

Commissioner of Central Excise Vs. S.K. Sacks (P) Ltd.

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Court : Punjab and Haryana

Decided On : Jan-22-2008

Reported in : 2008(125)ECC307; 2008(151)LC307(P& H); 2008(226)ELT38(P& H)

Judge : Satish Kumar Mittal and; Rakesh Kumar Garg, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 11(A)(C), 11(C), 35(G) and 57(1)(5); [Central Excise Tariff Act, 1985](#); Central Excise Rules, 1944 - Rules 9(2), 57(C), 57(1), 57(1)(5), 173(Q) and 226

Appeal No. : CEA No. 154 of 2006

Appellant : Commissioner of Central Excise

Respondent : S.K. Sacks (P) Ltd.

Advocate for Def. : Jagmohan Bansal, Adv.

Advocate for Pet/Ap. : Gurpreet Singh, Adv.

Disposition : Appeal dismissed

Judgement :

Rakesh Kumar Garg, J.

1. The revenue has filed this appeal under Section 35(G) of the Central Excise Act 1944, challenging the order dated, 27th December, 2005 (Annexure P-3) passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for brevity 'the Tribunal') whereby it has accepted the appeal of the Respondent herein and set aside the said order. In this appeal the revenue has raised the following substantial question of law:

Whether penalty and interest can be waived in toto on the sole ground that duty has been deposited before issue of show cause notice when the Central Excise law does not provide for the same and especially when the Hon'ble Tribunal themselves has been distinguishing their ruling in the case of CCE v. Machino Montell (I) Ltd. (2004)(168) ELT 466?

2. Briefly stated, the facts of the case are that the assessee is engaged in the manufacturing of Plastic Sacks/Plastic fabric falling under Chapter 39 of the schedule of [Central Excise Tariff Act, 1985](#) and is availing the facility of MODVAT credit on inputs. The Central Excise Preventive staff visited the factory of the assessee on 5.2.1999 and detected a shortage of 13280 kgs of inputs HDPE granules involving credit of Rs. 1,03,680; and further on scrutiny of MODVAT documents, the staff detected wrong availment of credit of Rs. 2,21,776 availed on invoices issued by M/s. Kosmo Plastic Exports Pvt. Ltd., Amritsar for which the Director of the Respondent admitted to have not received the material mentioned in the disputed invoices. The credit of Rs. 1,03,680 and Rs. 2,21,776 was deposited by the Respondent-assessee on 5.2.1999 itself. The assessee was issued show cause notice for demand of Central Excise duty of Rs. 1,03,680 leviable on inputs found short and MODVAT credit of Rs. 2,21,776 wrongly taken under Rule 9(2) of the Central Excise Rules, 1944 and that for adjustment of amount already paid by them towards payment of duty under Rule 57(1). Penal action under Section 11(C) of the [Central Excise Act, 1944](#) read with Rule 9(2), 57(C), 57(1), 173 (Q) and 226 of the Central Excise Rules, 1944 was also proposed. The Adjudicating Authority vide order dated, 27th November, 2000 confirmed the demand already debited by the Respondent and imposed penalty of Rs. 25,000 under Rule 173(Q) on the assessee.

3. The department filed an appeal before the Commissioner (Appeals) Central Excise, Jalandhar contending that the shortage of inputs and non receipt of input material were admitted by the Respondent-assessee and therefore, the penalty under Rule 57(1)(4) equal to MODVAT credit wrongly availed was to be imposed as the Respondent has taken MODVAT credit by fraud and willful mis-statement.

4. On the other hand, the Respondent-assessee had submitted that it was a technical breach for which no penalty was imposable. The Commissioner (Appeals) Central Excise vide his order dated, 29.1.2004 modified the original order dated, 27th November, 2000 of the adjudicating authority and enhanced the penalty from Rs. 25,000 to Rs. 3,25,456 under Rule 57 (1) (5) of the Central Excise Rules 1944. The Commissioner (Appeals) Central Excise also ordered for charging of interest under Rule 57(1)(5) of the Central Excise Rules, 1944.

