

S. Kumar Leatherites Vs. Commissioner of Central Excise,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-10-2002

Reported in : (2002)(140)ELT521TriDel

Judge : B T K.K.

Appellant : S. Kumar Leatherites

Respondent : Commissioner of Central Excise,

Judgement :

1. The appellants manufacture textile fabrics, impregnated coated covered or laminated with PVC, falling under chapter sub-heading 5903.10. They are also availing Modvat credit under Rule 57A of the Central Excise Rules, 1944. Their premises were visited by the Officers of Anti-Evasion, Central Excise Commissionerate, Jaipur-I on 6-10-97.

On verification of the records and on taking the stock of the raw materials and the end products, it was found that a total 1,977 meters of PVC coated fabric were short as against the recorded balance in RG-1 register. These goods were valued at Rs. 88,965/- involving the Central Excise duty of Rs. 20,462/-. Similarly, on stock verification of modvatable inputs, a shortage of 3360 kgs PVC resin, 400 kgs of DOP and 2025 kgs of Benzoplast were noticed as against the recorded balance of these items in their RG-23A Part I account. All these inputs found short were valued at Rs. 3,57,798/- involving credit of Rs. 72,310/-.

The statement of Shri Lallan Singh, General Manager of the party was recorded on 6-10-97 wherein he admitted the shortages as mentioned above. He, further, deposed in his statement that the shortage of finished goods was due to less recording of quantity so despatched and the shortage in raw material occurred due to receipt of less quantity in the factory premises. The party voluntarily reversed the excess Modvat credit amounting to Rs. 72,310/- in their RG-23A Part I on the same date.

2. A show cause notice dt. 21-6-99 was issued to the party in which they were called upon to show cause why the Central Excise duty of Rs. 20,462/- should not be recovered from them in respect of the finished goods found short under the proviso to Section 11A(1) of the Central Excise Act, 1944 read with Rule 9(2) of the Central Excise Rules, 1944 and why a penalty should not be imposed on them under Rules 9(2), 173Q and 226 of the Central Excise Rules, 1944. They were also called upon to show cause why a penalty equal to the duty should not be imposed on them under Section 11AC. In respect of the inputs material found short, they were called upon to show cause why the amount of Rs. 72,310/- already debited should not be adjusted and why a penalty should not be imposed upon them under Rule 57-I(4) of the Central Excise Rules, 1944.

3. On considering the reply of the party, the Joint Commissioner (Tech) of the Central Excise vide his order dt. 2-11-99 confirmed the demand of Rs. 92,772/- on the appellants under Section 11A read with Rule 57-I(4). He further imposed a penalty of equivalent amount on the party under Section 11 AC read with Rule 57-I(4) and a penalty of Rs. 5,000/- under Rule 173Q.4. The party filed an appeal but the same stood rejected vide order dated 15-5-2000 passed by the Commissioner (Appeals), Jaipur.

5. The present appeal is against the impugned order of Commissioner (Appeals), Jaipur. I have heard Shri K.K. Anand, 1d. Advocate and Shri V.K. Verma, 1d. JDR for the respondents. The 1d. Counsel for the appellants very fairly admitted that the appellants are not contesting the amount of duty confirmed on them in respect of the end products found short as also for the shortage of the input material on which Modvat credit had already been availed. He submits that the present appeal

is against imposition of penalty equal to the duty amount in terms of the provisions of Section 11AC read with Rule 57-I(4). He further submits that the show cause notice does not invoke the provisions under the proviso to Section 11A(1) and there is no allegation in the show cause notice dt. 21-6-99 of any fraud, collusion, wilful mis-statement, suppression of facts or contravention of any provisions of the Act or the Rules with intent to evade payment of duty. It is, therefore, contended that the penalty equal to the duty amount is not tenable either under Section 11 AC or in Rule 57-I(4).

The 1d. Counsel in support of the case places reliance on the following judgments :-CCE v. H.M.M. Limited 2. CCE, Tiruchirapalli v. CEGAT, Chennai [2001 (133) E.L.T. 536 (Mad.) = 2001 (47) RLT 383 (Mad.).

6. Shri V.K. Verma, 1d. JDR for the respondents on the contrary relied upon the decision of the Tribunal in the case of H. Guru Instruments (P) Ltd. v. CCE, Calcutta [1987 (27) E.L.T. 269 (T)]. He contended that the allegation of fraud or suppression need not be mentioned directly and it is enough if there is adequate material in the show cause notice from which such inference could be made out.

7. I have considered the submissions made by both the sides. In this case, it is not in dispute that the finished goods valued at Rs. 88,965/- involving the Central Excise duty of Rs. 20,462/- were found short on verification of the stock, Similarly, there was a shortage of input material on which the Modvat credit amounting to Rs. 72,310/- had been availed. Shri Lallan Singh, General Manager and authorised signatory of the party in his statement dt. 6-10-97 admitted the shortages and stated that the finished goods were short due to less recording of quantity despatched and the shortage in raw materials occurred due to receipt of less quantity in the factory premises. This statement is not disputed till date and in fact, the appellants debited excess Modvat credit voluntarily in their RG 23A Part II. This leads to conclusion that the appellants had cleared the end products without payment of duty as also they availed excess Modvat credit in respect of the goods received and found short on verification. In the show cause notice these facts are very clearly spelt out. The extended period of time for the demand of duty has been invoked in the notice by referring to the statement of Shri Lallan Singh,

General Manager. In the show cause notice, there is further invocation of the provisions under the proviso to Section 11A(1) as also the provision under Rule 57-I(i)(ii) for imposition of penalty, the provisions of Section 11AC and Rule 57-I(4) have been referred to. A cumulative reading of the show cause notice and the facts mentioned therein leaves one in no doubt that the extended period for the demand of duty is applied by invoking the provisions of fraud, suppression and violation of the Rules with the intent to evade payment of duty, etc. The reliance placed by the appellants on the Apex Court judgment in the case of M/s. H.M.M.Limited referred to above is misplaced. It is observed by the Supreme Court in this judgment. "Therefore, in order to attract the proviso to Section 11A(1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful mis-statement or suppression of fact on the part of the assessee or by reason of contravention of any provisions of the Act or the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was guilty of wilful mis-statement or the suppression of fact." However, in the case under consideration the facts are entirely different. Further reliance on the decision of the Hon'ble Madras High Court in [2001 (133) E.L.T. 536 (Mad.) = 2000 (47) RLT 383 (Mad.)] is also not correct. In this judgment, it is observed, "Despite prescription of penalty in the statutory provision, the element of discretion still lies and what is provided in the provision is the maximum. Discretion, which should no doubt be exercised judiciously, can be exercised, having due regard to the facts and circumstances of the case, which is what the Tribunal has done." In the present case, since admittedly the appellants have intentionally not paid the duty on the goods actually cleared by them as also availed the Modvat credit on the modvatable documents without receiving the full quantity of the goods, the intention to avail the benefit against the Rules is manifest on the very face of the facts of the case. The present case is, therefore, covered by the decision of the Tribunal in the case of M/s. H. Guru Instruments (P) Limited cited by the 1d. JDR. It is, however, observed that there is no warrant to impose penalty under Section 11AC as well as under Rule 173Q. Therefore, the penalty of Rs. 5,000/- imposed

on the appellants under Rule 173Q is set aside.

But for this modification, the appeal otherwise fails and the same is accordingly dismissed.

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