Mohan Generator and Pumps P. Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-01-2007

Reported in : (2007)(119)ECC19

Judge : R Abichandani

Appellant : Mohan Generator and Pumps P. Ltd.

Respondent : Cce

Judgement :

1. The appellant challenges the order of the Commissioner (Appeals) dated 28.2.2005 upholding the order-in-original confirming the demand of duty of a total amount of Rs. 3,29,078/- under Section 11A of the Central Excise Act, 1944 and imposing penalty of Rs. 2,50,000/- under Rules 9(2), 52A and 173Q of Central Excise Rules of 1944 and ordering payment of interest under Section 11AB of the Act.

2. The appellant was registered as a manufacturer of diesel generating sets falling under sub-headings 8502.90, 8501 and 8408 of the Tariff Act. According to the Revenue, the appellant was availing exemption under the Notification No. 9/99-CE dated 28.2.99 and was availing the facility upto 26.4.199. As per the conditions incorporated in the notification an assessee availing the benefit thereunder could not opt out of the facility in the remaining part of the financial year, for availing the benefit of the Notification No. 8/99-CE dated 28.2.99. It was alleged that the appellant had filed a declaration under Rule 173B with effect from 1.4.1999 by

their letter dated 3.4.1999 stating that they had opted for the exemption under the Notification No. 9/99 upto 26.7.1999. The clearances were made at a concessional rate of 60% of the normal rate of duty with a facility of availing modvat credit under Rule 57A. During the period from 1.4.1999 to 26.4.1999, the appellant effected clearances of its product of the value of 5,01,519/- and paid duty amount of Rs. 9,410/- from its personal ledger account and Rs. 38,737/- from RG.23A Part II account, that is, by utilizing modvat credit. However, thereafter the appellant claimed exemption under the Notification No. 8/99 dated 2.8.1999 and filed a declaration under Rule 173B with effect from 27.4.1999, claiming full exemption for first aggregate clearance of Rs. 50,00,000/- under that notification.

According to the appellant, since they had not exercised option under Notification No. 9/99, but had exercised their option only with effect from 27.4.1999 to avail exemption under the Notification No. 8/99, the benefit of the Notification No. 8/99 could not be denied to the appellant.

3. It appears from the record that the appellant had represented to the Chairman of CBEC on 25.4.2000, seeking a clarification in the matter, in response to which the appellant was informed by the Board by their letter dated 6.1.2000, that since the appellant had already exercised option under the Notification No. 9/99 by filing declaration under Rule 173B with effect from 1.4.1999, it was not open to the appellant to switch over to the benefits of the Notification No. 8/99 with effect from 27.4.1999 for the remaining part of the financial year, in view of the terms and conditions of the Notification No. 9/99. Similar clarification was given to the appellant on the said issue by the Joint Commissioner, Central Excise, Kanpur on 10.4.2000.

4. The adjudicating authority on the basis of the material on record found that the appellant had exercised the option under para 2(i) of the Notification No. 9/99 in writing in the declaration filed under Rule 173B, with effect from 1.4.1999 and actually made clearances in the terms of the said declaration, to the tune of Rs. 5,01,519/- in the financial year 1999-2000 paying the concessional central excise duty at the rate of 60% of the normal rate upto 26.4.1999. The contention of the appellant that it had not exercised option as per para 2(ii) of the Notification No.

9/1999, was rejected on the ground that information sought under para 2(ii) of the said notification was an additional information. It was found that the appellant had written in the declaration under Rule 173B that it had availed the benefit of the Notification No. 9/99-CE dated 28.2.1999, which amounted to exercise of option as per para 2(i) of the said notification. It was held that since the option for benefit under the Notification No. 9/99 was exercised, it was incumbent upon the appellant not to withdraw the same and switch over to the benefits of the Notification No. 8/99 with effect from 27.4.1999. It was held that the appellant had not followed the departmental direction and had willfully misutilized the facility.

The amount of duty short paid was worked out for the relevant quarters and the total duty demand of Rs. 3,29,078/- was upheld.5. Before the Commissioner (Appeals), it was contended that the Notification Nos. 8/99 and 9/99 were misinterpreted by the adjudicating authority and that no option under Notification No. 9/99 was exercised by the declaration under Rule 173B, which was filed by the appellant.

