

**2016 (4) TMI 976 - CESTAT MUMBAI**

**M/s Smita Steels Rolling Mills Pvt. Ltd. Versus Commissioner of Central Excise, Thane-I**

No.- Appeal No. E/1379 & 1380/10

**Dated.- March 17, 2016**

**Ramesh Nair, Member (J)**

**For the Appellant : Shri Vinod Awtani, CA**

**For the Respondent : Shri H M Dixit, Asstt Commissioner (AR)**

**ORDER**

Per Ramesh Nair

These appeals are directed against Order-in-Appeal No. VSK/74 TO 75/Th-I/2010 dated 26/3/2010 passed by the Commissioner (Appeals) Central Excise, Mumbai Zone-I, wherein Ld Commissioner (Appeals) upholding the demand of interest and penalty, rejected the appeal of the appellant.

2. The issue involved in the present case is that the show cause notice was issued only for the demand of interest and imposition of penalty under Section 11AB and 11AC respectively for the alleged offence that the appellant had availed Cenvat credit to the extent of 100% in respect of Capital goods instead of 50%.

3. Shri. Vinod Awatani, Ld. C.A. appearing on behalf of the appellant submits that the show cause notice were issued only for demand of interest and penalty under Section 11AB and Section 11AC respectively. However, no show cause notice was issued for demand of any wrong avilment of Cenvat credit. Therefore there is neither the show cause notice under Section 11A(1) and nor any Adjudication Order under Section 11A(2) was issued and consequently there is no determination of duty under Section 11A(2). He submits that under provisions of Section 11AB and Section 11AC the penalty and interest can be demanded only if the duty was determined under Section 11A(2). He placed reliance on following judgments:

*(a) Commissioner of C.Ex. Chandigarh Vs. Groz Beckert Asia Pvt Ltd [2009 (240) ELT 222 (Tri. Del.)]*

*(b) Madura Coats Pvt Ltd Vs. Commissioner of Central Excise, Tirunelveli [2006 (193) ELT 470 (Tri. Bang.)]*

*(c) Eicher Demm Vs. Commissioner of C. Ex. Chandigarh [2002 (140) ELT 227 (Tri. Del.)]*

*(d) Commissioner of C. Ex. Chandigarh Vs. Eicher Demm [2010 (252) ELT 519 (H.P.)]*

*(e) Dhillon Kool Drinks Beverages Vs. Commissioner of C.Ex. New Delhi [2000 (120) ELT 81 (Tri.)]*

*(f) Commr. of C. Ex. Bangalore-III Vs. Bharat Heavy Electricals Ltd [2010 (257) ELT 369 (Kar.)]*

4. On the other hand, Shri. H.M. Dixit, Ld. Asstt. Commissioner (A.R.) appearing on behalf of the Revenue reiterates the findings of the impugned order.

5. I have carefully considered the submissions made by both sides and perused the record.

6. I find that the Show cause notice was issued only for demand of interest under Section 11AB and imposition penalty under Section 11AC for the reason that the appellant had availed 100% Cenvat credit on receipt of the Capital goods instead of 50% as provided under Rule 4(2)(a) and (b). I find that statutory provision for interest and penalty are provided under Section 11AB and 11AC which reads as under:

Section 11 AB. Interest delayed payment of duty:-

1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below [ten per cent.] and not exceeding thirty six per cent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 11A till the date of payment of such duty:

Section 11AC. Penalty for short-levy or non-levy of duty in certain cases

(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 has been 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;

Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. –

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any willful 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,-

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of-

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA .

(2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.

From the reading of the above subsection (1) of Section 11A it provides for issuance of show cause notice and subsection (2) provides for determination of duty. In the present case neither any show cause notice was issued for proposing any demand of duty/Cenvat nor any determination of duty / Cenvat was made under subsection (2). In my considered view, issuance of show cause notice and determination of demand is the main ingredient in order to demand interest and penalty under Section 11AB and 11AC respectively. In absence of observance of Section 11A (1) and (2) the interest and penalty cannot be imposed. In view of the clear statutory provisions as discussed above, I am of the view that interest and penalty are not sustainable, impugned order is set aside and appeals are allowed.

( Order pronounced in court on 17/3/2016 )