Commissioner of Central Excise Vs. Power Controls Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Dec-09-2003

Reported in : (2004)(93)ECC238

Judge : K Usha, S T S.S.

Appellant : Commissioner of Central Excise

Respondent : Power Controls Ltd.

Judgement :

1. These appeals at the instance of Revenue and cross-objections by the assessee arise out of orders passed by the Commissioner (Appeals), dated 20-12-2001.

2. The common issue raised in the appeals at the instance of Revenue is whether Commissioner (Appeals) was justified in holding that no penalty under Section 11AC could be imposed by departmental officers till amendment to Section 33 by Finance Act, 1999 came into effect that abatement claimed by the assessee under Section 4(4)(d)(ii) has to be allowed and that the quantum of duty demanded is to be re-quantified treating the price realised by the appellant as inclusive of the duty payable. In the cross appeal, the assessee has prayed for rejection of the appeal filed by the Commissioner and for setting aside the penalty imposed under Rule 173Q by the Commissioner (Appeals) or in the alternative to reduce the quantum of the same.

3. As far as the issue relating to abatement claimed under Section 4(4)(d)(ii) of the Central Excise Act is concerned, it is covered by the decisions of this Tribunal in Srichakra Tyres Ltd. v. CCE, Madras -1999 (108) E.L.T. 361 (Tribunal) and that of the Supreme Court in CCE v. Maruti Udyog Ltd. - 2002 (141) E.L.T. 3 in favour of the assessee.

Therefore, we find no merit in this contention raised in these appeals.

4. The contention of the assessee accepted by the Commissioner (Appeals) on the issue of applicability of Section 11AC is as follows : The assessee contended that the power to impose penalties by an officer of Central Excise on adjudication flows from Section 33 of the Central Excise Act, 1944. Prior to the amendment to Section by the Finance Act, 1999 departmental officers were empowered to impose such penalties as prescribed under rules made under the Act and could not impose penalty prescribed in any section of the Act including Section 11AC incorporated in the Act as on 28-9-1996. No penalty could be imposed without specific sanction of law.

5. Section 33 comes under Chapter VI relating to adjudication of confiscation and penalties. Before the amendment by Finance Act, 1999 relevant portion of Section 33 reads as follows :- "Section 33. - Power of adjudication. - Where by the rules made under this Act anything is liable for confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged - After the amendment by Finance Act, 1999 the Section reads as follows :- "Section 33. - Powers of adjudication. - Where under this Act or by the rules made thereunder anything is liable for confiscation or any person is liable to a penalty such confiscation or penalty may be adjudged - According to the assessee since the liability for penalty is under Section 11AC and not under a Rule made under the Act the officer will get jurisdiction only after the amendment to Section 33.

6. If we examine the scheme of Sections 11A and 11AC we will find that the above contention has no merit at all. The relevant portion of Section 11A reads as follows :- "11A. Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or [erroneously refunded, whether or not such

non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder], a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund was erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice : Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason or fraud, collusion or any wilful 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, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words [one year], the words 'five years' were substituted." The above would show that power is given to the Central Excise Officer under Section 11A itself to issue notice to the assessee under the circumstances referred in the sub-section to show cause as to why he should not pay the amounts specified in the notice. Sub-section (2) of Section 11A provides as follows :- "11A(2) - [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under Sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined." Sub-sections (2A) and (2B) refer to the procedure to be followed by the Central Excise Officers. Section 11AC which provides for the penalty for short-levy, or non-levy of duty in certain cases reads as follows :- "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 wilful 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 11A, shall also be liable to pay a penalty equal to the duty so determined." There are provisions under Section 11AC which deal with situations where quantum of penalty can be reduced. A reading of Sections 11A, 11AA, 11AB and 11AC would show that the scheme is such that liability to pay penalty is imposed by the statute under Section 11AC and it can be demanded by the Central Excise Officers who has been given the power to determine and recover duty not paid by the assessee under Section 11A. It is not necessary to take recourse to provisions contained under Section 33. We, therefore, disagree with the view taken by the Commissioner (Appeals) on the applicability of Section 11AC for the period before Section 33 was amended by Finance Act, 1999.

7. But at the same time we do not propose to enhance the quantum of penalty, as contended in the appeal filed by the Revenue. We do not also accept the contention raised by the assessee to reduce the quantum of penalty. According to us, the quantum of penalty imposed by the Commissioner (Appeals) is just and adequate in the facts of the case.

8. We, therefore, modify the order passed by the Commissioner (Appeals) vacating his finding on the applicability of Section 11AC for the period before amendment of Section 33 by the Finance Act, 1999. Appeal filed by the Revenue is allowed to that extent.

9. The prayer in the cross-objection for reducing the quantum of penalty is rejected.