(2021) 09 CESTAT CK 0053

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 85644 Of 2019

M/s. V.D. Enterprises APPELLANT

Vs

Commissioner Of Cen. Ex. And S.T., Aurangabad RESPONDENT

Date of Decision : 17-09-2021

Acts Referred:

Finance Act, 1994 — Section 78(1)
Customs Act, 1962 — Section 129B(1A)
Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 — Rule 20
Central Excise Act, 1944 — Section 11AB, 11AC, 11A(2B)

Citation : (2021) 09 CESTAT CK 0053

Hon'ble Judges : Sanjiv Srivastava, Technical Member

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. This appeal is directed against Order-in-Appeal No. NSK/EXCUS/000/APPL/420/18-19 dated 01.11.2018 passed by Commissioner of GST & Central Excise (Appeals), Nashik. By the said order, the Commissioner (Appeals) has held as under:-

"ORDER

The appeal filed by the assessee appellant is partially allowed to the extent of reducing penalty under section 78(1) of the Finance Act, 1994 to Rs.15,97,932/-. All other amounts of Service Tax, Interest and penal liabilities & late fees under the Order-in-Original No. 47/ST/JC/2017 dated 29.08.2017 passed by the Joint Commissioner, CST & Central Excise, Aurangabad are upheld."

2.1 The appellant has filed this appeal against the order of the Commissioner (Appeals) limiting the penalty to Rs.15,97,932/-, stating various grounds and decisions, -

· Hajarilal Jangid [2011 (24) STR 510 (Tri.-Mumbai)]

· Spectrum Power Generation Ltd. [2017 (3) GSTL 500 (Tri.-Hyd.)]

· Galaxy Construction Pvt. Ltd. [2017 (48) STR 37 (Bom.)]

· Kum United Trax Pvt. Ltd. [2014 (36) STR 210 (Tri.-Bang.)]

· K.S. Murlimohan [2011 (21) STR 512 (Tri.-Bang.)]

· Jatti Motors Pvt. Ltd. (Kar.) in CEA No.44 of 2009.

· Prakash Sadashive Karde [2016 (94) VST 209 (Tri.-Mum.)]

3.1 When the matter was called for hearing today, none appeared on behalf of the appellant. It is observed that in the past, this matter was listed for hearing on several occasions, i.e. 17.12.2019, 21.02.2020, 26.03.2021, 07.04.2021 and 05.08.2021. On all occasions, either nobody appeared or a request for adjournment was made.

Section 129B(1A) of the Customs Act, 1962 reads as follows:-

"The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal."

Rule 20 of the CESTAT (Procedure) Rules, 1982 reads as follows:-

"Rule 20. Action on appeal for appellant's default. - Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits :

Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal."

3.2 In view of the above provisions, this appeal is liable for dismissal on the ground of non-prosecution of the appeal in terms of Rule 20 of the CESTAT (Procedure) Rules, 1982.

3.3 The Commissioner (Appeals) has in para 11.3 of the impugned order recorded as follows:-

"11.3 Therefore, total penalty of Rs.15,97,932/- under section 78(1) of the Finance Act, 1944 is required to be upheld because the appellant had contravened the provisions of the Act & Rules made there-under with intent to evade payment of duty."

3.4 Even on merits, I find that the issue is squarely covered against the appellant by the decision of the Hon'ble Supreme Court in the case of Rajasthan Spinning

& Weaving Mills [2009 (238) ELT 3 (SC)] wherein the Hon'ble Apex Court has held as follows:

"2. What are the conditions and the circumstances that would attract the imposition of penalty under Section 11AC of the Central Excise Act ('The Act', hereinafter)? In the two cases before us the Tribunal has taken the view that there was no warrant for levy of penalty since the assessees had deposited the balance amount of excise duty (that was short paid at the first instance) even before the show cause notice was issued. On the other hand, on behalf of the Revenue, the appellants in the two appeals, it was contended, relying upon a recent decision of this Court in Union of India v. Dharamendra Textile Processors, 2008 (231) E.L.T. 3 (S.C.) that mere non payment or short payment of duty (without anything else!) would inevitably lead to imposition of penalty equal to the amount by which duty was short paid. In our view the reason assigned by the Tribunal to strike down the levy of penalty against the assessees is as misconceived as the interpretation of Dharamendra Textile is misconstrued by the Revenue. We completely fail to see how payment of the differential duty, whether before or after the show cause notice is issued, can alter the liability for penalty, the conditions for which are clearly spelled out in Section 11AC of the Act."

"15. Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of duty before the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub section 2B will have no application."

3.5 In view of the above, the appeal is liable to be dismissed on merits also.

4.1 Accordingly the appeal is dismissed both under Rule 20 of the CESTAT (Procedure) Rules, 1982 for non-prosecution and on merits too.

(Order pronounced in the open court)