(2014) 01 MAD CK 0082

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3501 of 2008

Commissioner of Central Excise APPELLANT

Vs

Eurotherm Del India Ltd. RESPONDENT

Date of Decision : 30-01-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11AC

Citation : (2014) 307 ELT 490

Hon'ble Judges : T.S. Sivagnanam, J;Chitra Venkataraman, J

Bench : Division Bench

Judgement

T.S. Sivagnanam, J.—This appeal by the Revenue is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal (The Tribunal) dated 21-11-2007 in Final Order No. 1382 of 2007. The appeal has been admitted on the following substantial questions of law: "(i) Whether on the facts and in the circumstances of the case, the CESTAT was correct in setting aside the appeal filed by the Department regarding imposition of mandatory penalty under Rule 57-1(4) and Section 11AC for the entire period subsequent to 28-9-1996?

(ii) Whether the CESTAT was correct in setting aside the appeal filed by the Department when the entire duty demanded has been paid by the first respondent in accordance with the Additional Commissioner''s Order No. 24 of 2003, dated 13-6-2003?"

The respondent/assessee was issued with a show cause notice dated 17-8-1999 demanding duty of Rs. 3,19,033/- on the allegation that they have not reversed the Modvat credit availed on inputs cleared by them to their servicing department and also products cleared to their customers as replacements for the products supplied earlier, without payment of duty. The assessee did not dispute the violation committed but stated that they have used the inputs involving duty of Rs. 1,71,614/- only for which, they have paid by debit to personal ledger account entries made on 18-12-1998 and 13-3-1999 and therefore, no penalty can be imposed on them. The Adjudicating Authority rejected the contention raised by the assessee and by order dated 21-12-1999, confirmed the demand and adjusted the amount paid by the assessee and also imposed penalty equivalent to the amount of duty under Rule 57-1(4) of the Central Excise Rules, 1944 r/w Section 11AC of the Central Excise Act, 1944 and penalty of Rs. 1,50,000/- under Rule 173Q of the Central Excise Rules, 1944.

2. Aggrieved by such order, the assessee preferred appeal before the Commissioner (Appeals). The Appellate Authority found that the Original Authority has not assigned any reasons in support of its conclusion and therefore, remanded the matter to the Original Authority to re-examine the claim made by the assessee that they have not cleared any manufactured item for repairs/warranty replacements. As regards the penalty, the Appellate Authority held that Rule 57-1(4) applies only where credit of duty paid on any inputs has been taken wrongly by reason of fraud, wilful misstatement, etc. with intent to evade payment of duty and not where it is a lapse of not reversing the credit. Further, the Appellate Authority observed that the mandatory penalty under Rule 57-1(4) of the Central Excise Rules, 1944 as imposed by the lower authority for the period earlier to 28-9-1996 is not correct and cannot be sustained. The penalty under Rule 173Q was also vacated. Aggrieved by such order dated 20-4-2000 vacating the penalty, the Revenue preferred appeal to the Tribunal. The Revenue, in their memorandum of grounds before the Tribunal contended that that portion of the order passed by the Appellate Authority, dated 20-4-2000, wherein it set aside the order of the Original Authority imposing mandatory penalty under Rule 57-1(4) of the Central Excise Rules, 1944 is neither legal nor proper. The copy of the memorandum of grounds filed by the Department before the Tribunal, was produced before this Court by the learned counsel for the assessee from which, it is evident that the Department justified their claim for mandatory penalty. The Tribunal dismissed the appeal filed by the Revenue by order dated 21-11-2007, which is impugned in this appeal. The Tribunal held that the penal provision under sub-rule (4) to Rule 57-1 of the Rules was brought into force on 23-7-1996 [and not on 28-9-1996 as mentioned in the order-in-appeal, dated 20-4-2000]. Therefore, the penal provision can have only prospective effect and there is no question of imposing penalty for the period prior to 23-7-1996. Having held so, the Tribunal observed that the question that would survive is whether the decision of the lower appellate authority should be interfered with insofar as the period from 23-7-1996 to 28-9-1996 is concerned and the Tribunal did not interfere with the decision of the lower appellate authority for the said period and accordingly the appeal was dismissed. Challenging the said order, the Revenue has preferred this appeal, which has been admitted on the above questions of law.

3. The Department''s contention before the Tribunal was that whether the lower appellate authority was right in setting aside the mandatory penalty under Rule 57-1(4) of the Central Excise Rules, 1944 and Section 11AC of the Central Excise Act, 1944 for the entire period subsequent to 28-9-1996. The Tribunal did not venture to examine this question but merely stated that it need not interfere with

the decision of the lower appellate authority.

4. We have perused the grounds of appeal filed by the Revenue before the Tribunal, from which it is seen that the Department has contested the matter regarding imposition of penalty prior to the date of introduction of the said provision, viz., 57-1(4) of the Central Excise Rules, 1944 and thereafter. Therefore, the Revenue having raised such a ground before the Tribunal, the Tribunal ought to have considered the issue and rendered a finding. Without doing so, the Tribunal merely observed that they need not interfere with the decision of the lower appellate authority as regards the penalty for the brief period from 23-7-1996 to 28-9-1996 when the contention of the Department that post 28-9-1996 also the Department was entitled to levy penalty and that the period covered for adjudication was from 1-4-1994 to 30-9-1998. Hence, this question requires consideration of the Tribunal.

5. Accordingly, the matter is remitted back to the Tribunal directing it to consider the question of levy of penalty under Rule 57-1(4) of the Central Excise Rules, 1944 for the period post 23-7-1996 in accordance with law after giving opportunity to both sides. With the above direction, this Civil Miscellaneous Appeal is disposed of. No costs.