Sterlite Optical Technologies Vs. Commissioner of Cen. Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-09-2003

Judge : J Balasundaram, S T C.

Appellant : Sterlite Optical Technologies

Respondent : Commissioner of Cen. Excise

Judgement :

1. After hearing both sides for some time on the applications for waiver of pre-deposit of penalty amount of Rs. 38,68,582/- (equal to the duty demand which has been already paid by the applicants) under Section 11AC and penalty of Rs. 25,000/- imposed upon the Sr. Officer Commercial of the applicants, we found that it is possible to hear and decide the appeals themselves at this stage with the consent of both sides. We, therefore, do so after waiving the pre-deposit of penalties.

2. The brief facts of the case are that the assessee received back a particular quantity of finished goods viz. optical fibre during he period 2.7.2001 to 18.10.2001. they availed Cenvat credit of Rs. 1,35,65,335/- in respect of the duty involved on the above gods in terms of Rule 16 of Central Excise Rules 2001. Out of this quantity received, the consumed a certain quantity in their factory for the manufacture of cables and on balance quantity, they have carried out the process of rewinding and subsequently cleared goods on payment of duty. At the time of clearance of these goods again, they reduced the assessable value and consequently short paid the duty than the amount of Cenvat credit taken by them

at the time of return of the goods. As per the provisions of Rule 16(2) of the Central Excise Rules 2001 when the process carried out on duty paid returned goods does not amount to manufacture, then the assessee is liable to pay duty equal to the Cenvat credit taken on the goods. In the instant case, as the process of rewinding was not amounting to manufacture, the assessee has to follow the provisions of Rules 16(2) of the Rules viz, that they were required to pay duty equal to the Cenvat credit. Since they had short paid duty, the amount of Rs. 38,68,582/- was required to be paid by them. They paid this amount on 5.12.2001. On 17.4.2002, a show cause notice was issued proposing to demand the above mentioned amount of differential duty and to appropriate the sum already paid by them and to impose and recover penalty and interest under Section 11AC and 11AB of the Act; the Sr.Officer Commercial also called upon to show cause against imposition of penalty under Rule 26 of the Central Excise Rules. The Adjudicating authority viz. the Commissioner of Central Excise confirmed the demand and imposed penalty equal to the duty as well as confirmed recovery of interest. In addition, she imposed penalty of Rs. 25,000/- on the officer of the Company. Hence, these appeals.

3. The liability to pay the differential duty is not disputed by the appellants. The challenge in the appeals before us is confined to the levy of interest and imposition of penalty on the ground that the allegation of suppression which has been made in the notice and confirmed in the order cannot sustain in view of the fact that the exercise is one of Revenue neutrality as the appellants cleared the goods to their own 100% subsidiary units and the credit was available to the appellants and in these circumstances, the Larger Bench decision in the case of Jay Yuhshin Ltd. v. CCE, New Delhi [2000(119) ELT 718] holding that the charge of suppression cannot apply in a situation where credit is available to the assessee itself, would be directly applicable. Ld.D.R. in reply points out that this plea was never raised before the adjudicating authority nor in the appeal before the Tribunal and further there is no material on record to show that the clearances in this case were to the assessee own unit so as to make applicable the Larger Bench decision cited by the appellants.

4. We have carefully considered the rival submissions and perused the records. It is correct that the plea regarding Revenue neutrality thus wiping out the allegation of suppression and extended period of limitation for the purpose of application of Section 11AC and Section 11AB has not been raised in the prior proceedings. There is also no material on record to show that the clearances were made by the appellants to their own unit in order to see how far the Larger Bench decision would be applicable. Since this is an issue raised before us based the Larger Bench decision of the Tribunal, the interest of justice requires that this matter be re-examined in the light of the submissions and the Tribunal's judgment, by the Adjudicating Authority.

We, therefore, set aside the impugned order and remand the case to the jurisdictional Commissioner of Central Excise for fresh decision on the above aspects, after extending a reasonable opportunity of hearing to the appellants.