

Commissioner of Central Excise Vs. Supreme Industries Limited

Commissioner of Central Excise Vs. Supreme Industries Limited

SooperKanoon Citation : sooperkanoon.com/1167692

Court : Chennai

Decided On : Jan-03-2014

Judge : The Hon'ble Mrs.Justice CHITRA VENKATARAMAN

Appellant : Commissioner of Central Excise

Respondent : Supreme Industries Limited

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated :

03. 01.2014 Coram The Honourable Mrs.Justice CHITRA VENKATARAMAN and The Honourable Mr.Justice T.S.SIVAGNANAM C.M.A.No.2370 of 2006 --- Commissioner of Central Excise, Chennai III, 121, Utthamar Gandhi Salai, Nungambakkam, Chennai 34. ... Appellant -vs- 1.M/s.Supreme Industries Limited, 68, SIPCOT Industrial Complex, Hosur 635126. 2.Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 3rd, 4th & 5th Floor, 34, Jai Centre, P.D' Mello Road, Poona Street, Masjid (E), Mumbai 400 009. ... Respondents Civil Miscellaneous Appeal filed against the impugned Final Order No.A/1881/WZB/2005 CIV/SMB, dated 02.11.2005, on the file of the Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai- 400 009. For appellant : Mr.K.Ravindranath SCCG For Respondent : Mr.B.Sathishsundar for R1 R2 Tribunal

JUDGMENT

(The Judgment of the Court was made by T.S.SIVAGNANAM, J.) This appeal by the Revenue is directed against the Final Order passed by the Customs Excise & Service Tax Appellate Tribunal (Tribunal) dated 02.11.2005, by which the appeal filed by the respondent/assessee was partly allowed, whereby the demand of duty was confirmed and the penalty and interest were set aside. This appeal has been admitted on the following substantial question of law:- ".Whether or not the CESTAT was in error in holding that the penalty imposed under Section 11AC and the interest charged under Section 11AB of the Central Excise Act, 1944, are not sustainable if the duty is paid before issuance of show cause notice irrespective of the fact that evasion of duty was detected by the department and the demand was made under the proviso to Section 11A(1) on reason of suppression of facts or wilful misstatement of contravention of the provisions of Central Excise Act and Rules made there under with intent to evade payment of duty?.

2. The respondent/assessee is engaged in the manufacture of plastic articles availing Modvat/Cenvat credit facilities. On a verification done at their factory, shortage of XLPE scrap was found. This resulted in issuance of show cause notice dated 10.10.2001, demanding Modvat credit of Rs.5,52,045/- under Rule 57I of the Central Excise Rules, 1944, (Rules) and a proposal to confirm and adjust the amount paid already and to charge interest under Section 11AB of the Central Excise Act, 1944 (Act) and impose penalty under Rule 173Q of the Rules and penalty under Section 11AC of the Act. The assessee submitted their reply and the Adjudicating Authority confirmed the demand of credit taken to the tune of Rs.2,51,177/- along with interest and imposed penalty of equal amount on the ground that the scrap account was manipulated and there has been removal of scrap without payment of duty. The appeal filed by the first respondent/assessee before the Commissioner (Appeals), was rejected by order dated 23.03.2004. Challenging the same, the first respondent preferred appeal to the Tribunal. The Tribunal after considering the case of both parties, confirmed the demand of duty and set aside the penalty and interest on the ground that duty amount was paid prior to issuance of show cause notice.

3. Aggrieved by such order of the Tribunal, the Revenue is on appeal contending that the penalty imposed under Section 11AC and interest charged under Section

11AB of the Act, are sustainable, even if duty is paid before issuance of show cause notice irrespective of the fact that evasion of duty was deducted by the department and the demand was made under proviso to Section 11A(1) on reason of suppression of facts or willful misstatement or contravention of the provisions of Central Excise Act.

4. We have heard the learned counsels appearing on either side and perused the materials available on record.

5. To answer the substantial question of law framed for consideration, two issues have to be dealt with; firstly as to whether mere payment of duty prior to issuance of show cause notice would absolve the assessee from the levy of penalty and interest. If the first issue is answered against the assessee, then as to whether under what circumstances penalty could be imposed under Section 11AC or in other words under what circumstances, the said provision could be made applicable.

6. Answer to the first issue is no longer res integra and has been settled by the Hon'ble Supreme Court in the case of Union of India vs. Rajasthan Spinning and Weaving Mills reported in (2009) 13 SCC448 wherein the Hon'ble Supreme Court pointed out that payment made whether before or after show cause notice, does not alter liability for penalty and the finding of the Tribunal holding that no penalty under Section 11AC of the Act could be imposed, if assessee had deposited short paid amount of excise duty before issuance of show cause notice was held to be a misconceived interpretation by the Tribunal, whereby the Tribunal overlooked the two explanations which qualified the main provision of Section 11A(2-B) and accordingly, set aside the order passed by the Tribunal. Therefore, answer to the first issue has to be against the assessee.

