(2015) 09 MAD CK 0086

In the Madras High Court

Case No : C.M.A. No. 2409 of 2008

Sri Raja Vinayagar Mills	APPELLANT
Vs	
The Customs Excise and Service Tax Appellate Tribunal and Others	RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11AC, 11D, 11D(1)

Citation : (2015) 09 MAD CK 0086

Hon'ble Judges : V. Ramasubramanian and T. Mathivanan, JJ.

Bench : Division Bench

Advocate : T. Ramesh, for the Appellant

Judgement

V. Ramasubramanian, J.—This appeal is by the assessee, questioning the correctness of the order of the CESTAT, confirming the demand of duty, but, setting aside the penalty.

2. Heard Mr. T. Ramesh, learned counsel for the appellant and Mr. S. Xavier Felix, learned Standing Counsel for the respondent/Department.

3. The appellant cleared VSF Yarn in hanks without payment of duty by claiming exemption under Notification No. 3/2001 CE dated 1.3.2001. As per this notification, the raw materials brought into the factory should be duty paid and no CENVAT credit should be taken for those materials to avail of the full exemption.

4. However, a show cause notice dated 9.5.2005 was issued, alleging that the appellant collected duty from the seller to compensate the loss of CENVAT credit not taken by them on their raw materials. The show cause notice was issued for the alleged contravention of section 11D of the Central Excise Act, 1944.

5. The appellant submitted a reply contending that section 11D is not attracted and that in any case, credit notes were issued to the sellers. After perusal of the invoices and books of accounts of the appellants, the Deputy Commissioner of

Central Excise, by an order in original, passed on 8.9.2005, dropped further proceedings, on the ground that the appellant did not retain any account representing excise duty, warranting action under section 11D.

6. However, the Department filed an appeal before the Commissioner (Appeals). The first appellate authority allowed the appeal by order dated 27.9.2006, holding that the issue of credit notes would not absolve the appellant of the liability to remit, the duty collected, to the department. The appellate Commissioner relied upon a larger Bench decision of CESTAT to come to such a conclusion. The appellate Commissioner also imposed a penalty under section 11AC for the act of suppression. The appellant/assessee filed an appeal before the CESTAT. By an order dated 7.1.2008, the Tribunal allowed the appeal partly, setting aside the penalty, but, upholding the demand of duty.

7. The appellant, thereafter, filed a petition for rectification. The same was dismissed by the Tribunal by an order dated 30.5.2008. Therefore, the assessee is before us.

8. On the question of law as to whether the issue of credit notes would absolve a person of the liability to deposit, the duty collected, with the Department, there is no dispute as the law is well settled. However, the contention of Mr. T. Ramesh, learned counsel for the appellant is that this is not a case where the appellant had actually collected duty of excise so as to warrant the invocation of section 11D(1) of the Act. According to the learned counsel, the appellant did not collect any amount of excise duty, but, what the original authority himself indicated in his notice was the credit of modvat. Therefore, relying upon the decision of the Bombay High Court in VIRAJ IMPO & EXPO LTD. v. COMMISSIONER OF CENTRAL EXCISE, THANE-II (2006 (205) ELT 364), the learned counsel contended that the modvat credit cannot be treated as equivalent to the collection of excise duty.

9. But, unfortunately for the appellant, even the original authority viz., the Deputy Commissioner, Central Excise recorded a finding in para 5 of his order as follows:--

"It appears on perusal of the invoices raised by the assessee for clearance of VSF Yarn that they had collected Central Excise duty equal to the amount of duty which they have paid for purchasing the raw material."

10. Again towards the end of the same paragraph, the original authority recorded a finding that once the appellant had collected duty on exempted goods, the amount collected by them representing excise duty is required to be deposited in the Government Account as per section 11D.

11. Even in the last paragraph, where the original authority decided to drop, he recorded a finding that the assessee had already issued credit notes to the parties from whom the amount representing the excise duty was collected at the time of clearance of goods.

12. In the circumstances, the question as to whether the appellant actually

collected duty of excise from the sellers, warranting invocation of section 11D or where the appellant merely claimed modvat credit which was reversed after the issue of credit notes becomes a question of fact. Even the original authority which passed the order in favour of the appellant, has recorded a finding into which we shall not go in an appeal. Therefore, the appeal is dismissed. The question is answered against the assessee. The amount demanded may be allowed to be paid through CENVAT credit.

