2

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

E/00196/2009

[arising out of Order-in-Original No.01/2009 (Commr.)(De Novo), dated 29.01.2009 passed by the Commissioner of Central Excise, Coimbatore]

M/s. DATAFIELD INDIA PVT. LTD. APPELLANT

Versus

COMMISSIONER OF CENTRAL EXCISE, COIMBATORE RESPONDENT

Appearance:

For the Appellant Shri Meenakshi Sundaram, Adv.
For the Respondent Shri S. Govindarajan, AC (AR)

CORAM:

Hon'be Smt. Sulekha Beevi C.S, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing/decision **13-12-2017**

FINAL ORDER NO. 43901/2017

Per Bench:

The appellant is aggrieved by the penalty imposed.

1.1. Brief facts are that appellants are 100% E.O.U. engaged in manufacture of cable/cord for telephone instruments. They procure imported raw materials as well as indigenous raw material. Both without payment of duty. The finished goods are exported. As per the

Customs, Excise & Service Tax Appellate Tribunal

provisions of EXIM Policy, the scrap generated has to be cleared on payment of duty. The appellants cleared the second quality goods in DTA without payment of duty on the ground that these are rejects and not dutiable. Officers visited the premises, conducted investigation and show-cause notice was issued dated 10.06.1997 for recovery of an amount of Rs.29,59,494/- and proposing to confiscate the goods under Rule 173Q and Rule 226 of Central Excise Rules, 1944. The notice also proposed to imposed penalty under section 11 AC of the Central Excise Act, 1944 and Rule 9(2), 52A, 173Q and 226 of Central Excise Rules, 1944. The appellants filed reply to show-cause notice contesting the allegations. After due process of law, the original authority confirmed duty demand of Rs.10,85,732/- confiscated the waste seized giving an option to redeem the same on payment of fine of Rs.1,000/-. The adjudicating authority imposed equal penalty under section 11AC and Rules 9(2), 173Q and Rule 226 of Central Excise Rules, 1944.

2. The appellants filed appeal before the Tribunal against such order. The Revenue also filed appeal being aggrieved by the decision of original authority to extend the benefit of cum-duty price under section 4(4)(d)(ii) of Act *ibid*, while computing the duty demand. The Tribunal vide final order dated 11.07.2007 maintained the duty demand, except for some errors pointed in calculation and dismissed the appeal filed by department. The Tribunal observed that the equal penalty imposed is without giving regard to the facts of the case and that 11AC was not in force for major part of the disputed period as the said provisions came into force only w.e.f. 28.09.1996. The Tribunal remanded the matter for re-determination of penalty.

Customs, Excise & Service Tax Appellate Tribunal

3. Against this order, the appellant approached the Hon'ble High Court of Madras, as CMA No.1295/2008. Meanwhile, pursuant to the remand order, the original authority passed the de novo order-in-original imposing equal penalty to the tune of Rs.9,00,761/- under 11AC read with Rule 173Q of Central Excise Rules. Aggrieved, the appellant is now before the Tribunal.

4. On behalf of the appellants, learned counsel Shri R. Meenakshi Sundaram submitted that the Tribunal while remanding the matter had directed the adjudicating authority to re-determine the penalty imposed. The Tribunal had categorically observed that the penalty imposed cannot sustain. The appellants had filed appeal before the Hon'ble High Court challenging the order passed by the Tribunal, in the first round of litigation. The same was brought to the notice of the adjudicating authority at the time of personal hearing. In spite of that the adjudicating authority proceeded to pass the impugned order confirming the equal penalty under section 11AC read with Rule 173Q of Central Excise Rules. He pointed out that the provisions of section 11AC was introduced only with effect from 28.09.1996 and, therefore, equal penalty imposed for the entire period will not sustain. It was also argued by the learned counsel that on appreciation of the facts, in the first round of litigation, the Tribunal held that the imposition penalties under section 11 AC and Rule 173Q are not proper. That the adjudicating authority has not considered the said observation made by the Tribunal while imposing the penalty.

5. Against this, the Ld. AR Shri S. Govindarajan reiterated the findings in the impugned order. He submitted that there were discrepancies in the clearances of rejects by the appellants to the DTA

Customs, Excise & Service Tax Appellate Tribunal

without payment of duty. That, therefore, the penalty imposed is legal and proper.

6. Heard both sides.

7. The appellants is challenging only the penalty imposed. The record of personal hearing in the *de novo* proceedings revealed that the appellants had informed the adjudicating authority that they have filed an appeal before High Court against the final order of the Tribunal, remanding the matter. In spite of this, we find that the adjudicating authority has proceeded to pass the impugned order. It is also seen in the final order passed by the Tribunal dated 11.07.2007 that the Tribunal observed that the Commissioner has imposed equal penalty without having regard to the fact that section 11AC was not in force during the major part of the dispute. Again, the imposition of composite penalty under section 11AC and Rule 173Q was held to be erroneous. Even after remand, the adjudicating authority without taking into cognizance the said observations of the Tribunal has imposed equal penalty. On such score, we are of the opinion that the penalty imposed under section 173Q requires to be set aside. The disputed period is October, 1994 to March, 1999. The provisions of section 11AC were introduced with effect from 28.09.1996 only. Therefore, the said provision can be applied only from such date. We, therefore, hold that the penalty under section 11AC for the period prior to 28.09.1996 cannot sustain and requires to be set aside, which we hereby do.

8. In the result, the impugned order is modified to the extent of setting aside the penalty imposed under section 173Q and setting aside the penalty imposed under section 11AC prior to the period

Customs, Excise & Service Tax Appellate Tribunal

28.09.1996 without disturbing the other confirmations in the impugned order. The appeal is party allowed in the above terms.

(Dictated and pronounced in open court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Customs, Excise & Service Tax Appellate Tribunal

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25/01/18
सहायक पंजीकार / Assistant Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण,
चेन्नई / CESTAT, CHENNAI - 600 006.

ksr
15-01-2017