7. The next issue to be considered is whether under what circumstances Section 11AC of the Act, would stand attracted. Section 11AC deals with 'Penalty for short-levy or non-levy of duty in certain cases' and the said provision reads as follows:-
11AC:- 'Penalty for short-levy or non-levy of duty in certain cases:- Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful misstatement 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 (2) of section 11-A, shall also be liable to pay a penalty equal to the duty so determined; Provided that where such duty as determined under sub-section (2) of Section 11-A, and the interest payable thereon under section 11-AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this Section be twenty-five per cent, of the duty so determined: Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso: Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, for the purposes of this Section, the duty, as reduced or increased, as the case may be, shall be taken into account: Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent, of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation:- For the removal of doubts, it is hereby declared that:- (1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11-A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President. (2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

8. The said provision stands attracted where any duty of excise has not been levied or paid or has been short-levied or short-paid by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade payment of duty. Thus, the pre-requisite being there should be material to establish either

fraud, collusion or willful misstatement or suppression of facts or contraventions of the provisions of the Act and all these to have been committed with an intent to evade payment of duty.

9. The Hon'ble Supreme Court in the case of Union of India vs. Rajasthan Spinning and Weaving Mills (supra) pointed out that the decision in the case of Union of India vs. Dharmendra Textile Processors reported in (2008) 13 SCC369 cannot be said to hold that Section 11AC of the Act would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in Section 11AC for its application. It was further pointed out that the decision in the case of Dharmendra Textile Processors(supra) must be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the Section, once the Section is applicable in a case, the authority concerned would have no discretion in quantifying the amount and penalty must be imposed equal to duty determined under sub-section (2) of Section 11A of the Act. Thus, the issue would be as to whether Section 11AC would stand attracted to the facts of the present case.

10. We have perused the show cause notice, the order in original, the order passed by the Appellate Authority and the impugned order passed by the Tribunal. In the show cause notice dated 10.10.2001, except for stating that the respondent/assessee has contravened the provisions of the Rules, there is no specific allegation so as to hold the respondent/assessee guilty of having committed fraud, collusion or suppression of facts or made any willful misstatement with an intent to evade payment of duty. In terms of the provision of section 11AC of the Act, the authority is bound to record a prima facie finding that there was an intent to evade payment of duty by suppressing the materials facts or by making willful mis-statement or by committing fraud or collusion. Thus, in the absence of any such specific allegation in the show cause notice, the authorities cannot mechanically impose penalty under Section 11AC of the Act. After the assessee submitted their explanation, the Adjudicating Authority while passing the order dated 24.09.2002, only observed that there is possible manipulation of scrap accounts to show higher production than what would have been normally produced and there is no finding that the first respondent/assessee was guilty of

willful mis-statement or suppression of facts or act of fraud with an intention to evade payment of duty. The first Appellate Authority also did not go into the said aspect and rejected the appeal by merely observing that the order of the Original Authority is just, fair, and calls for no interference. The Tribunal while confirming the demand, set aside the penalty and interest. In paragraph 4 of the impugned order passed by the Tribunal, the Tribunal, by relying upon its earlier decision, observed that the duty amount is paid by assessee before issuance of show cause notice, therefore no penalty can be imposed under Section 11AC. The said finding cannot be sustained in the light of the decision of the Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills (supra).

11. For the reasons we have assigned in the preceding paragraphs, in the absence of any specific findings having been recorded by the authorities, so as to make provisions of Section 11AC of the Act applicable to the case of the assessee, we have no hesitation to hold that the imposition of penalty was totally unjustified and the order of the Tribunal setting aside the penalty, is to be confirmed for reasons other than mentioned by the Tribunal.

12. As regards the claim for interest, the Tribunal set aside the interest solely on the ground that the duty was paid prior to the show cause notice. The settled legal principle is that interest leviable under Section 11B of the Act is for the money withheld and the levy of interest is automatic and that is why it is termed to be compensatory. However, penalty is for default and therefore punitive and unless reasonable cause is shown, penalty is not imposable. This distinction was not taken into consideration by the Tribunal when admittedly, the Tribunal confirmed the demand of duty, which was paid belatedly by the respondent/assessee. Thus, the duty having been paid belatedly, the interest on such duty is automatic and the assessee is liable to pay the interest. Accordingly, the order of the Tribunal to that extent alone calls for interference.

13. In the result, the appeal is partly allowed and the order passed by the Tribunal setting aside the penalty, is confirmed and so far as the order setting aside the interest, is set aside and the order of the Adjudicating Authority to that extent stands restored. No costs. (C.V.,J) (T.S.S.,J) 03.01.2014 Index : Yes/No Internet

:Yes/No pbn CHITRA VENKATARAMAN,J and T.S.SIVAGNANAM,J Pbn To
1)The Commissioner of Central Excise, Chennai-III-Commissionerate, 121,
Mahatma Gandhi Road, Nungambakkam, Chennai 600 034. 2)The Commissioner
of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai 600 034. 3)
The Customs Excise & Service Tax Appellate Tribunal West Zonal Bench, 34, Jai
Centre, P.D' Mello Road, Poona Street, Masjid (E), Mumbai-400 009.
C.M.A.No.2370 of 2006 03.01.2014

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com