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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Aug-24-2001

Reported in : (2001)(77)ECC644

Appellant : Stellar Chemical Laboratories

Respondent : Stellar Chemical Laboratories

Judgement :
1. M/s. Stellar Chemicals Laboratories Pvt. Ltd. manufactures drugs. On a surprise visit the officers found that goods valued at Rs. 16,09,695/- had been cleared by them under cover of seven invoices showing payment of duty amounting to Rs. 2,89,745.10; but that debit entries had not been made either in the PLA or in the modvat registers namely RG23A, Part-II, RG-23C, Part II. Show cause notice was issued seeking recovery of the duty under Rule 292 read with Section 11A of the Central Excise Act, 1944. Imposition of penalty was alleged under Section 11AC as well as under Rule 173Q(1). Before the Joint Commissioner it was claimed that the person who wrote the excise register was not available and a substitute was posted in his place and this substitute was not clear about the making entries in the register and therefore had kept loose leaf accounts to be subsequently incorporated. These accounts were also shown to the visiting officers.

It was claimed that the case did not involve any los of revenue inasmuch as at the time of RT12 assessments the officers would have realised the mistake and would have taken corrective action. It was claimed that the entire issue was owing to inadvertence. The joint Commissioner confirmed the duty and also imposed

penalty under both the provisions as alleged.

2. The assessee then filed an appeal. The Commissioner (Appeals) disposed off the appeal in the following manner: "I have gone through the appeal records and considered the submissions made by the appellants in their appeal memorandum and also submissions made during the course of personal hearing. The short point for my consideration is whether penalty imposed under Section 11AC on the appellants and under Rule 209A of Central Excise Rules, on the employee of the appellant, is justified or not.

"It is observed that the appellants had removed the excisable goods under different invoices showing all the details like description of goods, quantity, rate of duty, amount of duty, entry No. of RG-23A Part II and name of consignee. The entries of production and clearance of the goods have also been made in RG1 Register. There was also sufficient balance in RG23A Part II A/cs and PLA. The appellants had also debited the duty voluntarily before issue of SCN. Thus, it is observed that there was no malafide intention on the part of the appellants to evade payment of duty. Therefore, there is no justification to impose penalty under Section 11AC of the Act, 1944.

"However, it is observed that the appellants had contravened the provisions of Rule 9(1) read with Rule 173F inasmcuh as they had removed the goods without making debit entry in the RG23A Pt. II accounts. Therefore, the penalty under Rule 173Q is justified." 3. Against this finding of the Commissioner (Appeals) the assessee has filed appeal No. E/299/2001. The prayer made is that the Commissioner (Appeals) should have remitted the penalty under Rule 173Q also. The Commissioner of Central Excise & Customs, Vadodara has filed the appeal E/742/2001 against the same judgment claiming that the Commissioner (Appeals) should have imposed penalty under Section 11AC also. It has been claimed that levy of penalty under the aforesaid Section is mandatory in the light of the language thereof. Against this appeal the assessee have filed cross-objection bearing No. E/CO-86/2001.

4. In appeal E/219/2001 the assessee have filed an application No.E/Stay-249/2001 for waiver of pre-deposit. Both the appeals and the cross-objection are

taken up for disposal after granting waiver of pre-deposit of the penalty under Rule 173Q as prayed for.

5. As regards the Revenue's appeal, the assertion that penalty was mandatory under Section 11AC, I find the Tribunal judgment in the cae of Escorts JCB Ltd. Vs. CCE, New Delhi 1999 (35) RLT 9 to be relevant.

In this judgment the Tribunal held that the limit fixed in Section 11AC was the maximum limit and that it was not mandatory that in all the cases the maximum alone should be imposed. Thus the sole ground made in the appeal from the Revenue is without any basis.

7. As regards the appeal from the assessee, Shri Patel relies upon the Tribunal judgment in the case of Kellner Pharmaceuticals Ltd. Vs. CCE 1985 (20) ELT 80 wherein under identical circumstances penalty under Rule 173Q was held as not imposable. The ratio of the judgment applies to the present case in view of the fact that at all times there sufficient balance in their RG-23 accounts. The judgment reproduced in 1984 (18) ELT 238 is also material inasmuch as the offence of the present assessee was a minor irregularity.

8. I have extracted the above finding of the Commissioner (Appeals) where he has absolved the assessee on any mala fide. In that circumstances there is no case for him to sustain the penalty imposed under Rule 173Q. His order is set aside.

9. The assessee's appeal is allowed and the Revenue's appeal dismissal.

The cross-objection also stands disposed off.