5. Feeling aggrieved against the said order of the Commissioner (Appeals) Central Excise, the assessee filed an appeal before the Tribunal. The Tribunal vide impugned order dated, 27th December, 2005 after relying upon its earlier order in the case of CCE. Delhi v. Machino Montell (I) Ltd. (2004)(168) ELT 466 (Tri.-LB), accepted the appeal and held that penalty and interest is not imposable in the case where show cause notice was subsequent to the payment of duty by the Appellant, therefore, enhancement of penalty by the Appellate Authority from Rs. 25,000 to Rs. 3,25,456 and demand of interest under Section 57(1)(5) was not warranted. Hence this appeal.

6. Learned Counsel for the revenue submitted that view taken in the impugned order and the decision relied upon therein are not legally sustainable. Once there was requisite mens rea, which conferred jurisdiction to levy penalty mere deposit of the amount of duty and interest by itself did not deprive the authority of jurisdiction to levy penalty as the said deposit could not be conclusive of their being no intention to evade payment of duty or duty being short levied or for having not paid by reasons of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act.

7. On the other hand, the assessee has supported the order of the Tribunal and has relied upon the judgments of this Court in CEA No. 13 of 2005 decided on

25.7.2006 (Commissioner of Central Excise, Delhi v. Machino Montell (I) Ltd. and Anr.), CEA No. 21 of 2007 decided on 10.5.2007 (The Commissioner, Central Excise Commissionerate, Rishi Nagar, Ludhiana v. Jindal Polyvin Pipes and Anr.), CEA No. 22 of 2007 decided on 10.5.2007 (The Commissioner, Central Excise Commissionerate, Rishi Nagar, Ludhiana v. TR Industries and Anr.) and CEA No. 26 of 2007 decided on 16.8.2007 (Commissioner of Central Excise, Ludhiana v. Sigma Steel Tubes and Anr.).

8. We have heard learned Counsel for the parties and perused the record.

9. This Court while deciding CEA No. 13 of 2005 in the case of Commissioner of Central Excise, Delhi v. Machino Montell (I) Ltd. and Anr. (supra) remanded the matter to the Tribunal after discussing the provisions of Section 11(A)(C) and observed in the operative part of the judgment as under:

Question will remain whether situation mentioned in Section 11AC exists, which has to be determined irrespective of the deposit of duty due, prior to issuance of notice. Since the question has not been determined by the Commissioner (Appeals) or by the Tribunal, whose decision are based on the only consideration of deposit, we set aside the order of the Commissioner (Appeals) and the Tribunal and remand the matter back to the Commissioner (Appeals) for a fresh decision on the question of penalty after determining the question whether the non-payment of duty in the present case at the relevant time, which was made up later, was on account of fraud, collusion or any willful mis-statement 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 as laid down under Section 11AC and as held by the adjudicating authority.

The Tribunal will also take a fresh decision on the question of liability to pay interest.

10. The decision dated, 25.7.2006 of this Court in M/s. Machino Montell 's case (supra) was further relied upon by the Court in CEA Nos. 21 and 22 of 2007 on a similar question of law as raised in the present appeal and it was held that the finding with regard to the intention to evade the payment of duty is a question of

fact. Similar judgment dated, 16.8.2007 in CEA No. 26 of 2007 titled as Commissioner of Central Excise, Ludhiana v. Sigma Steel Tubes and Anr. as well as after relying upon the Machino Montell's³ case (supra) and the judgment of the Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Ltd. v. Commissioner. 2004 (163) ELT A53, this Court held that no penalty is imposable under Section 11(A)(C) of the Act as well as under Rule 173 (Q) of the [Central Excise Act, 1944](#) once the duty is debited before issuance of show cause notice.

11. It may be seen that in the present case there is no such finding of fact that the assessee has committed fraud or misrepresentation with the intention to evade duty. Admittedly, the duty was paid before issuance of show cause notice. On the basis of the aforementioned findings as well as clear position of law, we are of the opinion that no substantial question of law warranting admission of this appeal arises.

12. In view of the above, this appeal fails and the same is dismissed accordingly.

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