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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Feb-05-2007

Reported in : (2007)(117)ECC385

Judge : S Peeran, J T T.K.

Appellant : Aditya Industries

Respondent : The Commissioner of Central

Judgement :

1. This appeal has been filed against the Orders-in-Appeal No. 67 & 68/2003 (H-II) CE dated 06.11.2003, passed by the Commissioner of Customs & Central Excise (Appeals), Hyderabad.

2. The appellants are the manufacturers of Air Conditioners, Deep Freezers, Bottle Coolers, Water Coolers, Cooling Coils and Condensers which are all excisable goods. After certain investigations, the Revenue proceeded against the appellants by issue of show cause notice demanding duty and proposing penalties. The Original Authority in his Order dated 31.3.2000 confirmed the duty demand of Rs. 12,85,507/-. He imposed a penalty of Rs. 1,00,000/- on the appellants under Rule 173Q of the Central Excise Rules, 1944. He confiscated the plant and machinery. However he gave an option to redeem the goods on payment of fine of Rs. 25,000/-. He imposed a penalty of Rs. 50,000/- on Shri G.Somasekhara Rao of G.P.A. Holder of the appellants. The appellants appealed to the Commissioner (Appeals). But the Commissioner (Appeals) upheld the order of the Original

Authority.

3. Shri M.S. Nagaraj, learned Advocate appeared on behalf of the appellants. He urged the following points.

(i) Te lower authorities have not taken into consideration the evidence produced before them especially the fact that the appellants were not availing exemption during 1987-88, but they were paying 50% of the duty in terms of Notification Nos. 75/87-CE dated 1.3.1987 and 166/86-CE dated 1.3.1986.

(ii) He said that the Original Authority has confirmed the duty demand of Rs. 12,85,507/- but the actual duty which may become payable would be only Rs. 1,91,188/- (iii) Even though the appellants requested for extending the benefit of Modvat credit on the compressors and other inputs, used in the manufacture of final product, the lower authorities have not given the benefit. He said that the appellants procured 551 Compressors from M/s Kirloskar Brothers Ltd., Pune and M/s Shriram Refrigerators Ltd., Hyderabad on payment of duty under GP 1. The manufactures in their letter addressed to the Assistant Commissioner have confirmed the fact of clearance of compressors to the appellants firm giving the Invoice and GP 1. This fact is also confirmed by the Show Cause Notice. In addition, the appellants has procured 34 compressors from other dealers on payment of duty under GP 1. The Modvat credit on 364 compressors after excluding the number of compressors (221) used for manufacture of goods cleared under exemption is Rs. 15,33,906/.

The Modvat credit on fan motors would be to the extent of Rs. 42,430/-. Thus, the appellants are entitled for total Modvat credit of Rs. 15,76,336/- for the period from 1987-88 to 1991-92. The duty demanded is only Rs. 12,85,507/-. Therefore they could not have evaded payment of duty.

(iv) The lower authorities have denied the modvat credit on the ground that the same is not admissible when the goods cleared are in a clandestine manner. The lower authorities have also held that the credit balance at the end of the financial year lapses. The Tribunal in the case of CCE, Madras v. National Trading Company [has held that the Modvat credit lying in the books of accounts is not expugnable when the assessee starts clearing the goods under exemption.

(v) The disallowance of credit being carried forward for the year 1987-88 and 1988-89 to the extent of Rs. 30,160/- and Rs. 2,33,464/- respectively is contrary to law.

(vi) Further the learned Advocate relied on the following case laws which hold that the assessee is entitled to claim Modvat credit even in respect of clandestine removal :DSM Anti-Infective India (P) Ltd. v. CCE, Chandigarh (e) Sitham Fluid Seals Pvt. Ltd. v. CCE, Coimbatore (vii) The value arrived at in the Show Cause Notice has to be treated as cum-duty value in terms of the judgment of the Supreme Court in the case of CCE, Delhi v. Maruti Udyog Ltd. and demand duty only after deducting the amount of duty.

(viii) Since the Modvat credit balance is much more than the duty demanded, the entire demand is unsustainable.

4. Shri K. Sambi Reddy, learned JDR pointed out that in respect of clandestine removal, no Modvat credit is admissible. Therefore he vehemently opposed the prayer of the appellants.

5. We have gone through the records of the case carefully. The demand of duty arises on account of certain clandestine removal. The appellants has actually not challenged the issue of demand duty on merits. However their grievance is that the duty calculation has not been properly made in the sense that the benefit of Modvat credit has not been given in spite of the evidence of having received duty paid inputs. We have perused the records. It is seen that the compressors were received from M/s Kirloskar Brother Ltd., Pune and M/s Shriram Refrigerators Industries, Hyderabad on payment of duty. The invoices have also been produced. However the lower authorities have not considered these documents. The appellants cited case laws which hold even in respect of clandestine removal, Modvat benefit cannot be denied. In the case of DSM Anti-Infective India (P) Ltd. cited supra, it has been held that once duty is demanded the benefit of Modvat credit of duty already paid cannot be disallowed on the plea that the Modvat procedure is not followed. In the case of T.T.K. Pharma Ltd. cited supra it has

been held that when the assessee to called upon to pay duty on goods in question, they should be allowed to avail input duty credit and the should be allowed to deduct duty from the sale price of the goods for arriving at the assessable for determining the duty. The ratio of the above mentioned cases is clearly applicable to the present case. The duty confirmed comes to Rs. 12,85,507/-. The total Modvat credit available for the period in dispute is Rs. 15,76,336/-. In these circumstances, there will not be any net duty liability on the appellants. While calculating the duty, the lower authorities have not given cum-duty benefit in terms of the Apex Court judgment in the case of Maruti Udyog Ltd. (supra). The Commissioner (Appeals) in the impugned order has simply stated that the Modvat credit has already lapsed without quoting any authority. In these circumstances, the impugned order is bad in law. Since the Modvat credit available to the appellants is much more than the duty demanded, no further demand is sustainable. The said demand can be adjusted against the credit claimed by the appellants. Therefore the penalties on the appellants are not sustainable. Therefore, we set aside the impugned order and allow the appeals with consequential relief.

(Operative portion of the order has been pronounced in the court completion of hearing)