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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jul-28-2003

**Reported in :** (2003)(90)ECC187

**Judge :** P Chacko

**Appellant :** Minda Industries Ltd.

**Respondent :** Cce

**Judgement :**

Officer of Central Excise visited the appellant's factory on 25.3.98 and conducted verification of the physical stock of inputs and final products, whereupon, inter alia, a shortage of certain auto parts (final products) was found vis-a-vis the RG-1 balance. A panchnama was duly prepared in this connection in the presence of Shri J.S. Sisodia, Manager (Finance) of the appellant company, and other independent witnesses. A statement of Shri Sisodia was also recorded under Section 14 of the Central Excise Act, wherein he admitted the shortage and paid the Central Excise Duty on the goods found short.

On the basis of these results, the department issued a show-cause notice proposing to appropriate the amount of duty so paid by the party, towards demand of duty on the goods found short, as also proposing to impose penalty on them under Section 11AC of the Act on the alleged grounds of fraud, suppression and contravention of various rules of the erstwhile Central Excise Rules, 1944. These proposals were contested by the party in their reply to the show-cause notice. The

adjudicating authority confirmed the demand of duty (Rs. 99,424) and appropriated the amount deposited by them, towards the demand so confirmed. It also imposed a penalty of equal amount on the party under Section 11 AC. The appeal preferred against the order of the original authority, by the appellants, did not succeed before the Commissioner . (Appeals).

3. The appellants' representative submits that they are a Public Ltd. Company and had not intention whatsoever of evading duty on any goods on the date of visit of Central Excise officers to their factory. 4968 pcs of head lamps (Part No. HL 5159), being a part of the products found short on 25.3.98, had been loaded onto a truck within the factory premises, before the officers' visit. But the truck was still within the premises when the panchnama was recorded. Therefore, it is wrong to say that the above quantity of goods had been cleared clandestinely.

Regarding the remaining quantity of the goods found short, the representative of the company submits that these goods were very much lying in the production floor of the factory and had not been taken into the bonded storeroom, for which reason, there cannot be a valid case of clandestine removal in respect of this quantity of the goods.

It is further submitted that there is no case for imposing any penalty under Section 11AC inasmuch as the appellants did not contravene any provision of law with intent to evade payment of duty.

4. Ld. DR, Shri S.C. Pushkarna, on the other hand, submits that the shortage has been admitted by Shri Sisodia in his statement dated 25.3'.98 and such statement has not been retracted. It is further submitted that the allegation of fraud and suppression has been upheld by the original authority on the basis of the evidence on record. In this connection, the DR has referred to the panchnama and the invoice referred to therein. It is also submitted that the explanation given today by the Ld. Representative of the company in relation to the shortage found of 4968 pcs of auto parts is only an afterthought as no such explanation was offered by Shri Sisodia in his statement dated 25.3.98. The DR, therefore, urges that the penalty imposed under Section 11AC by the authorities should be sustained.

5. I have carefully considered the submissions. The allegation in the show-cause notice is one of clandestine removal of a certain quantity of auto parts (final products) without payment of duty. This allegation is based on the shortage of these goods found on 25.3.98 vis-a-vis RG-I balance as on that date. Out of this quantity of the goods, 4968 pcs were admittedly cleared before the officers' visit to the factory, without payment of duty. This categorical admission is contained in Sisodia's statement dated 25.3.98. It was stated that they could not make the necessary entries in RG-I and PLA in respect of the goods so cleared. However, no explanation as to why such entries could not be made was offered by Shri Sisodia.

6. Regarding the remaining quantity of the goods found short, it was stated that the goods were lying in the production floor and could not be transferred to the bonded storeroom. It was further admitted that these goods could not be tallied, presumably, with the RG-I entries. It was also stated that the amount of duty on these goods had been voluntarily paid. It is significant to note that the explanations of the kind given in the reply to the show-cause notice and offered by the representative of the company today, are not forthcoming from Sisodia's statement, which has not been retracted. The claim that a truck loaded with the goods covered by the Invoice No. 42500 dated 25.3.98 (referred to in the panchnama) was still within the factory premises when the panchnama was prepared and, therefore, there was no clearance of the goods at all at the material time is apparently, not supported by the evidence on record. The time of removal as shown in the Invoice is 1110 hrs., whereas the panchnama proceedings started at 1130 hrs., which means the goods covered by the invoice and loaded on to the truck had already been cleared by the time the officers started their proceedings. The evidence, thus, goes against them and disproves the explanation today offered on behalf of the appellants. In view of the admission, by Shri Sisodia, of removal of finished goods without payment of duty or account in RG-1, it has to be held that the orders of the authorities below in regard to the demand of duty of Rs. 99,424 are well-founded. Insofar as the penalty is concerned, I find that the maximum penalty has been imposed by the authorities below. For a penalty to be imposed under Section 11AC, there are certain prerequisites such as fraud, suppression, mis-statement and contravention of rules with intent to evade

payment of duty. Fraud and suppression were alleged in the show cause notice. On a perusal of the orders passed by the lower authorities, I find that there is a clear-cut finding of suppression with intent to evade payment of duty, recorded by the adjudicating authority and sustained by the Commissioner (Appeals). I do not see any reason to disturb this finding.

7. However, in the facts and circumstances of the case, it appears to me that imposition of maximum penalty under Section 11AC is not justifiable in this case. It has been held by this Tribunal, time and again, that what is prescribed by Section 11AC is the maximum limit of penalty and that the appropriate quantum of penalty to be imposed under this Section requires to be determined on the basis of the facts and circumstances of the case. Having appreciated the facts and circumstances of the instant case, I am of the view that a penalty of Rs. 50,000 will serve the purpose of Section 11AC. Accordingly, the quantum of penalty will stand reduced to Rs. 50,000. Subject to this modification, the impugned order is upheld. The appeal is disposed of.

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