

Commissioner of Central Excise Vs. M/S Bisht Electronics

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Court : Delhi

Decided On : Sep-20-2011

Judge : Sanjay Kishan Kaul; Rajiv Shakdher, Jj.

Acts : [Central Excise Act, 1944](#) - Sections 11AC, 14; [Code of Civil Procedure \(CPC\), 1908](#) - Order 5 Rule 20; [Central Excise Tariff Act, 1985](#) - chapter 89

Appeal No. : CEAC No. 16/2006

Appellant : Commissioner of Central Excise

Respondent : M/S Bisht Electronics

Advocate for Pet/Ap. : Mr. Staish Kumar, Adv.

Judgement :

1. This is an application for early hearing on the ground that the questions of law in issue already stand determined by the Honble Supreme Court in Union of India vs Dharmendra Textile Processors (2008) 231 ELT 3. In view of the averments made in the application, the application is allowed.

2. Application stands disposed of.

CEAC No. 16/2006

3. The captioned appeal has been filed by the revenue against the judgment of the Customs, Excise and Service Tax Appellate Tribunal (in short „Tribunal) dated

01.12.2005. The appeal had been admitted on 10.05.2006 by a division bench of this court. By the said order following questions of law were framed for adjudication:

(i) Whether CESTAT was right in law in reducing the penalty leviable under Section 11AC of the [Central Excise Act, 1944](#), even when evasion of duty by the unit had been established?

(ii) In case answer to question no. (i) is in the affirmative whether the CESTAT was required to give reasons in support of the order of reduction.

(iii) Whether CESTAT was in law justified in deleting the penalty levied against the proprietor of the unit?

4. It was further directed that the said appeal be posted for hearing in its own turn. We may note that the revenue had also filed a separate appeal bearing CEAC no. 15/2006 qua that part of the impugned judgment whereby the penalty against the proprietor Rukam Singh was set aside. That appeal has been withdrawn today by the learned counsel for the revenue in respect of which a separate order has been passed.

5. The revenue on 22.09.2010 moved an application for early hearing being CM No. 17155/2010 on the ground that the questions of law framed were covered by the judgment of the Supreme Court in the case of Dharmendra Textiles (supra) as is mentioned in the very beginning of our judgment. Notices in the application had been issued and several attempts were made to serve the respondent. Since the respondent could not be served by ordinary process, an application was moved by the revenue for substituted service under Order V Rule 20 of the Code of Civil Procedure, 1908 (in short the „Code). The said application was numbered as CM No. 3377/2011. Order on that application was passed on 21.02.2011. The revenue was given leave to serve the respondent by way of publication. In the order dated 26.08.2011, it is noted that the respondent stands served by way of publication. The matter was posted for hearing today, i.e., 20.09.2011. There is no appearance on behalf of the assessee even today. It is in these circumstances, we have proceeded to decide the questions of law framed.

6. In order to adjudicate upon the questions framed, following facts are required to be noticed. The assessee at the relevant time was engaged in the business of manufacture of car stereos under the brand name "Pioneer" falling under chapter 89 of the [Central Excise Tariff Act, 1985](#). Evidently, the manufacturing activity was carried on by the assessee without obtaining the necessary central excise registration. The assessee thus cleared the stereos without payment of central excise duty.

7. On 16.03.2001, the officers of the central excise preventive division-IV, Delhi raided the premises of the assessee. At the time of the raid the assessee was found to be in possession of fifty (50) car stereos carrying the brand "pioneer". The said car stereos were valued at Rs 12,500/-. The said car stereos were seized by the Central Excise officers, under a punchnama, in the reasonable believe that the same had been removed with an intent to clear the said branded car stereos without payment of duty. The goods in issue were not, according to the revenue, eligible for SSI exemption. The sample of cardboard boxes, used for packaging the car stereos carrying the brand name pioneer, was also seized. Copies of the challan found on the premises were also resumed under the said punchnama.

8. The statement of Rukum Singh, i.e., the proprietor was also recorded under Section 14 of the [Central Excise Act, 1944](#) (in short „C.E. Act). The revenue came to the conclusion that the assessee had manufactured and removed goods during the period 1997 to 2001, and therefore evaded duty to the extent of Rs 21,19,735/- . Accordingly, a show cause notice was issued on 18.06.2002. By virtue of the said show cause notice, the assessee was called upon to show cause as to why: duty to the extent of Rs 21,19,735/- ought not to be demanded and recovered under Rule 9 of the Central Excise Rules, 1944 read with the first proviso of Section 11A of the C.E. Act; penalty not be imposed under Section 11AC of the C.E. Act read with Rule 173Q of the erstwhile Rules; and, lastly interest not be charged under Section 11AB of the C.E. Act.

9. After giving opportunity to the assessee, by an order dated 31.07.2003 the Commissioner of Central Excise passed an adjudication order. By virtue of the said order the assessee was called upon to pay not only the central excise duty in

the sum of Rs 21,19,735/- but also in addition penalty equivalent to the duty imposed. In so far as the proprietor Mr Rukam Singh was concerned a penalty in the sum of Rs 5,00,000/-, under Rule 209A of the Central Excise Rules, 1944 read with Section 38A of the C.E. Act, was imposed.

