(2011) 03 KAR CK 0044

In the Karnataka High Court

Case No : C.E.A. No. 91 of 2008

Commr. of C. Ex. and S. Tax, LTU — APPELLANT

Vs

Bharat Electronics Ltd. — RESPONDENT

Date of Decision : 08-03-2011

Acts Referred:

Central Excise Rules, 1944 — Rule 57AD, 57CC
Finance Act, 2005 — Section 82

Citation : (2011) 267 ELT 172 : (2013) 20 GSTR 488

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

Bench : Division Bench

Advocate : N.R. Bhaskar, for the Appellant; K. Parameshwaran, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—This is an appeal filed by the revenue challenging the order passed by the Tribunal 2006 (195) E.L.T. 190 (Tribunal), which has allowed the appeal and set aside the penalty and set a side the penalty and interest for wrongful availment of MODVAT/CENVAT credit.

2. The Assessee - M/s. Bharat Electronics Ltd., Jalahalli, Bangalore is a holder of Central Excise Registration No. 5/92. They are in the business of manufacture of various electronics and telecommunication components as well as defence equipment. They are availing exemptions from payment of central excise duty under various notifications for certain clearances of the equipment and components manufactured by them. They also availed MODVAT/CENVAT credit for the inputs used in the manufacture of their final products during the periods 1996-97 to 2000-01. A show cause notice came to be issued to the aseessee accusing them for not maintaining separate inventory accounts of the receipts and use of inputs which are used in or in relation to the manufacture of goods which are exempted from the whole of the duty of excise leviable thereon or chargeable to Nil rate of duty. They were also accused of taking MODVAT/CENVAT

credit duty paid on such inputs and have not paid an amount equal to 8% of the price of such exempted goods as required under the provisions of erstwhile Rule 57CC/57AD of CER, 1944 (Central Excise Rules, 1944). Therefore, they were accused of suppressing true facts from the Department and of misdetermination.

3. The Assessee sent a reply to the said Show Cause Notice contesting the claim However, the order-in-original came to be passed on 12-3-2002 determining a sum of Rs. 92,63,374/- for the period of 1996-1997 to 2000-2001. Before the order was passed, a sum of Rs. 53,43,593/- had already been paid by the Assessee and therefore, the said amount was adjusted towards the aforesaid amount and the Assessee was liable to pay only the balance amount. The Assessee paid the said balance amount within the time stipulated. However, they preferred an appeal against the said order to the Tribunal challenging the aforesaid order imposing the duty, interest and penalty on the ground that at the relevant point of time, there was no provision which authorised the revenue to impose the aforesaid duty, penalty and interest.

4. The Tribunal on consideration of the materials on record, the judgment of the Apex Court and the Circulars issued by the Department held that, there was no machinery for the recovery of the amount during the relevant period. It is only to overcome the said flaw in law, that Clause 82 of the Finance Act, 2005 (hereinafter referred to as ''the Act'') was promulgated to recover the amount retrospectively. The Explanation to Rule 82 clearly removes any doubt pertaining to non-punishment of an offence or omission on any person for violation of the Rules. It also recorded a finding that there was no suppression of facts and the Assessee being a PSU unit was not to gain, anything in the matter. Therefore, the prayer for setting aside the penalty and interest was allowed. Aggrieved by the said order, the revenue is in appeal.

5. The learned Counsel for the revenue assailing the impugned order contends that, though at the relevant point of time, there was no provision for re-covey of the amount due, however the Assessee availed a-wrong credit. Clause 82 of the Act was enacted enabling the Department to recover the said amount. Admittedly, the Assessee has not maintained separate accounts as required under the law. They had suppressed this fact. They have wrongfully availed mod-vat/CENVAT credit. In these circumstances not only they are liable to pay the duty claimed but also liable to pay the interest thereon. The amended provisions enable the authorities to recover the interest.

6. Per contra, learned Counsel for the Assessee submitted that even if the amended provisions are held to be retrospective, the liability to pay the interest arises only in the event of the Assessee not paying the duty determined within the time stipulated in the order-in-original. In the instant case a substantial amount was paid even before the determination and the balance amount was paid after the determination within the time stipulated. Therefore there is no liability to pay interest. The amended provisions make it clear that the liability to pay interest arises only if the Assessee does not pay the duty levied within the

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time stipulated.

7. From the material on record, it is clear that the Assessee has not maintained separate accounts of either purchase of inputs which are utilised in the manufacture of exempted goods or dutiable goods. It is also not in dispute that the Assessee has wrongfully availed MODVAT/CENVAT credit. On being pointed by way of a Show Cause Notice, they have promptly reversed the credit. They also paid a substantial amount of duty payable even before the order in original was passed. After the order was passed, within the stipulated time, the balance duty leviable has been paid. Though the amendment was retrospective in nature, the penalty being penal in character cannot be retrospectively imposed and therefore, the tribunal has rightly set aside the order imposing the penalty.

8. In so far as the payment of interest is concerned, as is clear from the terms of the amended provisions, it is payable in the event of the Assessee not paying the amount held to be due under the order within the period stipulated therein In the instant case even before the Tribunal order, substantial amount was paid and the balance amount was paid within the period stipulated. Therefore, there is no cause for levy of interest. It the duty had not been paid and the recovery proceedings are initiated in terms of the order determining the payment of duty, by virtue of the amended provisions the duty is recoverable with inter-est. This is not a proceeding initiated by the authorities for recovery of the amount. In these circumstances, the Tribunal was justified in holding that as the Assessee had reversed the credit, paid the duty in respect of which wrongly mod-vat/CENVAT credit was claimed within the time stipulated, the liability to pay the interest does not arise.

9. In that view of the matter, we are satisfied from the materials on record that the order passed by the Tribunal is legal and valid and does not suffer from legal infirmity which calls interference.

10. Accordingly, the appeal is dismissed as no substantial question of law is involved.

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