

2010-TIOL-890-CESTAT-DEL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Appeal No.469 of 2008-SM (BR)

Arising out of the Order No.46/2007/CE/JP-II Dated: 18.12.2007
Passed by the Commissioner of Central Excise, Jaipur-II

Date of Decision: 2.3.2010

M/s BHANSALI ENGG POLYMERS LTD

Vs

CCE, JAIPUR

Appellant Rep by: Shri J P Kaushik, Adv.

Respondent Rep by: Shri I Baig, SDR

CORAM : M Veeraiyan, Member(T)

Deemed violation of rule 8(3A) of the CER, 2002 – voluntary payment of short paid Education Cess with interest – no mens rea - CCE ordering for appropriation of duty paid through CENVAT as being made through PLA - sound case for invoking section 11A(2B) of the CEA, 1944 – Penalty and interest set aside.

FINAL ORDER NO.279/2010/SM(BR)

Per: M Veeraiyan:

This is an appeal against the order of the Commissioner No.46/2007/CE/JP-II dated 18.12.2007.

2. Heard both sides.

3.1 The relevant facts, in brief, are that the appellants took a wrong credit in PLA amounting to Rs. 1,32,000/-. This error has led to short payment of education cess amounting to Rs.34,498/- relating to the period July, 2006. This error in taking credit consequent to short payment of education cess was detected by the appellant themselves in September, 2006 and accordingly, they voluntarily debited the short paid amount of Rs.34,498/- along with interest on 3.11.2006.

3.2 A show cause notice dated 13.07.2007 came to be issued proposing that the clearances of goods valued Rs.27,84,85,045/- effected from 5.09.2006 to 3.11.2006 should have been made paying duty on consignment basis from PLA without using Cenvat credit and accordingly, proposal was made for demanding duty and interest and for imposition of penalty. Original Authority passed following order-

"1. I order that the assessee is liable to pay Rs.4,54,48,760/-(Rs.Four crore fifty four lakh forty eight thousand seven hundred sixty only), on the goods cleared during the period from 5.9.06 to 3.11.06, under Section 11A of the Central Excise Act, 1944 but

also order that duty already paid by adjustment cenvat credit may be appropriated towards payment of PLA.

2. I order that interest, at the rate specified, shall be paid under Section 11AB of the Central Excise Act, 1944 for every consignment cleared during the period from 5.9.06 to 3.11.2006 using cenvat credit from the date of clearance till the date of payment.

3. I also impose a penalty of Rs.50,000/- (Rs. Fifty thousand only) under Rule 25 of Central Excise Rules, 2002 on M/s. Bhansali Engineering Polymers Ltd. SP-138-143, Ambaji Industrial Area, Abu Road.

4. Ld. Advocate for the appellant submits that it is a case of clerical mistake. Nobody would like to intentionally make a short payment of Rs.34,498/- attracting consequences as held by the Commissioner. The show cause notice also did not attribute mens rea on the part of the appellant. He submits that inasmuch as the appellant themselves detected the error and made the payment of short paid amount along with interest, show cause notice itself should not have been issued to them in terms of Section 11A(2B) of the Central Excise Act. He also submits that as the Commissioner has held the payment by the Cenvat credit as discharge of liability towards the duty, the question of demanding interest does not arise. Further, no ingredients of Rule 25 of Central Excise Rules, 2002 is present to impose a penalty of Rs.50,000/-.

5. Ld. SDR submits that there is clear violation of Rule 8 of Central Excise Rules, 2002 and the consequences are to follow. The order of the Commissioner clearly mentions that the assessee is liable to pay Rs.4,54,48,760/- and, therefore, adjustment of duty already paid does not absolve them of their liability to pay interest. He also justifies the penalty imposed.

6.1 I have carefully considered the submissions from both sides. It is noticed from the records that the appellant is a unit paying revenue of more than Rs.2 Crores per month. It is not in dispute that there was a short payment to the tune of Rs.34,498/-. The appellants' submission was that such a mistake has occurred due to an erroneous credit taken amounting to Rs. 1,32,000/- in their computerised records and at the time of payment of duty, they have gone by the balance shown in the computerised records and the mistake was detected by them during reconciliation. The short payment of Rs.34,498/-, in the facts and circumstances of the case, is to be treated as due to a clerical mistake. It cannot be considered as a deliberate action and equated as "default". It is only a case of short payment due to a *bona fide* mistake. Further, the Commissioner has taken the payment during the relevant period using cenvat credit as payment towards excise duty and appropriated the same.

6.2 It is appropriate to refer to Section 11A (2B), which reads as under:-

SECTION [11A.....

(2B) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in

this section, and the period of "one year " referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

6.3 In my considered opinion, this is a fit case for invocation of the provisions of Section 11A (2B). Though, there is a deemed violation of Rule 8 (3A) of Central Excise Rules, 2002, no mens rea is attributable. Further, the detection of mistake was by the appellant themselves and their taking remedial action deserves to be accepted in the light of specific provisions under Section 11A (2B). Therefore, the demand of interest and imposition of penalties are not sustainable.

6. The appeal is allowed with consequential relief as per law.

(Order dictated & pronounced in open court on 3.2.2010.)

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