

**Cce Vs. Punjab Wool Comber Ltd.**

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

**Decided On :** Aug-02-2007

**Reported in :** (2007)(122)ECC66

**Judge :** R Abichandani

**Appellant :** Cce

**Respondent :** Punjab Wool Comber Ltd.

**Judgement :**

1. The Revenue has preferred this appeal against the order dated 16.06.2005 made by the Commissioner (Appeals) setting-aside the penalty imposed on the appellant under the order-in-original and holding that no interest was chargeable as was held by the adjudicating authority.

2. The respondent, Punjab Wool Combers Ltd., was availing modvat credit facility on inputs as well as capital goods. It was noticed during the course of visit by the Excise Staff on 10.02.2000, that the assessee had sold one dyeing machine to original noticee No. 2, i.e, Malwa Cotton & Spg. Mills, under invoice no. 143 dated 31.03.1999. Earlier, by entry dated 01.05.1995, modvat credit was taken of an amount of Rs. 5,97,478/- on the said dyeing machine by the respondent. The dyeing machine was cleared without giving any intimation as required by Rule 57-S(ii) of the Central Excise Rules, 1944 and without payment of duty.

The said dyeing machine was a used one and was removed as such and, therefore, according to the Revenue, as per the provisions of Rule 57-S(ii) of the Central Excise Rules, 1944, a duty amount of Rs. 3,58,487/- was required to be paid after making deduction of 2.5% of credit taken for each quarter of a year of use or fraction thereof, from the date of availing credit. Later on, the assessee debited the said amount by entry dated 17.02.2000. A show cause notice dated 09.02.2000 was issued and duty demand was sought to be confirmed and penal action proposed. The adjudicating authority confirmed the demand of duty and adjusted the same against the amount already deposited.

Penalty was imposed under Rule 173-Q in the context of violation of Rules 52-A and 57-S on the assessee, and a penalty was also imposed of an amount of Rs. 3,58,487/- under Rule 57-U(6) read with Section 11-AC of the Act on the assessee. A penalty of Rs. 1 lac was imposed on the original noticee no. 2 under Rule 209-A.3. The Appellate Commissioner, taking note of the fact that the respondent-assessee had deposited the entire amount of duty prior to the issue of the show cause notice, relying upon the Larger Bench decision of the Tribunal in the case of CCE, Delhi v. Machino Montell (I) Ltd. imposable upon the noticees nor interest was chargeable from them. The Commissioner (Appeals) while holding that, the decision of the Tribunal in the case of CCE, Delhi v. Machino Montell (I) Ltd. (supra), was applicable in the present case as duty was deposited by the appellants on 17.02.2000 vide PLA entry before the issue of the show cause notice dated 09.03.2004 and that the interest was not chargeable from the assessee under Section 11-AB and penalty imposed on both the original noticees was not imposable, set aside the order made by the adjudicating authority.

4. Admittedly, the confirmation of the demand of duty was not contested as recorded by the Appellate Commissioner. The contest was against the imposition of penalty, which has been set-aside relying upon the Larger Bench decision of the Tribunal in the case of CCE, Delhi v. Machino Montell (I) Ltd. (supra). The said decision has been reversed by the Hon'ble High Court of Punjab & Haryana by its decision in CCE, Delhi v. Machnio Montel (I) Ltd. . In paragraph 7 A perusal of the above provision, shows that the said provision incorporates liability to pay penalty in the situations mentioned therein. Once a case is covered by the situation

mentioned in the Section, mere deposit prior to issuance of show cause notice under Section 11A of the Act will not necessarily negate the situation mentioned in the said Section.

Therefore, the very basis of the decision of the Commissioner (Appeals) does not exist. It may also be noted that, the Division Bench of the Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Central Excise, Delhi-IV v. Ilpea Paramount Pvt. Ltd. , while dealing with the identical issue, has held that, once mens rea is established, the quantum is not left to the discretion of the authority. The said proposition was laid down by the Hon'ble High Court in the following words: 19. Having regard to the language of Section 11AC, we find that language of Section 11AC clearly leaves no room for discretion in the quantum of penalty to be imposed.

20. We are of the view that language of the statute is clear. If the situation demands imposition of penalty, the same has to be equal to the amount of duty. There is no doubt that penalty is not to be imposed mechanically. The statute itself lays down that penalty is to be levied only where duty is short-levied or short-paid or erroneously refunded by reason 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". Element of mens rea is statutorily insisted upon. Once mens rea is established, the quantum is not left to the discretion of the authority. Though, such inflexible rule may not be valid in every situation but condition precedent for levy of penalty is statutorily laid down and in the said situations, making a provision for minimum penalty cannot be held to be arbitrary in any manner.

21. We, therefore, do not find any reason to interpret the plain language of the statute to hold that what is laid down is only maximum amount of penalty and not the minimum.

5. It is brought to the notice of the Bench that, the Hon'ble High Court of Bombay has taken a similar view in the case of CCE v. Padmashri V.V. Patil Sahakari Sakhar Karkhana Ltd. reported in 2007-TIOL-419-HC-MUM-CX (decided on 25<sup>th</sup> July, 2007), holding that, since there was a sense of deliberate evasion and scheming for the purpose on the part of the assessee, there was no discretion to

impose penalty lesser than 100% or 25% in case duty determined was paid within 30 days from the date of determination. From the report of the said decision, the aforesaid ratio of the decision appears in the following terms in paragraph 7 of the judgment: 7. Considering the scheme together, it is evident that interest chargeable Under Section 11AB is a sort of civil liability of the assessee, who has failed to pay the duty or who has short paid the duty. This is irrespective of the fact whether such nonpayment/short payment is innocent or mala fide. So far as penalty Under Section 11AC is concerned, it is certainly a provision, penal in nature.

This is because, it comes into play only when nonpayment/short payment is a result of fraud, collusion or any wilful mis-statement/suppression of facts or contravention of any of the provisions of the Act / Rules on the part of the assessee, with intent to evade payment of duty. There is a sense of deliberate evasion and scheming for the purpose on the part of the assessee and that is why in that case, there is no discretion to impose penalty lesser than 100% or 25% in case duty determined is paid within 30 days from the date of determination.

6. The Larger Bench decision of this Tribunal in the case of Commissioner of Central Excise, Delhi-IV v. Ilpea Paramount Pvt. Ltd. reported in 2007 (213) ELT 500 (T-LB), in paragraph 15 of its judgment held that, "Once it was held that imposition of penalty under Section 11-AC of the Act was warranted, the wordings of Section 11-AC did not leave any option for imposing a reduced penalty, except as specifically provided for in the amended provisions of Section 11-AC. Under the first proviso to the amended provisions of Section 11-AC, it is only when the duty is paid, along with interest and penalty, as determined, within thirty days, that the person concerned will be entitled to the benefit of paying penalty at the rate of 25% of the duty determined." 7. For the foregoing reasons, it becomes clear that the decision of the Commissioner (Appeals), setting-aside the penalty by placing reliance on the decision of the Tribunal in the case of CCE, Delhi v. Machino Montell (I) Ltd. (supra), which has been reversed, cannot be sustained.

Even the finding that the interest was not chargeable cannot be sustained in view of the aforesaid decisions. The impugned order of the Commissioner (Appeals) is,

therefore, set-aside and the order-in-original stands restored so far as the respondent, Punjab Wool Combers Ltd., is concerned. The appeal stands disposed of accordingly.

(Dictated and pronounced in the open Court on the 2<sup>nd</sup> day of August, 2007)

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