(2023) 09 CESTAT CK 0024

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No.60120 Of 2022

M/S Hero Motocorp Limited — APPELLANT

Vs

CCE & ST Gurugram — RESPONDENT

Date of Decision : 18-09-2023

Acts Referred:

Central Excise Rules, 2002 — Rule 14, 19, 19(3)
Central Excise Act, 1944 — Section 11A(1), 25

Citation : (2023) 09 CESTAT CK 0024

Hon'ble Judges : S. S. Garg, Member (J)

Bench : Single Bench

Advocate : Srinivas Kotni, Shivani

Final Decision : Allowed

Judgement

S. S. Garg, Member (J)

1. The present appeal is directed against the impugned order dated 13.01.2022 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has confirmed the demand of duty amounting to Rs. 5,12,692/- and interest on the said amount under Section 11AA and penalty under Section 25 of Central Excise Rules, 2002 read with Section 11A(1) of the Central Excise Act.

2. Briefly the facts of the present case are that the appellant is a public limited company and is engaged in the manufacture and clearance of two wheelers falling under chapter no. 87 of the First Schedule to the Central Excise Tariff Act, 1985. A show cause notice was issued to the appellant demanding duty of Rs. 5,12,692/- in respect of goods exported on FOC basis where no sale proceeds were received during the period from 13.04.2015 to 23.03.2017. The appellant filed reply to the show cause notice and the original authority confirmed the entire demand of duty amounting to Rs. 5,12,692/- along with interest and equal penalty. Aggrieved by the said order, the appellant filed the appeal before the Commissioner (Appeals) who rejected the said appeal and upheld the Order-in-

Original. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the appellant has exported the goods in compliance with the provisions and the procedures under Rule 19 of the Central Excise Rules, 2002 read with Notification No. 42/2002-CE(N.T.) dated 26.06.2001. He also submits that there is no condition at all specified under the said notification or Rule 19, mandating receipt of foreign currency in case of FOC exports by an exporter. He also submits that there is no restriction on the availment of Cenvat Credit on inputs, input services and capital goods used in the export goods, even if, these goods are exported as FOC. He also submits that the fact of exports being made in a proper manner was never disputed by the Department, neither at the time of export nor at the time of submission of documents with the Central Excise Department. He also submits that the Ld. Commissioner (Appeals) has placed reliance on the RBI Master Circular No. 14/2012-13 dated 02.07.2012 which cannot be a ground to levy excise duty on export of samples made on FOC basis. In any case, RBI circulars and guidelines are relevant only for the purpose of exchange control related procedures and mechanisms including GR waiver, investments, export/import remittances etc. and the same cannot be applied for interpreting Central Excise exemption notification and procedure. The levy and exemption of Central Excise duty on export transactions is governed by the Central Excise Act, Central Excise Rules and the Notification issued under the same. He further submitted that the impugned order referring to the RBI Master Circular for the first time without mentioning the same in the show cause notice, is bad in law because it is a settled law that a show cause notice is always the foundation upon which the department builds its case. He also submits that entire demand is bad in law as the impugned order was travelled beyond the show cause notice. He further submits that appellant has exported the goods on FOC basis in compliance with the provisions of Rule, 19 read with Notification No. 42/2002 and the appellant had bona-fide belief that he is eligible to avail Cenvat credit and the same cannot be recovered from the appellant under Rule 14 of the CC Rules. He also submits that there was no willful suppression or deliberately wrong doing by appellant. Hence, the penalty cannot be imposed in support of the submissions he relied upon the decisions:

- Torrent Pharmaceuticals Ltd. [2019 (370) ELT 1479 (G.O.I)]

- Commissioner of Central Excise, Delhi III Vs. Shyam Telecom Ltd [2015 (317) ELT 619 (Tri. Del.)]

- Jindal Stainless Ltd. Vs. Commissioner of Central Excise, Rohtak, [2013 (289) ELT 321 (Tri.-Del.)]

- P & P Overseas Vs. Commissioner of Central Excise, Delhi III [2015 (317) ELT

586 (Tri. –Del.)]

- P & P Overseas Vs. Commissioner of Central Excise, Delhi III [2017 (49) S.T.R. 611 (Tri.-Del)]

- Commissioner of Central Excise Banglore Vs. Brindavan Beverages (P) Ltd. [2007 (213) E.L.T. 487 (SC)

- Commissioner of Central Excise, Bombay-III Vs. Bhikhal Dwarkadas {1998 (99) ELT 438]

- Maruti Suzuki India Lt. Vs. CCE, Delhi-III [2013 (294) ELT 604 (Tri, Delhi).

Unique Pharmaceutical Laboratories [2013 (295) ELT 129 (GOI)]

- Union of India Vs. Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)]

- I.O.C. Limited Vs. Union of India [2005 (186) ELT 271 (Guj.)]

5. On the other hand, Ld. DR reiterated the findings of the impugned order and submitted that the appellant has exported the goods in violation of the procedures and master circular issued by the RBI. She further submitted that the appellant has not submitted any supporting documents or evidence to lower adjudicating authority to prove that the goods were sent as samples or for testing/repairing purpose nor submitted any GR waiver.

6. After considering the submissions made by both the parties and perusal of the material on record, I find that the appellant has exported the goods on FOC basis without receipt of foreign currency. Further, I find that there is no condition under Rule 19 of Central Excise Rules, 2002 read with Notification 42/2002-CE (N.T.) dated 26.06.2001 mandating receipt of foreign currency in case of FOC exports by an exporter.

7. Further, I find that at the time of export no objection was raised by the department neither at the time of export nor at the time of submission of document with Central Excise department that receipt of sale proceedings in foreign currency is required for FOC exports.

8. Further, perusal of form A.R.E.1 shows that the export goods were having no commercial value and the value was declared for customs excise purpose only and no sale proceeds were realized against the exports. Further, in the invoices also it is clearly mentioned that the impugned goods are for export, free of cost being sent for promotional purposes as trade sample on no returnable basis.

9. Further, I find that in the case of Commissioner of Central Excise, Delhi III Vs. Shyam Telecom Ltd cited (Supra) wherein Tribunal has held in para 6 as under:

"6. Rule 19 of the Central Excise Rules, 2002, permits export of the goods under bond/LUT without payment of duty, subject to following the procedure and conditions, as may be prescribed by the notification issued by the government in this regard. Notification No. 42/2001-C.E. (N.T.) dated 26.06.2001 issued under

Rule 19(3) prescribes the conditions and the procedure for this purpose and in this notification, there is no condition that in respect of the goods exported, the export proceeds must be received within any stipulated period. There is no such condition even in the Rule. In view of this, the condition regarding receipt of export proceeds cannot be imposed to demand duty foregone in respect of the goods cleared for export under bond/LUT. The duty on the goods can be demanded only if the goods have not been exported out of india within the stipulated period but there is no such allegation. In view of this, I do not find any infirmity in the impugned order. The Revenue's appeal is dismissed".

10. Further, I find that the impugned order relying upon the RBI Master Circular No. 14/2012-13 dated. 02.07.2012 is not justified because there is no allegation regarding the same in the show cause notice which is the foundation upon which the department has to build its case. Therefore, in my view, the entire demand is bad in law at the impugned order has travelled beyond the show cause notice which cannot be done in view of the decision of the Supreme Court in the case of Commissioner of Central Excise Banglore Vs. Brindavan Beverages (P) Ltd cited (Supra).

11. In view of these facts, I am of the considered opinion that the impugned order is not sustainable in law, therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any as per law.