
(1999) 10 AHC CK 0151

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 628 of 1999

Frontier Springs Limited

APPELLANT

Vs

Commr. of C. Ex. (Appeals)

RESPONDENT

Date of Decision : 28-10-1999

Acts Referred:

Central Excise Rules, 1944 — Rule 52A, 57F(1), 57G
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 35F

Citation : (2000) 67 ECC 353 : (2000) 118 ELT 567

Hon'ble Judges : P.K. Jain, J

Bench : Single Bench

Advocate : A.P. Mathur, for the Appellant; S.P. Kesharwani, for the Respondent

Final Decision : Disposed Of

Judgement

P.K. Jain, J.—The petitioner M/s Frontier Springs Limited has filed the present writ petition for the following relief :-

"(i) Issue a writ of Certiorari quashing the interim order dated 26.4.99 served on 22.5.99 passed by the Commissioner of Central Excise (Appeals), Allahabad on the stay-cum-waiver application;

(ii) Issue any other writ, order or direction in the nature of mandamus directing the Commissioner (Appeals) to decide the stay-cum-waiver application within a stipulated period without insisting on pre-deposit of 50% of the adjudged dues and further directing the respondents not to recover the adjudged dues during the pendency of the appeal."

2. In the writ petition the petitioner has alleged that he is engaged in the manufacture of leaf springs & coil springs falling under Chapter 73 of the Central Excise Tariff Act, 1985. The petitioner was using Flat bars as inputs in the manufacture of his final products and was availing the facility of Modvat. In terms of Rule 57-F(1) the inputs in which credit has been taken may be used in or in relation to the manufacture of final products. The inputs may also be

removed after intimating the Assistant Commissioner of Central Excise concerned in writing for home consumption or for export. It further provides that all removals of inputs for home consumption shall be made on payment of duty equal to the amount of credit availed in respect of such inputs and shall be under the cover of invoice prescribed under Rule 52-A. The petitioner vide letter dated 10th January, 1990 sought general permission under Rule 57F (i) & (ii) to remove inputs after payment of duty from the Jurisdictional Superintendent Central Excise Kanpur and the same was granted vide order dated 11-1-1990. However, a notice of demand-cum-show cause dated 2-5-1996 was served upon the petitioner on the ground that on scrutinizing the petitioner's R.T. 12 return pertaining to the Month of October, 1995 it was found that he had cleared 136.266 metric tonne of Flat bars on payment of duty of Excise amounting to Rs. 449680/- to his Unit No. 2 at Rania Kanpur Dehat. The petitioner was required to show cause before the Deputy Commissioner (Judicial) Central Excise Kanpur as to why Modvat Credit of Rs. 4,49,680/- utilized wrongly be not recovered from him as per Rule 57-F(i) & (ii) of the Central Excise Rules, 1944. In this case, the petitioner has removed his products at intermediate stage instead of input stage, hence he has contravened the provisions of Rule 57-F (i) & (ii). The petitioner in his show cause stated that shearing of Flat bars into smaller sizes does not amount to manufacture. The nature of Flat bars is not changed. Hence, it can not be said that the same were removed at intermediate stage. The same were removed admittedly after payment of appropriate Central Excise duty. Hence all objections raised through show cause notice were insignificant. The Flat bar is not final products of the petitioner. The Assistant Commissioner vide order dated 30-3-1998 adjudicated the case and confirmed the demand of Rs. 4,49,680/- and further imposed penalty of Rs. 1,50,000/- under the wrong impression that permission to clear inputs as such was granted for a specific case and not in general. Feeling aggrieved the petitioner has filed appeal before the Commissioner (Appeals) along with the Stay-cum-Waiver application. The Commissioner (Appeals) decided the Stay-cum-waiver application vide order dated 26-4-1999 served upon the petitioner on 22-5-1999 without considering the financial position of the petitioner correctly. The petitioner in support of his poor financial health had produced copy of the balance sheet at the time of hearing. The general permission for removal of inputs was also annexed along with the memo of appeal and the Commissioner (Appeals) ought to have examined the same before passing the impugned order. The order is bad because the Commissioner (Appeals) has neither considered the prima facie case on merits and nor the financial position correctly.

3. Copy of the impugned order is Annexure-5 whereby the stay application was rejected and the petitioner was directed to deposit 50% of the penalty imposed by the authority below.

