that date is under dispute. Both the lower authorities have not considered this aspect. Apart from that there is a lacunae of documentary evidence showing that Rs. 59082.87 demanded was for final product of the inputs or raw material of the accumulated credit balance, which is based on show cause notice allegations, reiterated by appellant in his reply as observed above. Applicability of R56A(2) and 5th proviso thereunder is also required to be considered in this case by Commissioner (Appeals). There is also controversy whether debit entry made is only a paper-entry or it is availed and utilised by the appellant. Both on facts and law orders of lower authorities cannot be maintained. So under these circumstances, the entire case has to be looked afresh in the light of the aforesaid reasons by Assistant Commissioner. There are no sufficient material available on record to uphold the appellant's case. Effect of Notification No. 84/87 dated 31.3.1987, applicability of R56(A)(2) 5th proviso and , which is contended to be squarely applicable to this case, and the nature of debit entry made, and the factual aspect as pointed out above has to be dealt with in detail.

Hence I Pass the following order, answering the question raised in Para 3 in the affirmative.

8. For the reasons discussed above, the appeal is allowed, and remanded (to) the Asstt. Commissioner to allow the appellant to produce the evidence, as observed in the order-in-original and hear the appellant and dispose-off the appeal according to law, dealing the above points in Para 5 to 7 of the order. Impugned order is set aside.