10. Aggrieved by the aforementioned order, two appeals were preferred with the Tribunal. The Tribunal by the impugned judgment sustained the duty on the ground that the goods in question were not eligible for exemption as the goods bore a brand name of another entity. Accordingly, the Tribunal came to the conclusion that the assessee was required to pay duty before clearance of the goods in issue. The Tribunal, however, held that the quantification of the duty demanded was incorrect, in as much as, the sale price had to be treated as cum-duty price. In these circumstances, the revenue was directed to re-quantify the duty amount treating the sale price as cum-duty price and, accordingly, intimate the correct duty to be paid to the appellant. Since in this case the Commissioner, Central Excise had levied penalty both on the assessee (i.e., the unit) as well as the proprietor, the duty imposed on the proprietor Rukam Singh was set aside while the duty imposed on the assessee (i.e., the unit) was reduced to Rs 1 lac.

11. As noticed in the very beginning of the judgment, the revenue had preferred two appeals. The appeal qua the proprietor Rukam Singh has been withdrawn. The captioned appeal is thus restricted to the assessee (i.e., the unit) whereby the penalty amount has been reduced from Rs 21,19,735/- to Rs 1 lac.

12. The learned counsel for the revenue in support of his contention that the Tribunal had no discretion to reduce the penalty imposed on the assessee relied upon the judgment of the Supreme Court in the case of Dharmendra Textile (supra) as well as Sony India Ltd. vs Commissioner of Central Excise, Delhi 2004 (167) E.L.T. 385 (SC).

13. In so far as this part of the submission made on behalf of the revenue is concerned, we had considered the issue in our judgment passed on 01.09.2011 in CEAC No. 20/2006 titled Commissioner of Central Excise, Delhi -I v. Radhika Containers Pvt. Ltd. In the said judgment we observed as follows:

"....6. We have heard the learned counsel for the revenue. In our view the matter is no longer res integra. The view taken by the Supreme Court in the aforementioned judgment (i.e., Sony India Ltd.) has also been considered, and has found resonance in the Division Bench judgment of the Bombay High Court in Godavari Manar Sahakari (supra). In that case the Bombay High Court specifically considered a contrary view taken by the Division Bench in so far as the quantification was concerned in the case of UOI vs Kirloskar Oil Engines Ltd. 2006 (206) E.L.T. 85 (Bom). The relevant observations made in paragraphs 9 & 10 of the Judgment in the case of Godavari Manar Sahakari (supra) are extracted hereinbelow:

"9. The reasons for such a stiff and stringent provision, are not far to guess. As can be seen from the scheme of Sections 11A, 11AA, 11AB and 11AC of the Act. It is evident that Section 11A prescribes procedure for recovery of duties not levied or not paid, or short-levied or short-paid, or erroneously refunded. Sub-Section (1) within itself and within its proviso covers the cases of duty not paid/ short paid in absence of mens rea or with intention. Section 11A(2) prescribes interest on delayed payment of the duty, in cases where, in spite of determination under Section 11A(2), the duty so determined is not paid within three months. Interest on delayed payment of duty, as can be charged under Section 11AB, is chargeable in both the cases, i.e., evasion of duty without, mens rea and wild intention to evade. It can be said that interest chargeable under Section 11AB, is a sort of civil liability imposed upon assessee for retaining the amount to which revenue was entitled, with him and utilizing the same, instead of allowing the same to come into the State coffer. Section 11AC is applicable only to those cases, where there is evasion of duty intentionally, by fraud, collusion or willful misstatement or suppression of facts. It may not be erroneous to say that penalty under Section 11AC is a sort of penal provision and, therefore, the said provision is harsh and stringent. The person, who deliberately evades the duty, is required to pay penalty equivalent to the amount of duty determined as evaded by fraud, collusion etc.

10. We, therefore, accept the submission of learned Assistant Solicitor General that under Section 11AC, there is no discretion left with the authority to impose any different quantum of penalty."

7. We are in respectful agreement with the view taken. We had taken a similar view in Poonam Sparks (supra) case based on the view of the Supreme Court in Dharmendra Textile (supra)....."

14. In consonance with what is observed in the said judgment, the Tribunal had no discretion to reduce the penalty, as was sought to be done by way of the impugned judgment. Accordingly, question number (i) is answered in the negative and in favour of the revenue. This would also answer question no. (iii). Accordingly, question no. (iii) is also answered in favour of the revenue. Since the question no. (i) has been answered in the negative and in favour of the revenue, we are not called upon to answer question no. (ii) as it is axiomatic that once it is held that Tribunal had no discretion to reduce the penalty, the question of giving reasons does not arise.

15. Accordingly, the appeal of the revenue is allowed. The order of the Tribunal is set aside to the extent it reduced the penalty imposed on the assessee/ unit to less than the amount quantified as the duty evaded by the assessee. With the aforesaid directions the appeal is disposed of.

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