4. The Respondent is Commissioners of Central Excise (Appeals) have filed counter affidavit in which they have stated that in the Month of October, 1995 the petitioner cleared 136.266 metric tones of Flat bars to his unit No. 2 located

at Rania Kanpur Dehat whereas in the month of October, 1995 the petitioner was not having any stock of Flat bars as disclosed in RG 23A part-I. The goods were cleared without obtaining dated acknowledgement permission from the Office of the Jurisdictional Assistant Commissioner and thus there was contravention of the provisions of Rule 57F(i)(ii). The provisions of Rule 57-G of the Central Excise Rules were not complied with. On perusal of declaration filed under Rule 57-G it was noticed that the petitioner had not declared flat bar as his final product. Without mentioning the goods in the declaration under Rule 57-G excisable goods cannot be removed on availment of credit. It was further stated that general permission for removal of intermediary goods i.e. flat bars was not permissible under the Rules and hence, illegality was committed. u/s 35F of the Central Excise Act, 1944 financial stringency is necessary to be shown for dispensing with the requirement pre-deposit. The Commissioner (Appeals) has duly considered the grounds taken in application u/s 35F of the Central Excise Act and has passed the appropriate order.

5. Shri A.P. Mathur, learned counsel for the petitioner and Sri S.P. Kesharwani, learned Standing Counsel for the respondents have been heard.

6. Sri Mathur has urged that the excise duty payable on the goods was admittedly deposited prior to the removal of the goods and there was no loss of revenue to the department. It is further submitted that admittedly general permission was obtained before removal of the goods and there was sufficient compliance of the Rules and the provisions of law. Lastly it is submitted that the notice was barred by limitation and all these questions have not been considered by the learned Commissioner (Appeals) while passing the impugned order. It is next submitted that along with Waiver-cum-stay application copy of the balance sheet was filed showing the financial condition of the petitioner which has also not been considered. Sri Kesharwani submits that the goods were removed by suppressing facts or by the mis-representation. Under the proviso to Sub-section (1) of Section 11A the limitation in such cases shall be extended to 5 years. It is also submitted that such a question was not raised before the Assistant Commissioner who confirmed the demand notice and imposed the penalty and also in the memo of appeal as well as in Stay-cum-Waiver application no such grounds was taken. Sri Kesharwani further submits that general permission is not in accordance with the Rules and could not have been granted. It is further submitted that the financial condition of the petitioner has been looked into by the Commissioner (Appeals) while passing the impugned order.

7. The goods are said to have been removed in the month of October, 1995 whereas the notice was served on 2nd May, 1996. u/s 11A of the Central Excise Act the notice is required to be served within a period of 6 months from the relevant date. However, proviso to Sub-section (1) of Section 11A of the Act provides that in case there is mis-statement of facts or there is suppression of facts and in other circumstances mentioned in the proviso, the period of limitation shall be 5 years. The question of limitation has not been considered by

any of the authorities below. It may, however, be pointed out that the petitioner does not appear to have filed any objection to the show cause notice before the authority passing the order confirming the notice and imposing penalty. In the memo of appeals as well as in the Waiver-cum-stay application also no such ground is shown to have been taken. Therefore, the learned Commissioner (Appeals) was not required to dispose of such a controversy while passing the impugned order.

8. The order passed by the Commissioner (Appeals) however, shows that there was general permission obtained by the assessee for removal of the intermediate goods. Besides this, perusal of the notice further shows that the goods were removed after payment of the excise duty payable by the petitioner. Thus there was no loss of revenue caused to the department. The default on the part of the petitioner in these circumstances, prima facie appears to be of a technical nature. This has not been considered by the Commissioner (Appeals) while passing the impugned order. As regards poor financial condition the learned Commissioner (Appeals) has observed that no evidence has been produced in this regard whereas the petitioner has alleged that copy of the balance sheet was produced in support of the poor financial condition.

9. Considering the fact that the petitioner had already deposited the excise duty payable by him before removal of the goods and there was general permission in his favour for removal of such goods and there is only technical question whether general permission could be granted or not, without expressing any opinion on the merits of the case, I am of the view that the Waiver-cum-stay application should have been allowed by the learned Commissioner. He has only granted stay to the extent of 50% of the amount of the penalty. No reason is assigned for rejection of the stay to the extent of 50%. In these circumstances, the petition succeeds.

10. The petition is hereby allowed. The impugned order passed by respondent No. 1 is modified. The Waiver-cum-stay application is allowed. Realisation of the amount of excise duty and penalty is stayed pending disposal of the appeal. The learned Commissioner (Appeals) is directed to dispose of the appeal expeditiously,....

No order as to costs.