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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jun-12-2008

Judge : P Chacko, K T P.

Appellant : Ashok Leyland

Respondent : Cce

Judgement :

1. This appeal is against a penalty of Rs. 1,42,022/- imposed under Rule 57I(4) and another penalty of Rs. 10,000/- under Rule 173Q of the Central Excise Rules, 1944. The department had found certain MODVAT credits on inputs to have been irregularly taken by the appellants during the period January 1994 to June 1998. But, before any show-cause notice was issued, the entire credit was reversed. However, a show-cause notice was issued on 27.1.1999 mainly for levy of interest on the amount of the reversed credit under Rule 57I(5) and penalty under Rule 57I(4). The original authority imposed a penalty of Rs. 1,42,022/- on the party under Rule 57I(4) and a separate penalty of Rs. 40,000/- on them under Rule 173Q. It also demanded interest on the credit amount under Rule 57I(5). The first appellate authority reduced the Rule 173Q penalty to Rs. 10,000/- and also vacated a part of the Rule 57I(4) penalty for the period prior to 28.9.1996. Still aggrieved, the party has preferred the present appeal.

2. After hearing both sides and considering their submissions, we note that the lower appellate authority has sustained the penalty under Rule 57I(4) for the period from 28.9.1996 on the ground that the party had contravened Rules 57A,

57F and 57G with intent to evade payment of duty punishable under Rule 57I. Learned Counsel points out that the requisite ingredients for a penalty under Rule 57I(4) were not alleged in the show-cause notice. We have heard the learned SDR also, who reiterates the findings of the lower appellate authority. We find that Rule 57I(4) providing for penalty on a person for irregular availment of MODVAT credit and Section 11AC of the Central Excise Act providing for penalty on a person for non-payment, short-payment etc. of duty of excise are *pari materia* provisions. For such a penalty, the irregular availment of MODVAT credit or the non-payment, short-payment etc. of duty of excise, as the case may be, must be by reason of fraud, wilful mis-statement, collusion or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade payment of duty. At least one of these ingredients should be alleged and proved before imposing such penalty. In the present case, on a perusal of the show-cause notice, we find that it was alleged that the assessee had contravened Rules 57A, 57F and 57G with intent to evade payment of duty. "Contravention of Rules with intent to evade payment of duty" was one of the grounds under Rule 57I(4) to impose penalty on a person who had irregularly availed MODVAT credit on inputs. We find that Rule 173Q was also invoked in the operative part of the show-cause notice but without any specific allegation in the body of the notice unlike in the case of Rule 57I.

Rule 173Q as this rule stood during the material period had several clauses applicable to different factual situations, but none was specified in the show-cause notice. For these reasons, we are not in a position to sustain the penalty imposed on the appellants under Rule 173Q. However, there being specific allegation of "contravention of rules with intent to evade payment of duty", in the show-cause notice, we cannot take the same view in respect of Rule 57I(4). It is on record that, when the wrong availment of MODVAT credit on inputs was pointed out by the department, the credit was reversed. Today, there is no grievance whatsoever for the appellants in relation to the reversal of credit. Hence it must be held that wrong availment of MODVAT credit on inputs is an admitted fact. The only question which remains to be considered is whether it was done with "intent to evade payment of duty". In this context, it is submitted by the learned Counsel that the show-cause notice did not allege any facts to establish "intention for evading

payment of duty". It is submitted that the company was paying duty of Rs. 3,129.06 lakhs per month during the material period and therefore it is baseless to have alleged that they had availed MODVAT credit of Rs. 1.40 lakhs with intent to evade payment of duty for a period of five years (1994 - 98). This argument of the learned Counsel is yet to be rebutted. We, therefore, hold that no mens rea has been made out against the appellants.

3. In the result, both the penalties are set aside and this appeal is allowed.

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