

(2011) 04 KAR CK 0201
In the Karnataka High Court
Case No : C.E.A. No. 74 of 2008

Commissioner of C. Ex.

APPELLANT

Vs

Apollo Power Systems (P) Ltd.

RESPONDENT

Date of Decision : 08-04-2011

Acts Referred:

Citation : (2017) 347 ELT 71

Hon'ble Judges : N. Kumar and Ravi Malimath, JJ.

Bench : Division Bench

Advocate : Shri Jeevan J. Meeralagi, Advocate, for the Appellant; Shri M.A. Narayan, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

1. This appeal is by the Revenue challenging the order passed by the Appellate Authority as well as the Commissioner of Appeals who disallowed the penalty imposed by the Assessing Authority.

2. The assessee is in the business of manufacturing acoustic enclosures for DG sets and Control Panels falling under Chapter sub-heading Nos. 7308 90 90 and 8537 10 00 of the schedule to the Central Excise Tariff Act, 1985. They purchased control panels manufactured from M/s. Power Control Equipments, Bangalore on payment of Central Excise duty and cleared the same to 100% EOU without payment of Central Excise duty and on the basis of CT3 certificate, misdeclaring that the same have been fabricated/manufactured by them and thereby have not fulfilled the condition specified in Notification No. 22/2003-C.E. Consequently, they also irregularly availed the Cenvat credit amounting to Rs. 6,72,064/- and Education Cess amounting to Rs. 13,441/- on the control panels purchased from M/s. Power Control Equipments, Bangalore and utilised the same for payment of duty on clearance of excisable goods. On being pointed out in the course of audit, the assessee has accepted the mistake and paid the duty and interest and requested for waiver of penalty. However, the Assessing Authority appropriating the amount paid towards duty and interest, imposed a penalty of

Rs. 65,000/-. Aggrieved by the same, the assessee preferred an appeal to the Commissioner of Central Excise. The Commissioner in the facts of the case took a lenient view of the matter and held that when the reversal of credit is done at the instance of the audit but before the issue of show cause notice and there is no suppression of facts/misdeclaration with intent to evade payment of duty, he concluded that no penalty is leviable in the facts of the case. Accordingly, the order imposing penalty was set aside. Aggrieved by the said order, the Revenue preferred an appeal to the Tribunal. The Tribunal on re-appreciation of entire material on record was of the view that though the credit taken by the assessee is irregular, it appears to be on the impression that inspection, testing, etc., would amount to manufacture and therefore, when the error was pointed out even before the issue of show cause notice, duty and interest is paid. The Tribunal did not find any justification to interfere with the order passed by the Appellate Authority and therefore, the appeal came to be dismissed. Aggrieved by the said orders, the Revenue is in appeal.

3. The learned Counsel for the Revenue assailing the impugned order contends that the facts are not in dispute. The assessee did not purchase the raw materials for the purpose of manufacturing control panels. On the contrary, he purchased finished control panels from M/s. Power Control Equipments, Bangalore on payment of Central Excise duty. But wrongly, he took credit of duty paid and utilised the same while making payment of duty. It cannot be said to be a bona fide mistake or error in the interpretation of the notification. At any rate, testing, inspection and packing do not constitute manufacturing as understood in the context of Central Excise Act. Therefore, he contends that the orders passed by the Appellate Authority are illegal and require to be set aside.

4. Per contra, the learned Counsel for the assessee has submitted that in the facts of the case when the assessee also had the facility for manufacturing control panels and in fact when he got a 100% EOU order for supply of panels in order to meet the demand, he has purchased the finished product and thereafter, attended to other requirements, which he was under the bona fide belief that it constitutes manufacture and therefore, availed the credit. But once it is pointed out in the course of audit before issue of show cause notice, he has paid the duty and the interest. In the facts of the case, the Assessing Authority was not justified in imposing penalty and the Appellate Authorities were justified in passing the impugned order. He also points out that the Instruction F. No. 390/Misc./163/2010-JC, dated 20-10-2010 passed by the Central Board of Excise & Customs, New Delhi in respect of prescribing monetary limits for Departmental appeals before CESTAT and High Courts. In view of the said circular, no appeal lies to the High Court against a claim of less than Rs. 2 lakhs much less a claim of penalty when no substantial question of law is involved. Though the said circular is dated 20-10-2010, the policy behind the circular is to be understood and the assessee herein is a small time manufacturer and when he has paid the duty and interest, the penalty of Rs. 65,000/- which is the subject matter of the proceedings, the Revenue should not have preferred this appeal, when two fact

finding authorities have concurrently held against the revenue.

5. Without going into the illegality or technicality and the application of the various provisions, we are satisfied that in the facts of this particular case that the Appellate Authorities committed no error in giving the benefit of waiver of penalty when the assessee had paid the duty and interest even before issue of show cause notice when the error was pointed out during the audit. In that view of the matter, we do not see any justification to interfere with the concurrent finding recorded by the two fact finding authorities.

6. Though this appeal was admitted to consider the substantial question of law, we decline to answer the same in view of our finding recorded above which is purely confined to the facts of the case as the substantial question of law is already decided by the Apex Court.