The Appellate Commissioner found that the appellant had declared under Rule 173B that it was availing the benefit of the Notification No. 9/99 with effect from 1.4.1999 and had actually made clearances at concessional rate of duty under that notification and also availed modvat credit facility during the period from 1.4.1999 to 26.2.1999. It was, therefore, held that it was crystal clear that the appellant had exercised its option under para 2(i) of that notification. Later on, the appellant claimed exemption under Notification No. 8/99 and filed the declaration again under Rule 173B with effect from 27.4.1999. Since as per the terms of the Notification No. 9/99, it was not open to the appellant to switch over to the Notification No. 8/99 with effect from 27.4.1999 for the remaining part of the financial year, it was held that once the appellant opted for concessional rate of duty under Notification No. 9/99, they could not switch over to full exemption under Notification No. 8/99 in the same financial year. The order of the adjudicating authority was, therefore, upheld.6. The learned Counsel for the appellant contended that the appellant had never opted for the benefit of the Notification No. 9/99. He submitted that the declaration filed under Rule 173B was not an option contemplated by the Notification No. 9/99. He submitted that the option under

Notification No. 9/99 was to be given in writing addressed to the Assistant Commissioner while the declaration under Rule 173B was required to be filed before the Superintendent. Therefore, filing of declaration under Rule 173B before the Superintendent was not an exercise of option in writing which was required to be addressed to the Assistant Commissioner. The learned Counsel placed reliance on the trade notice issued by the Mumbai Commissionerate on 23.3.1999 in which while referring to the two Notification Nos. 8/99 and 9/99 both dated 28.2.199, it was stated that all the manufacturer shall send the option to the Assistant Commissioner, in addition to the declaration filed with the Superintendent under Rule 173B of the Central Excise Rules, 1944. It appears that on the strength of this trade notice, the appellant wrote to the Assistant Commissioner on 26.4.1999 stating that it had opted to work under the provisions of the Notification No. 8/99 with effect from 26.4.1999. According to the learned Counsel this was the only option addressed to the Assistant Commissioner and, therefore, the authorities below have committed an error in treating the declaration filed under Rule 173B before the Superintendent as an exercise of option under Notification.9/99. In the alternative, it was contended that if the benefit of full exemption under Notification No.8/99 was denied, then cenvat credit benefit on inputs should be given to the appellant, which was permissible under the Notification No.9/99. It was also submitted that there was no warrant for imposing penalty in the facts of the present case.

6.1 The learned Counsel placed reliance on the following decisions in support of his contentions: (a) The decision of the Tribunal in Karm Sanitations v. Commissioner of Central Excise, , was cited to point out that it was held in paragraph of the judgment that no declaration under Notification No. 38/97 was filed by that appellant and that the modvat declaration under Rule 57G could not be substituted for the requirement of the Notification No. 38/97 (which was similar to Notification No. 9/99). The Tribunal upheld disallowance of modvat credit, but set aside the penalty taking into consideration the facts and circumstances of that case.Commissioner of Central Excise, Delhi v. Maruti Udyog Ltd., , was cited for the proposition that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. In that case the Hon'ble the Supreme Court had come to the conclusion that the price at which the waste was sold should be considered to be cum-duty price and the assessable value should be determined after deducting the element of excise duty. The decision was rendered in the context of pre-amended provisions of Section 4 whereunder the duty of excise was chargeable with reference to the value, which was deemed to be the price at which such goods were ordinarily sold.Agarwal Metal Industries v. CCE Bangalore, proposition that when the benefit of the notification availed by the assessee was denied on the ground that the notification did not apply, the assessee could not be deprived of the benefit of modvat credit, which might be admissible in the absence of benefit of such notification.

(d) Reliance was also placed on the decision of the larger bench in Commissioner of Central Excise, New Delhi v. Avis Electronics Pvt.

Ltd., particular thing is directed to be performed in a manner prescribed by rules, it should be performed in that manner itself and not otherwise.

7. The learned authorized representative for the department supporting the findings and reasoning of the authorities below pointed out that in the declaration under Rule 173B, the assessee was required to declare availment of any exemption under such notifications. He submitted that declaration was to be in quadruplicate and that mere filing thereof with the Superintendent will not make the exercise of option to avail of the benefit of exemption declared therein ineffective. He submitted that the declaration though filed before Superintendent was meant for the proper officer who was the Assistant Commissioner. He also submitted that as per the record even the second option for the benefit of Notification No. 8/99 was also, contained in a declaration under Rule 173B, which was subsequently filed. He submitted that this was clear from the facts narrated in the impugned order. He further argued that once the option was exercised for the benefit of the Notification No. 9/99, it could not be withdrawn during the remaining financial year and therefore, any subsequent letter addressed to the Assistant Commissioner opting for the Notification No. 8/99 was of no consequence. He also submitted that the trade notice requiring information to be sent to the Assistant Commissioner was only an additional requirement and did not take away the

character of option exercised by making a declaration regarding availment of the exemption notification under Rule 173B. He pointed out that under the notification issued under Rule 2, the proper officer prescribed for such declaration under Rule 173B was the Assistant Commissioner. He submitted that though the papers of declaration were to be filed in the office of the Superintendent, they were meant for consideration by the proper officer who also had an authority to extend time for filing such declaration. He further argued that the appellant cannot claim declaration of value on the ground of cum-duty price and also avail of cenvat credit benefit.

