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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-04-2002

Reported in : (2003)(153)ELT106Tri(Mum.)bai

Judge : S T Gowri, G Srinivasan

Appellant : Datar Switchgear Ltd.

Respondent : Commissioner of C. Ex. and Cus.

Judgement :

1. Datar Switchgear Ltd., the manufacturer of excisable goods had taken under Rule 57Q credit of the duty paid on capital goods that it received for the manufacture of its final product. The notice issued to it in June 1996 by the jurisdictional Superintendent demanded duty of Rs. 777 lakhs approx. on the capital goods that it removed from the factory on the ground that in terms of the Sub-rule (1) of Rule 575, the credit that was taken should have been reversed. Penalty under Rule 173Q was also proposed. By a subsequent corrigendum issued on 10-12-96 by the Commissioner, imposition of penalty under Section 11AC and recovery of interest under Section 11AB was also proposed. In its reply, the appellant contended that the credit taken of the duty paid on capital goods had already been utilised in the finished excisable goods. It had not cleared the capital goods for home consumption, but shifted them to another of its plant and hence the provisions of sub-rule (1) of Rule 57S were not applicable. It also challenged the applicability of Section 11AB and 11AC The Commissioner did not accept these contentions and confirmed the demand of the credit already taken and

imposed penalty under Rule 57U and ordered recovery of interest under the same rule. Hence this appeal.

2. The contentions of the counsel for the appellant are these. Rule 57U only applies in those cases in which credit has been taken on account of an error, omission of misconstruction on the part of the officer or manufacturer. Credit has been rightly taken. While the corrigendum to show cause notice proposed recovery of interest and penalty under Section 11AC and 11AB, the Commissioner has invoked the provisions of Rule 57U. The appellant had informed the department of its intention to shift the capital goods.

3. The departmental representative says that removal of the goods to any another factory amounts to. removal for home consumption and the provisions of the rules requiring deposit of duty at the rates prescribed therein and otherwise relies upon the order of the Commissioner. We do not find it possible to accept the contention that the notice that was issued by the Asst. Commissioner demanding duty was without jurisdiction. The two circulars of the Board that are relied upon in this regard 3/92, dated 14-5-92 and 2/97, dated 27-2-97 relate to the situation subsequent to the amendment made to Section 11A of the Act in 1992. The circular of 1992 provides that, notwithstanding to the amendment made to the Section, only the Collector will issue and decide demand in case of allegation of fraud, suppression and mis-statement were involved, both were in the normal period and extended period of limitation contained in Section 11A of the Act. This circular will have no application in cases of recovery of Modvat credit wrongly availed.

The notice issued by the Superintendent in this regard did not invoke the provisions of Section 11A. The fact that a corrigendum, invoking the provisions of Section 11AB and 11AC was issued by the Commissioner does not have the effect of changing the demand for duty, if altering the character of the notice which demanded the credit. No doubt as the counsel for the appellant argues penalty under Section 11AC and interest under Section 11AB could not be imposed or demanded in a situation period prior to 1996 when they were enacted. This is the ratio of the judgment of the Supreme Court in Elgi Equipment v. CCE - 2001 (128)

E.L.T. 52 and the same ratio has been repeated in number of decisions. This would however only result in penalty imposed and interest demanded being set aside and would not affect the validity of the notice being issued.

4. As to the merits of the issue, the provisions of Sub-rule (1) of Rule 57S, providing that in cases where capital goods are removed for home consumption credit is to be reversed at the rate shown therein would apply. Removal of goods from one factory to another even of the same owner would in our view certainly be covered by the term removal for home consumption. We do not find anything in law to support the proposition advanced by the appellant that such removal would not amount to home consumption. The argument appears to be based on a view that clearance for home consumption must necessarily involve sale of goods. That is not so. Even if goods are removed to another destination within the country, otherwise than way of sale should be goods removed for home consumption. The fact that the credit that was taken had been utilised in the manufacture of final products cleared on payment of duty does not render inapplicable the provisions of this sub-rule. In point of fact, the second proviso under the sub-rule specifically deals with a situation in which the capital goods are removed after being used in or in relation to manufacture of final products.

5. Another argument that was advanced was that the removal of the capital goods was part of the shifting of the appellant's factory. The correspondence submitted by the appellant does indicate this to be the case. This letter of 7-11-95 had told the Superintendent that it was going to start production in the new premises within the next two or three months and for that purpose was shifting of machine step by step.

Further the letter dated 9-11-95 listed the 11 items of machinery that was proposed to be shifted. Further letters listed other items which were to be shifted. We however do not see how this has any impact on the demand of duty. The provisions of Sub-rule (1) of Rule 57S would apply whenever machinery is removed for home consumption irrespective of the purpose for which it is removed. Sub-rule (4) of Rule 57S enables the Commissioner to permit the manufacturer to shift his capital goods to another factory to transfer the unutilised

credit lying in old factory to the account in the new factory. The provisions of this sub-rule are independent of, and do not in any way affect the operation of Sub-rule (1).

6. The position that emerges therefore is that duty was required to be paid on these goods in accordance with the provisions of second proviso under Sub-rule (1) of Section 57S. Penalty that the Commissioner has imposed under 57U also cannot be sustained for the reason that under Sub-rule (5) of this rule imposition of penalty was communicated on the statute book along with the 11AC and 11AB of the Act in July 1996, the ratio of the decisions that is cited with regard to the applicability of this provision prior to their enactment will apply.

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