(2021) 07 CESTAT CK 0010

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 41413 Of 2019

M/s. Balamurugan Chemicals Private Limited — APPELLANT

Vs

Commissioner Of G.S.T. And Central Excise — RESPONDENT

Date of Decision : 01-07-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 3(5), 15(2)
Central Excise Act, 1944 — Section 11AC, 11AC(1)(a)
Central Excise Rules, 2002 — Rule 4, 8, 8(1), 12
Finance Act, 1994 — Section 73(3)

Citation : (2021) 07 CESTAT CK 0010

Hon'ble Judges : P. Dinesha, J

Bench : Single Bench

Advocate : G. Mani, Vikas Jhajharia

Final Decision : Dismissed

Judgement

1. The only issue that arises for my consideration is, whether the penalty of Rs.33,89,805/- and Rs.2,55,529/- under Section 11AC of the Central

Excise Act, 1944 read with Rule 15 (2) of the CENVAT Credit Rules, 2004 is correct?

2. When the matter was taken up for hearing, Shri G. Mani, Learned Advocate, appeared for the appellant and Shri Vikas Jhajharia, Learned

Authorized Representative, appeared for the Revenue.

3. I have heard the rival contentions and gone through the various decisions/ orders relied upon by both the parties.

4.1 A Show Cause Notice dated 08.12.2017 covering the period 2013-14 and 2014-15 was issued after noticing certain discrepancies by the Central

Excise Audit team during the course of audit of accounts of the appellant from February 2017 to April 2017, during which time even the ER-1 returns, etc., came to be scrutinized. The Show Cause Notice specifically emphasizes that the appellant had availed CENVAT Credit on the capital goods

which were cleared as such, which was in contravention of Rule 3 (5) of the CENVAT Credit Rules, 2004 and on the same, the tax payable in terms

of the CENVAT Credit Rules, in the prescribed manner, was not paid, which is in violation of Rule 8 (1) of the Central Excise Rules, 2002. The

appellant had also not paid the Excise Duty on the clearance of excisable goods of Limenite ground as per Rule 4 read with Rule 8 of the Central

Excise Rules and the fact of very production and clearance of the Limenite ground itself was not declared in the ER-1 return, as required under Rule

12 of the Central Excise Rules.

4.2 The Show Cause Notice, however, takes note of the payment of duty liability as indicated, only in April 2017 which was declared in the

appellantâ??s ER-1 return for the said month, then proceeds to propose the appropriation while also inter alia proposing the invocation of extended

period on the ground of the appellant having wilfully suppressed with an intent to evade payment of Duty; that there was wilful suppression of facts,

which had invited the proposition for levy of penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 15 (2) of the CENVAT

Credit Rules, 2004 on both the following counts :

(1) Clearance of CENVAT Credit availed capital goods with the intent to evade payment of amount equal to CENVAT Credit availed on capital

goods cleared as such with the intent to evade the payment of Excise Duty.

(2) Production and clearance of excisable goods of Limenite ground during the month of May 2013 with the intent to evade the payment of Excise

Duty.

4.3 The above proposal culminated in confirming, inter alia, of the penalty in the Order-in-Original No. 01/JC/CE/2018 dated 26.02.2018, which was

thereafter upheld by the Commissioner (Appeals) vide impugned Order-in-Appeal No. 107/2019 dated 08.03.2019.

5. A perusal of the Show Cause Notice clearly indicates that there was an act of suppression, contravention, etc., which, but for the audit by the

Central Excise team, could not have been detected and resultantly, the appellant would have escaped the liability. The Show Cause Notice also points

out that the issuing authority prima facie suspected, inter alia, that the appellant had indulged in suppression of facts, etc., to avoid payment of amount

equal to CENVAT Credit availed thereby resulting in contravention of the CENVAT Credit Rules. The contraventions are specifically brought out at

page 8 in paragraph 5 of the Show Cause Notice, as below:

â??CONTRAVENTION OF SECTIONS AND RULES:

From the foregoing, it appears that the manufacturer have contravened the following rules of the CCR and CER as detailed below;

(i) Rule 3(5) of CCR in as much as, the assessee have not paid an amount equal to the Cenvat Credit availed on Capital goods cleared as

such for the year 2013-14;

(ii) Rule 8(1) of CER in as much as the assessee has not paid the amount payable in terms of CCR, 2004 in the prescribed manner within the

specified time as stipulated under CCR for the year 2013-14.

(iii) Rule 4 of CER read with Rule 8 of CER in as much as the assessee have not paid the excise duty payable on clearance of excisable

goods of Limenite Ground during the month of May 2013.

(iv) Rule 12 of CER in as much as the assessee have failed to declare the production and clearance of the excisable goods of Limenite

Ground during the month of May 2013 as required in the ER-1 return filed for the corresponding period.â??

In nutshell, proper declarations, wherever expected, of removal as such, were not made by the appellant. So also, it is expected of an assessee to be

prompt in its efforts to at least declare what is being manufactured that was cleared and both the above are lacking in the case on hand. These unique

facts take away the case of the appellant from the ratio decidendi or the principles laid down in the decisions relied upon during the course of

arguments.

6.1 Section 11AC of the Central Excise Act, 1944 reads as below:

â??SECTION [11AC. Penalty for short-levy or non-levy of duty in certain cases. â?"(1) The amount of penalty for non-levy or short-levy or

non-payment or short-payment or erroneous refund shall be as follows :-

(a) where any duty of excise has not been levied or paid or short-levied or short-paid or erroneously refunded, by reason of fraud or

collusion or any wilful mis-statement 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, the person who is liable to pay duty as determined under sub-section (10) of section 11A

shall also be liable to pay a penalty equal to the duty so determined;â?¦â??

The words â??with intent to evade â?¦â? have to be looked into from the facts of each case, which may vary from case to case and the same has to

be discerned from the actions. In most of the cases, it is impossible to prove such intent. The period involved in the case on hand is 2013-14 and 2014-

15 and the Department audit took place between February 2017 and April 2017. Till that time, the appellant should have filed its monthly/ER-1 returns

regularly/periodically/quarterly/monthly, as is applicable, possibly with the help of its auditors. If the bona fides were to be believed, then the grave

irregularity, as pointed out by the Revenue, should have been attempted to be set right on its own before being pointed out since the monthly/regular

ER-1 returns were not filed blindly. Obviously, therefore, upon being pointed out, the appellant felt exposed, made payments without even questioning

the delay, if any, in the Revenueâ??s audit nor did it even raise the issue of invoking the larger period when the Show Cause Notice was issued, but

accepted the appropriation of its payment towards duty and interest.

6.2 Admittedly, there is no challenge by the assesseeappellant to the invoking of larger period which has the same ingredients as that of Section 11AC

(1) (a) ibid. It is therefore difficult to accept that the ingredients would apply for one and not when it comes to the issue of penalty.

7. Learned Advocate for the appellant relied on various case-laws, but some of the case-laws are under Service Tax law, there is no provision similar

to Section 73 (3) of the Finance Act, 1994 under the Central Excise Act, but rather a specific provision for penalty is there under Section 11AC. In

most of the cases, facts are different, like there is quantification of duty, the payment of Service Tax was made before the issuance of Show Cause

Notice which again stands on a different footing; in some cases, the penalty apparently was directed to be deleted for no suppression, but here the

same is clearly for suppression of facts coupled with contravention of various provisions.

8. In view of the above, I do not find any merit in the contentions of the appellant and hence, the appeal stands dismissed.

(Order pronounced in the open court on 01.07.2021)

