(2011) 08 KAR CK 0116

In the Karnataka High Court

Case No : CEA. No. 17 of 2011

Commissioner of Central Excise Bangalore I Commissionerate, C.R. Building, Queen''s Road, Bangalore - 560 001 — APPELLANT

Vs

M/S. MTR Foods Limited. — RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:
CENVAT Credit Rules, 2002 — Rule 11 (1), 7

Citation : (2012) 282 ELT 196

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : K.N. Mohan, for the Appellant;

Final Decision : Dismissed

Judgement

N. Kumar

1. This appeal is by the Revenue challenging the order passed by the Tribunal allowing the appeal filed by the Assessee solely on the ground that the very initiation of proceedings was barred by law of limitation.

2. The Assessee is a manufacturer of Ice-Cream and were availing the benefit of CENVAT credit of duty paid on ''inputs service'' of the capital goods. They availed CENVAT credit of duty paid on prefabricated (construction) building (cold room) consisting of wall, roof, door, flashing window, on an assumption that they are required to manufacture final products, The cold room is used for freezing the Ice-Cream under below -20 to -40 Degree Celsius in order to make the Ice-Cream marketable. It is not in dispute that the Assessee has fifed the return as required under Rule 7 of the CENVAT Credit Rules, 2002 as per Annexure-10 giving the details such as name of the supplier/place, type of supplier, duty paying documents, ECC number of the supplier, date on which inputs received value thereof, CENVAT credit availed thereon and also the item in description.

The Revenue authorities after receipt of the returns did not raise any queries and audit was undertaken during the period between May 2003 to August, 2004. The said audit was supervised by the Deputy Commissioner of Central Excise and the audit note also has been signed by him. They did not find anything wrong in the availment of the CENVAT credit. It is only, when the audit took place during September and October, 2004, they noticed this wrong availment of credit and issued a show cause notice on 25-9-2007. Thereafter duty, interest and penalty was levied. Aggrieved by the same, the Assessee preferred an appeal to the Tribunal. The Tribunal without going into the merits of the matter, set aside the order impugned in the appeal solely on the ground that the initiation of proceedings is barred by time. Aggrieved by the said order, the present appeal is filed.

3. The Learned Counsel appearing for the Revenue submits that the defect was noticed in September, 2004, and the proceedings initiated on 25-9-2007 was well within the period of 5 years and therefore the Tribunal was not justified in setting aside the order on the ground of limitation. Section 11A on which reliance is placed reads as under:

11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

(1) when any duty of excise has not been levied or paid or has been short-levied or short-paid or (erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder), a Central Excise Officer may, within (one year) from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has bean short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this Sub-section shall have effect, [as if for the words (one year), the words "five years" were substituted:

Sub-section (1) of Section 11 provides for a period of one year as the period within which recovery of dues not levied or not paid or short levied or erroneously levied could be recovered. If the case falls under the proviso such as the duty has not been levied by reason of fraud. coercion or willful suppression of facts or contravention of any of the provisions of this Act or the Rules made thereunder with an intent to evade payment of duty by such person or his agent then 5 years is the period prescribed for initiating proceedings.

4. As is clear from the material on record, the returns were filed promptly. In the returns it is clearly mentioned that they availed credit under the aforesaid rules. The audit party accepted the same. It is only in the second audit that they noticed the mistake and initiated proceedings. Therefore, in the light of the aforesaid facts none of the other conditions prescribed in the Proviso exists in this case to extend the period of limitation of 5 years. It is in this background the Tribunal was justified in setting aside the order passed by the appellate authority and in restoring the order passed by the original authority. Therefore, there is no merit in this appeal. Accordingly, it is dismissed.