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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-21-2010

Judge : The Honourable Mr. Rakesh Kumar, Member (Technical)

Appeal No. : CENTRAL EXCISE APPEAL NO. 1991-1992 OF 2008 AND E/C.O./364-365 of 2008-SM

Appellant : Cce, Kanpur

Respondent : M/S. K.B.K. Plascon (P) Ltd., and Another

Advocate for Pet/Ap. : Shri S.K. Bhaskar, Authorised Representative (SDR) for the Revenue.

Judgement :

Per RAKESH KUMAR:

The facts giving rise to these appeals and cross objections are as under:-

The appellant company M/s. K.B.S. Plascon (P) Ltd., 24/468, Birhana Road, Kanpur are engaged in the manufacture of Plastic sheets, Plastic Rods, Plastic Block and Plastic parts of machines chargeable to central excise duty. They were also availing Cenvat credit of duty paid on inputs used in the manufacture of their final product. The factory of the appellant company was visited by the jurisdictional central excise officers on 25.8.2006. On verification of raw material lying in the factory the central excise officers found shortage of 6000 kgs. of P.P. Repol and

3220 kgs. of HDPE involving Cenvat credit of Rs. 1,02,929/. Shri Ramanand Sharma, authorized signatory of the appellant, on being asked by the officers, while admitting the shortage explained that cenvated input found short must have been removed by some employees without payment of duty. Subsequently, the entire Cenvat credit involved on the shortage was paid by the appellant company along with interest. A show cause notice dated 25.7.2007 was issued to the appellant for confirmation of duty demand amounting to Rs. 1,02,929/- along with interest and imposition of penalty against the appellant company as well as authorized signatory. The show cause notice was adjudicated by the Asst. Commissioner vide Order-in-Original No. 31/08 dated 29.3.2008 by which entire duty demand of Rs. 1,02,929/- was confirmed against the appellant company along with interest and the amount already deposited was appropriated. Besides this, penalty of equal amount i.e. Rs. 1,02,929/- was imposed on the appellant under Rule 15 of Cenvat Credit Rules, 2002, read with Section 11AC of Central Excise Act and another penalty of Rs. 5000/- on the appellant company under Rule 25 of Central Excise Rules, 2002. A penalty of Rs. 10,000/- was imposed on Shri Ramanand Sharma, Authorised Signatory of the appellant company under Rule 26 of the Central Excise Rules. On appeal, the Commissioner (Appeals) vide Order-in-Appeal dated 29.5.2008, while upholding the duty demand, set aside the penalty on the appellant company as well as on the authorized signatory. It is against this order of the Commissioner (Appeals) that the department has come in appeal before the Tribunal. Against the appeals filed by the department for restoration of penalty on the appellant company and its authorized signatory, the respondents have filed cross objections.

3. None appeared for the respondents, who vide their letter dated 3.6.10 had requested that the appeals may be decided on merits as they do not wish to appear for personal hearing.

4. Heard Shri S.K. Bhaskar, learned D.R., who pleaded that this is a case of clandestine removal as the shortage of cenvated raw material i.e. 6000 kgs. of P.P. Repol and 3220 kgs. of HDPE is huge, for which no explanation has been given by the respondent company and the explanation of Shri Ramanand Sharma, authorized signatory of the respondent that the material found short might have

been removed by the employees without payment of duty further corroborate the fact of clandestine removal; that this being a case of clandestine removal penalty had been rightly imposed by the original adjudicating authority on the respondent company under Section 11AC and on the authorized signatory under Rule 26 of Central Excise Rules, that the Commissioner (Appeals)'s order setting aside the penalty on the ground that there is no corroborative evidence that goods had been cleared clandestinely is not correct as looking to the quantum and the nature of the shortage, it is clear that cenvated inputs had been cleared clandestinely and that just because the entire duty had been paid before issuance of the show cause notice, it cannot be the ground for waiver of penalty and the judgments relied upon by the Commissioner (Appeals) in this regard are no longer a good law.

5. I have carefully considered the submissions of the learned D.R. and submissions of the respondents in the memorandums of Cross Objection filed by them. In this case, during the visit of the central excise officers, shortage of raw material 6000 kgs. P.P. Repol and 3220 kgs. HDPE was detected for which no explanation has been given by the appellant company. On the contrary the authorized signatory Shri Ramanand Sharma, in his statement on that day stated that that the goods found short might have been removed by the employees without payment of duty and subsequently entire duty along with interest was paid. In view of this the Commissioner (Appeals) s finding that there is no corroborative evidence in support of the department s allegation that the goods found short had not been clandestinely removed, is not correct and just because duty and interest has been paid prior to issuance of show cause notice, it cannot be a ground for waiver of penalty. As held by the Hon'ble Punjab and Haryana High Court in the case of CCE, Delhi vs. Machino Montell (I) Ltd., reported in 2006 (202) ELT 398 (PandH), penalty is liable to be imposed under Section 11AC in a case of clandestine removal of goods without payment of duty, or of fraud, suppression of fact, etc. and just because duty had been paid prior to the issuance of show cause notice, it would not save the assessee from penal provision of Section 11AC. In view of this, the Commissioner (Appeals)'s order setting aside the order of penalty on the Respondent company under Section 11AC is not correct and is set aside and order-in-original passed by the Asst. Commissioner in this regard is restored.

6. However, as regards the penalty imposed on the authorized signatory of the Respondent company under Rule 26 of Central Excise Rules, I find that there is no evidence on record to indicate that he was directly involved in dealing with the goods which he knew were liable for confiscation. Accordingly, the penalty imposed on Shri Ramanand Sharma is set aside.

7. As regards the penalty of Rs. 25,000/- imposed by the Asst. Commissioner on the Respondent company under Rule 25(1) of Central Excise Rules, 2002 and which has been set aside by the Commissioner (Appeals), I hold that since penalty under Section 11AC has been restored, there is no necessity for separate penalty on the Respondent company under Rule 25(1). Accordingly, the Commissioner (Appeals)'s order setting aside penalty on the Respondent company under Section 25(1) of Central Excise Act is upheld though not for the reason stated in the impugned order.

8. In view of the above discussion, the part of the Commissioner (Appeals) s order setting aside the penalty on the Respondent company under Section 11AC of Central Excise Act is set aside and on this point the order of the Asst. Commissioner is restored. The rest of the order of the Commissioner (Appeals), is upheld. Both the appeals filed by the Department and the Cross Objections filed by the Respondents stand disposed off as above.