CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

E/20616/2019-SM

[Arising out of Order-in-Appeal No. 28/2019-CT dated 16/04/2019 passed by Commissioner of Central Tax , BANGALORE-II(Appeal)]

Leitz Yooling Systems India Pvt Ltd
No 486c 14th Cross Iv Phase Peenya Industrial Area
BANGALORE - 560058
KARNATAKA

Appellant(s)

VERSUS

Commissioner Of Central Tax, Bangalore North West Commissionerate
2nd Floor, South Wing, BMTC Bus Stand Complex
Shivaji Nagar
Bangaluru - 560051
Karnataka

Respondent(s)

Appearance:

Shri H.Y. RAJU, Advocate
NO. 77, 1ST FLOOR,
ABOVE KBN TRADERS, BTS MAIN ROAD,
WILSON GARDEN EXTENTION,
BANGALORE - 56030
KARNATAKA

For the Appellant

Ms. D.S. Sangeetha, Jt. Commissioner(AR) — For the Respondent

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 20646 / 2019

Date of Hearing: 13/08/2019
Date of Decision: 13/08/2019

Per : S.S GARG

The present appeal is directed against the impugned order dt. 16/04/2019 passed by the Commissioner(Appeals) wherein the Commissioner(Appeals) has partially allowed the appeal of the appellant; but imposed equal penalty under Section 78 of the Finance Act, 1994.

2. Briefly the facts of the present case are that the assessee are manufacturers of wood working tools and were also engaged in trading of the goods. They had not maintained separate inventory in respect of common input services that were used for manufacture of dutiable goods and for providing the exempted service i.e. trading. Department alleged that they were liable to pay amount of 6% or 7% on the value of exempted goods as per Rule 6 of the CENVAT Credit Rules 2004 (in short, CCR) and issued show-cause notice dt. 24/08/2017 demanding Rs.84,79,638/- for the period August 2014 to February 2017 under Rule 6(3)(i) of the CCR, 2004. The assessee reversed an amount of Rs.10,34,452/- being the credit attributable to the exempted activity of trading along with interest of Rs.2,25,358/- on 14/08/2017 and penalty of Rs.1,55,168/- on 25/09/2017 i.e. within 30 days from the receipt of notice. After considering the reply of the assessee, the lower authority confirmed the demand of 6% / 7% made in the notice along with interest and penalty. Aggrieved by the Order-in-Original, appellant filed appeal before the Commissioner(Appeals) who has partially allowed the appeal of the appellant and has acknowledged that the appellant has reversed proportionate credit of Rs.10,34,452/- along with interest of Rs.2,25,358/- vide challan dt. 14/08/2017 and penalty of 15% amounting to Rs.1,55,168/- vide challan dt. 25/09/2017; but he has imposed penalty equivalent to proportionate credit under Section 78. Hence the present appeal.

3. Heard both sides and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and the law. He further submitted that the Commissioner(Appeals) has wrongly invoked the longer period of limitation under proviso to Section 73(1) of the Act for the period August 2014 to June 2017 on the ground that by not disclosing the fact of providing exempted service i.e. trading they have suppressed the facts with intent to avail inadmissible credit. He further submitted that earlier, audit was conducted for the period August 2009 to July 2014 and the Department was aware of the fact that they were also carrying out the activity of trading and in the Audit note No.378/2014 has not raised any objection with regard to the same and it was only during the subsequent audit, the audit party raised this objection and based on the said objection, the Department has issued notice alleging suppression with intent to evade payment of duty, which is not sustainable in law. In support of this, he relied upon the decision of this Tribunal in the case of MTR Foods Ltd. Vs. CCE, Bangalore [2014(3120 ELT 730 (Tri. Bang.] wherein the Tribunal held that when Department accepted the correctness of the availment of CENVAT credit and not found any wrong in the first audit and raised the objection on the same during the subsequent audit and issued a show-cause notice invoking longer period to recover the same is not sustainable. He further submitted that the appellant has rightly reversed the proportionate credit attributable to the trading and also paid the interest and also paid 15% penalty within a period of 30 days as prescribed under law; then the Department should not have imposed the penalty at all. He further submitted that the impugned order is contrary in itself. On the one hand, the Commissioner(Appeals) has held that the appellant has reversed proportionate credit attributable to trading along with interest and penalty, which was found to be correct as per the provisions of Rule 14 of the CCR, Section 78 of the Finance Act, 1994 and Rule 15(3) of the

CCR and needs no interference; however penalty under Section 78 would be equal to the amount of proportionate credit. The learned counsel further submitted that since there is no wilfull suppression on the part of the appellant in not following the Rule 6 of CCR procedure and reversing proportionate credit attributable to trading activity. Even though there was no suppression, still the appellant in order to avail the benefit of Second proviso to Section 78(1) of the Act, have reversed the proportionate credit of Rs.10,34,452/- attributable to trading activity with interest of Rs.2,25,358/- and paid penalty of Rs.1,55,168/- being 15% of the proportionate credit within the 30 days from the date of receipt of the show-cause notice and declared the same in the ST-3 return for the period April 2017 to June 2017 and also intimated the same to the Department vide their letter dt. 25/09/2017. These facts have not been appreciated by the Commissioner(Appeals) while imposing equal penalty under Section 78 which is not sustainable in law. In support of his submission, he relied upon the decision in the case of Continental Foundation jt. Venture Vs. CCE [2007(216) ELT 177 (SC)] wherein it is held that mere omission to give correct information cannot be construed as suppression so as to invoke the longer period of limitation under Section 11A.

5. On the other hand, the learned AR defended the impugned order.

6. After considering the submissions of both sides and perusal of the material on record and the decisions relied upon by the appellant, I find that the impugned order imposing penalty under Section 78 equal to the proportionate credit is not sustainable in law because of the fact that there was no suppression with intention to evade payment of duty. Further I find that in the earlier audit for the period August 2009 to July 2014 , the Department did not raise any objection in spite of the fact that the Department was aware of the input credit, which the appellant was availing. It is only during the

subsequent audit that this objection was raised and the present show-cause notice was issued. Further I find that after the issue of show-cause notice, appellant reversed the proportionate credit along with interest and also paid 15% penalty within 30 days from the date of receipt and also intimated the Department vide their letter dt. 25/09/2017. Further I find that the appellant is entitled to avail the benefit of less penalty provided under Second proviso to Section 78(1) of the Act which he has rightly availed. The order of the Commissioner(Appeals) is contradictory when he says that payment of interest and penalty is found to be correct as per the provisions of Rule 14 of CCR, Section 78 of the Finance Act, 1994 and Rule 15(3) of the CCR and also observed that it needs no interference. But thereafter, he also imposed equal penalty under Section 78 which according to my considered opinion is not sustainable. Therefore I set aside the same by allowing the appeal of the appellant.

(Operative portion of the Order was pronounced
in Open Court on **13/08/2019**)

S.S GARG
JUDICIAL MEMBER

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