8. The short issue under controversy is whether the appellant had exercised option in writing to the Assistant Commissioner, as contemplated by the Notification No. 9/99 so as to disentitle it from withdrawing the option during the remaining part of the financial year.

9. There is no dispute over the fact that the appellant had filed a declaration under Rule 173B, in which the fact about the appellant's availing of the benefit of the Notification No. 9/99 was clearly mentioned. Rule 173B required every assessee to file with the Superintendent concerned a declaration in quadruplicate giving the particulars enumerated thereunder and obtain an acknowledgement of such declaration. Such declaration was required to be filed within the period prescribed or such extended period as the Assistant Commissioner may permit. If any alteration becomes necessary, then it was required to be made as per Sub-rule (2). Under Sub-rule (3), the proper officer empowered under 14 of the Act can exercise powers to enquire in connection with the declaration by examining any conversant person and the relevant documents. The proper officer may reassess the correct duty payable under Sub-rule (4) requiring the assessee to pay the deficiency, if any under Rule 173B(1)(d), the assessee was required to give a declaration showing the exemption notification availed or proposed to be availed, if any. Thus, under a statutory declaration, the assessee was obliged to mention the nature of exemption availed under the relevant notification or proposed to be so availed. Though the declaration is to be filed with the Superintendent, the provisions of Rule 173B clearly indicate that it is for the proper officer, who was the Assistant Commissioner of Central Excise to consider such declaration and make

enquiry and orders in connection therewith including reassessing the correct amount. Though the declaration is required to be filed with the Superintendent, the function of consideration of such declaration was vested in the proper officer and not in the Superintendent whose job was only to receive such declaration for the purpose of placing them before the proper officer for enquiry and reassessment, as such proper officer may deem fit. The expression "proper officer" as defined in Rule 2(14) means the proper officer in whose jurisdiction or premises of the producer or any excisable goods etc. were situated. The list of proper officers under various Excise Rules was notified and amended from time to time. In respect of the provisions of Rule 173B, the Assistant Commissioner was notified as the "proper officer" by Notification No. 26/95 dated 6.6.1995. Therefore, the declaration under Rule 173 which contained a clear option of the appellants having availed of the benefit of the exemption under the Notification No. 9/99, which was required to be considered by the proper officer, namely the Assistant Commissioner though filed with the Superintendent, was in substance an exercise of option in writing for availing the exemption under the notification, as contemplated by para 2(i) of the Notification No. 9/99. If the appellant did not exercise the option to avail the benefit of the Notification No. 9/99, there was no need for it to make such declaration under Rule 173B. The condition contained in para 2 of the Notification No. 9/99 may be reproduced hereunder for ready reference: 2. The exemption contained in this notification shall apply only subject to the following conditions, namely- (i) a manufacturer who intends to avail the exemption under this notification shall exercise his option in writing for availing the exemption under this notification before effecting the first clearances of specified goods and such option shall be effective from the date of exercise of the option which shall not be withdrawn during the remaining part of the financial year.

(ii) While exercising the option under condition (i), the manufacturer shall inform in writing to the jurisdictional Assistant Commissioner of Central Excise with a copy to the Superintendent of Central Excise giving the following particulars, namely: (d) date from which option under this notification has been exercised; (e) aggregate value of clearances specified goods (excluding the value of clearances referred to in para 3 of this notification) till the date of exercising the option.

(iii) where a manufacturer opts for availing the exemption under this notification in terms of condition (i) above, the clearances of specified goods already made during the financial year, prior to the exercise of such option, shall be taken into account for computing the aggregate value of clearances, as specified in the said Table.

