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Commissioner of Central Excise Vs. Design Auto Systems Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-24-2004

Reported in : (2004)(170)ELT91TriDel

Judge : A T V.K., M Bohra

Appellant : Commissioner of Central Excise

Respondent : Design Auto Systems Ltd.

Judgement :

1. Revenue has filed this appeal against the Order-in-Original No.2/COMMR/CEX/IND/2003, dated 23-1-2003.

2. Mrs. Charul Barnwal, learned SDR, submitted that M/s. Design Auto Systems Ltd. manufacture vacuum and gas filled bulbs and availed facility of fortnightly demand of Central Excise duty as provided under Rule 8(1) of the Central Excise (No. 2) Rules, 2001; that as they had defaulted in payment of duty instalment for 3rd time in a financial year, the Deputy Commissioner, under order dated 28-9-2001, withdrew the facility of fortnightly payment of duty and the respondents were ordered to pay duty from account-current on consignment basis; that it was also, further, ordered that in the event of failure to make payment in the said manner, it would be deemed as if such clearance of goods had been made without payment of duty and, consequently, penalties would follow; that the said order was effective from the date of communication i.e. 15-10-2001; that, however, the scrutiny of monthly returns for the months of October, 2001 to December, 2001 reveals that

the respondents had paid duty by utilising Cenvat credit; the total duty involved is Rs. 20,48,930/-; that a show cause notice dated 29-10-2002 was issued to them for demanding the said amount of duty and for imposition of penalty; that the Commissioner, under the impugned order, has passed the order as follows : "The Assistant Commissioner's order dated 28-9-2001 would be followed regarding duty and penalty. I am not passing a fresh order as mentioned above." The ld. SDR, further, submitted that although the Commissioner has rightly held that the duty paid by the respondents from the Cenvat credit account during the period of forfeiture is liable to be recovered from them, he has erred in holding that the demand, as raised in the show cause notice, could be recovered by simply endorsing the Assistant Commissioner's earlier order dated 28-9-2001 and that fresh adjudication of demand would amount to res adjudicata; that the Assistant Commissioner's order dated 28-9-2001, was only for a limited purpose of forfeiting the facilities of fortnightly payment of duty and directing the respondents to pay the duty consignmentwise only by debiting the same in account-current; that as the respondents did not pay the duty through account-current, the duty can be recovered only under the provisions of Rule 8(4) of the Central Excise Rules read with Section 11A of the Act for which the course of issuance of show cause notice and its adjudication is a legal requirement.

3. Respondents, M/s. Design Auto Systems Ltd. have submitted cross-objection under their letter dated 20-3-2004 mentioning therein that a plain reading of order dated 28-9-2001 reveals that the said order has two portions - first the fortnightly duty payment facility of the respondents was forfeited and the second, if they pay all dues and also discharge duty on consignment basis from account-current at least for a period of two months the facility of fortnightly payment shall be restored; that the legislature has used the expression 'facility' in Rule 8(2), which clearly implies that the fortnightly duty payment scheme as the optional one; that it is totally incorrect and illegal to direct them to pay duty from account-current only; that the said condition of payment of duty from account-current at least for a period of two months can be enforced only when they wish to restore their facility, that it is totally illegal to debar the manufacturer from utilisation of the Cenvat credit, which is lawfully available to them; that therefore, the Commissioner has ordered by holding that the duty amount was to be paid by them from account-current.

They have also mentioned that if it is presumed that there is an implied intention to prohibit the utilisation of the Cenvat credit at the time of forfeiture, then the right place to have such a prohibition is Rule 3(3) of the Cenvat Credit Rules, 2001; that during the financial years 2002-2003 and 2003-2004, they paid duty of more than Rs. 12.50 lakhs and Rs. 16.06 lakhs respectively from the PLA and in the event that Rs. 20,48,930/- debited by them from the Cenvat Credit account, is not treated as proper payment of duty then the said amount would not be in balance in their Cenvat Credit account and the total duty of Rs. 28,56,377/-, paid from account-current during the subsequent two financial years, would not be required to be paid by them; that since they have already paid Rs. 28,56,377/- from the account-current, same can be ordered to be adjusted against Rs. 20,48,930/-.

4. We have considered the submissions of both the sides. It is not disputed by the respondents that they had defaulted in depositing the Central Excise duty on fortnightly basis, as a consequence of which the Dy. Commissioner, under order dated 28-9-2001, had denied the facility of fortnightly payment and directed them to pay the duty from account-current on consignment basis. It has also not been disputed by them that they had cleared the goods by debiting the duty from Cenvat credit instead of discharging the duty from account-current. Rule 8 of Central Excise Rules, 2001 provided that if the assessee defaults in payment of instalments for the third time in a financial year in succession or otherwise, the assessee shall forfeit the facility to pay the dues in instalment under this Rule for a period of two months, starting from the date of communication of the order passed by the Assistant/Deputy Commissioner in this regard or till such date on which the dues are paid, whichever is later and during this period, the assessee shall be required to pay excise duty for each consignment by debiting to the account-current and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties, as provided under these Rules shall be followed. There is no force in the submissions of the respondents that the condition of payment of duty from account-current can be enforced when the manufacturer wishes to restore the facility of payment of duty on instalment basis. The order dated 28-9-2001, passed by the Deputy Commissioner, was in pursuance to the default made by the respondents in payment of instalment by the due date for the third time in a financial year. As the

respondents had defaulted in payment of duty, the penalty consequently provided in Rule 8 of these Rules has to be followed and they have to suffer consequences for defaulting the payment of duty on due dates. After the payment of duty on consignment basis for two months as a consequence of their default in making the payment of instalment by the due date, it may be open to them whether to pay the duty on consignment basis or go for the facility of fortnightly payment of duty. They cannot first opt for the payment of duty by instalment and when they make default, they cannot take the plea that the consequences of their default will not be suffered by them since they are not going to opt in future for instalment facility.

Thus, there is no substance in the cross-objection filed by the respondents, which is dismissed.

5. Sub-rule (4) of Rule 8 clearly mentions that in the event of any failure, it shall be deemed that the goods have been cleared without payment of duty consequence and penalties, as provided in this Rule, shall follow. Once the goods are deemed to have been cleared without payment of duty as the respondents discharge their duty liability by debiting the Cenvat credit amount and not through the account-current, the payment of duty has to be made from them. The demand of duty can be made only under the provisions of Section 11A(1) of the Central Excise Act, which empowers a proper officer to issue a show cause notice if any duty has not been levied or paid or has been short-levied or short-paid. Rule 25 of the Central Excise (No. 2) Rules, 2001 provides for imposition of penalty, on any manufacturer which removes any excisable goods in contravention of any of the provisions of these rules. The duty not paid by them could not be recovered in pursuance of the order dated 28-9-2001, passed by the Deputy Commissioner as the said order was in pursuance of Sub-rule (4) of Rule 8 of Central Excise Rules, 2001 forfeiting the facility of payment of duty on fortnightly basis and directed the respondents to discharge the duty liability through account-current. The Commissioner was to adjudicate the demand of duty issued under Section 11A(1) of the Act and consider the imposition of penalty under Rule 25 of the Central Excise Rules. The Commissioner was not justified in holding that the issuance of a show cause notice for confirmation of recovery of duty is not warranted and is not sustainable. We, therefore, remand this matter to the Commissioner for re-adjudication after

following the principles of natural justice. The appeal is disposed of by way of remand.

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