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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-10-2004

Judge : K Kumar, M T K.D.

Appellant : Birla Copper

Respondent : The Commissioner of Central

Judgement :

1. The instant stay application is moved against the impugned order of the Commissioner of Central Excise, whereby the appellants have been directed to pay an amount of Rs. 1,58,40,000/- and the penalty of Rs.5,000/-. The appellants had erroneously debited the aforesaid amount in their PLA, in excess of what was required to be reversed. The appellants take modvat/cenvat credit on inputs, which are common for duty paying as well as exempted products. So while clearing the exempted products (gold) reversal from the credit account an amount equivalent to 8% of the value of exempted goods is required. The appellants, through an error made the excess reversal of the said amount and when they discovered the mistake after a lapse of about one year, they suo moto took the credit. The taking of credit in PLA without a valid refund sanctioning order from the competent authority was objected to. Since the credit was raised beyond the period of six months prescribed for claiming refund under Section 11B of the Central Excise Act, the show cause notice was issued, proposing recovery of the said amount which was confirmed by the impugned order. Hence, the appeal and stay application.

3. We note that the appellants have made strong prima facie case on merit to waive the pre-deposit, as the amount of 8% which is required to be reversed at the time of removal of exempted final goods is either the credit nor duty. Hence the amount is outside the scope of Section 11B of the Act. Case laws cited in this regard support this position.

The Commissioner had tried to overcome this position by saying that there was another order passed by his predecessor holding that the gold is dutiable (at 16%) and consequently the 8% reversal was payment of duty. Since this ground was not a part of the show cause notice, the Commissioner could not have expanded the proceedings, which were before him.

4. In the light of our observations above, we waive the pre-deposit of the entire amount of duty and penalty and stay their recovery till the disposal of appeals. R.H. on 12.7.04.