There is no dispute that the particulars required to be mentioned in para 2(ii) would also be contained in a declaration under Rule 173B. A bare look at the proforma for filing declaration under Rule 173B, which is at Annexure I (based on CBEC circular No. 124/35/95-CX. dated 10.5.1995) will show that all the relevant particulars including those mentioned in para 2(ii) of the notification were required to be stated thereunder. Effective rate of duty on which goods were assessable was to be mentioned as per that form, and number and date of the relevant notification, if any, having bearing on the applicable rate of duty was also required to be mentioned. Thus, in the context of Rule 173B(1)(d), declaration of availment of exemption under any notification opted for by the assessee was required to be mentioned. Therefore, an option could validly be communicated in the declaration under Rule 173B, showing the number and date of the relevant notification under which exemption or partial exemption, as the case may be, is claimed. In the present case, admittedly, the declaration contained an intimation of availing the exemption under notification No. 9/99. It is abundantly clear from the record and also admitted that, having filed this declaration under Rule 173B containing the option in writing regarding availment of exemption under Notification No. 9/99, the appellant had actually worked under the said notification by making clearances at the reduced rate of duty upto 26.4.1999. As concurrently found by the authorities below, the appellant had made clearances upto 26.4.1999 on payment of the reduced rate of duty at 9.6% taking the benefit of the Notification No. 9/99. Therefore, not only the appellant exercised the option contemplated by para 2(i) of the Notification No. 9/99, but it actually worked under the notification to get the benefit of the option by clearing the goods at a reduce rate of duty. The authorities below were, therefore, fully justified in holding that having exercised this option, it was not open for the appellant to withdraw the same and switch over to the benefits of the Notification No. 8/99, which contemplated clearances without payment of duty upto the aggregate value mentioned thereunder with liberty to withdraw during the remaining part of the financial year only in favour of exercise of option with respect to Notification No. 9/99 which facility was stoutly denied in paragraph 2(i) of the Notification No. 9/99 which expressly laid down that the option thereunder shall not be withdrawn during the part of the financial year. The trade notice by the Mumbai Commissionerate requiring a separate intimation to the Assistant Commissioner over and above the declaration under Rule 173B may have been issued for the sake of convenience, but it will not reduce the efficacy of such option exercised in the declaration in writing made under Rule 173B for consideration by the proper officer who was the Assistant Commissioner. The contention raised on behalf of the appellant that no option was exercised under the Notification No. 9/99, therefore, fails and the impugned order demanding duty in the context of the Notification No. 9/99 is upheld.10. Since the order of the authorities below holding that the appellant exercised option under the Notification No. 9/99 and the reduced rate of duty was payable under the said notification for the clearances made thereunder during the financial year and demanding duty on that basis, is upheld, it will be for the authorities to verify when the duty is worked out, if any modvat credit was admissible in the context of the said Notification No. 9/99, keeping in view that modvat credit on the inputs was specifically made inadmissible under para 2(iv) of the Notification No. 8/99 and there is no such embargo contained in the Notification No. 9/99.

11. The contention that the price should be treated inclusive of duty and the adjustment contemplated by Section 4(4)(d)(ii) (of the pre-amended provision of Section 4) is based on the ratio of Hon'ble the Supreme Court in Maruti Udyog Ltd. (supra). Though no such contention was raised till now, it being a question of law, the appellant may not be denied the benefit of the ratio of the decision of Hon'ble the Supreme Court in Maruti Udyog Ltd (supra). Necessary adjustment should, therefore, be made as may be warranted on the basis of the ratio of the decision of Hon'ble the Supreme Court in Maruti Udyog Ltd. (supra) and duty payable be accordingly recalculated while enforcing its recovery. It is stated by the learned Counsel for the appellant that a sum of Rs. 1,00,000/-, which is already deposited, may be appropriated towards the dues, as may be worked out under the impugned order.

12. Penalty of Rs. 3,50,000/- was imposed on the appellant by the adjudicating authority under Rule 9(2), 52A and 173Q of the said rules.

The learned Counsel for the appellant relied upon the decision of this Tribunal Karm Sanitations v. CCE, for pointing out that penalty was not imposed in a similar case. That was a case, where modvat declaration under Rule 57G was considered, which did not contain any requirement of disclosing an option regarding availment of exemption notification, unlike Rule 173B. In the present case, it appears that the appellant was informed in writing by the Superintendent on 14.6.1999 clarifying the situation and directing the appellant not to avail the facility under the Notification No. 8u/99 from 27.4.1999, as was tried to be done. The appellant, however, ignored the direction and switched over to Notification No. 8/99, which could not have been done in view of its having opted for the benefit under the Notification No. 9/99, under which it actually worked upto 26.4.1999. Therefore, the goods were removed without payment of the reduced rate of duty contemplated by Notification No. 9/99. For, violation of the directions of the proper officer, penalty prescribed under Rule 9(2) may extend to Rs. 2000/-. However, even after the directions were given on 14.6.1999, the appellant committed breach of the rules requiring duty to be paid at the time of removal of the goods at the reduced rate. Therefore, the provisions of Rule 173Q(1)(a) will apply so as to merit penalty. Having regard to the facts and circumstances of the case, penalty of Rs. 2,50,000/- appears to be harsh and it is, therefore, reduced to Rs. 5000/-, which was the minimum prescribed in Rule 173Q. In view of this modification in the impugned order, the appeal is partly allowed.