(2014) 12 MAD CK 0394

Madras High Court

Case No: Civil Miscellaneous Appeal No. 1099 of 2008

The Commissioner of Central Excise		APPELLANT
	Vs	
Mefco Engineers (P) Limited		RESPONDENT

Date of Decision: Dec. 12, 2014

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 11A, 11A(1), 11AC

Citation: (2015) 317 ELT 461

Hon'ble Judges: R. Sudhakar, J; R. Karuppiah, J

Bench: Division Bench

Judgement

R. Sudhakar, J.
This Civil Miscellaneous Appeal filed as against the order of the Customs, Excise and Service Tax Appellate Tribunal was admitted by this Court on the following substantial questions of law:

" 1. Whether Section 11AC can be invoked for imposing penalty on such circumstance where an assessee did not pay duty at the time of removal/clearance from factory but paid a part of duty prior to show cause notice and the remaining part after the issue of show cause notice?

2. Whether the CESTAT is correct for holding that penalty under Section 11AC cannot be invoked where part of duty demanded is paid even after the issue of show cause notice?

3. Whether the Hon''ble CESTAT is justified in law by holding a logic that since the assessee had paid a major part of the duty demanded before the issue of Show Cause Notice, Section 11AC is not invokable, particularly when there is no power of discretion on the quasi-judicial authorities to reduce or waive penalty in the light of the Apex Court''s decisions dated 01.04.2005 and 05.05.2004 in the case of M/s. Dabur India Limited, 2005 (182) ELT (SC) and Sony India Limited 2004 (167) ELT 385

(SC) respectively?"

2. The brief facts of the case are as follows:

On Budget day (28.2.1997) in the course of road patrol, the Central Excise Officers intercepted one trailer bearing registration No.TN45 X 3087. On interrogation, it was found that the goods contained in the trailer was lifted from M/s.MEPL and were not as per the delivery challan which indicated as M/s. Enmas process Technologies Ltd. The goods were detained as the transporter was not having the invoice. On further verification of the documents maintained by M/s.MEPL at their registered office, it was found that no duty was paid on the goods as also no invoice raised for removal of the said goods. As M/s.MEPL were a registered assessee under the Central Excise Rules, the goods were seized under a mahazar on 01.03.1997. Therefore, show cause notice was issued demanding duty of Rs.4,25,295/- for the period covering 1995-96 and 1996-97 under proviso to Section 11A(1) of the Central Excise Act, 1944. The Original Authority also confiscated the seized goods under Rule 173Q(2) of Central Excise Rules, 1944, imposed penalty of Rs.30,000/- for contravention of Rule 173Q of the Central Excise Rules and demanded interest under Section 11AB of Central Excise Act, 1944. The Original Authority after due process of law waived the mandatory penalty under Section 11AC of Central Excise Act, 1944.

3. Aggrieved by the order of the Original Authority waiving the imposition of mandatory penalty, the Revenue filed an appeal before the Commissioner (Appeals), who allowed the appeal by way of remand in relation to imposition of penalty under Section 11AC of the Central Excise Act for the period 28.9.1996 to 31.3.1997. On remand, penalty was imposed under Section 11AC and that was challenged before the Commissioner (Appeals) by the first respondent/assessee and the Commissioner (Appeals) allowed the appeal and set aside the penalty levied under Section 11AC of the Central Excise Act. Aggrieved by such an order, the Department filed an appeal before the Tribunal, which upheld the order of the Commissioner (Appeals) insofar as levy of penalty under Section 11AC, but in so far as the findings of the Commissioner (Appeals), the Tribunal set aside the same holding that the Tribunal''s final order No. 1296/2002 had laid the entire issue to rest, wherein it was held that Section 11AC was not invocable.

4. The Department filed rectification petition before the Tribunal saying that there was a factual mistake in paragraph 4 of the final order No. 1069 of 2005 dated 2.8.2005. The Tribunal, by order dated 2.3.2007, held as follows:

" 3. After considering the submissions, I accept the factual mistake in the opening sentence of para (4) of the final order inasmuch as it was not an admitted fact that the entire amount of duty had been paid by the assessee prior to issue of the show-case notice. The fact was that only a part of the demand of duty confirmed by the original authority had been paid prior to 26.8.97 (the date of issue of show-cause notice), the remaining part having been paid after that date. However, this change

of factual situation would not necessarily warrant a change in the conclusion reached in para (4) of the final order. In the case of CCE Vs. KJON Engineering (P) Ltd. - 2005 (67) RLT 157 (Mad.), the Hon''ble High Court had considered a factual situation similar to the one presented today by the department and, on such facts, it was held that Section 11AC penalty was not impossible. In other words, where the duty amount was paid atleast prior to the date on which the order of adjudication was passed, Section 11AC is not liable to be invoked for imposing penalty on the assessee according to the Hon''ble High Court in JKON Engineering (Supra), wherein their Lordships were dealing with a question of law referred to the Hon''ble High Court by this Tribunal. The High Court''s decision was also relied on by this Bench in arriving at a conclusion in para(4) ibid.

4. For the reasons stated herein before, para (4) of the final order requires to be restructured as follows:-

"Notwithstanding to the above controversy, it is an admitted fact that a major part (Rs.2,03,750/-) of the duty demanded by the original authority (Rs.2,78,405/-) had been paid by the assessee prior to issue of the show-cause notice. The remaining part (Rs.74,655/-) of the duty amount was paid after issue of the show-cause notice but before the order of adjudication was passed. Now it is settled law that, in such circumstance, Section 11AC cannot be invoked for imposing penalty vide CCE Vs.JKON Engineering (P) Ltd. - 2005 (67) RLT 157 (Mad.)"

5. Para (4) of the final order will stand substituted by the above para."

5. This order of the Tribunal is now under challenge in this appeal by the Revenue on the above-mentioned substantial questions of law.

6. Heard learned Standing Counsel appearing for the appellant and the learned counsel appearing for the first respondent and perused the materials placed before this Court.

7. As is evident from the facts of the case, here is a case of adjudication invoking the extended period under proviso to Section 11A(1) of the Central Excise Act. The issue as to whether penalty can be reduced in any manner came up for consideration before the Supreme Court in the decision reported in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, . In such circumstances, the decision of the Larger Bench of the Supreme Court in the decision reported in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, makes it very clear that penalty under Section 11AC of the Central Excise Act is mandatory and there is no element of discretion.

8. While considering the pari materia provision, namely, Section 11AC of the Central Excise Act, the Supreme Court in the decision reported in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, , held as follows:

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff''s case (supra) was not correctly decided but Chairman, SEBI''s case (Supra) has analysed the legal position in the correct perspectives. The reference is answered...."

9. The above-said decision was followed by the Supreme Court in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, wherein, the Supreme Court held as follows:

"23. The decision in Dharamendra Textile must, therefore be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.

24. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision.

25. In the light of the discussion made above it is evident that in both the appeals, orders were passed by the Tribunal on a wrong premise. In both the appeals, therefore, the impugned orders passed by the Tribunal are set aside and the matters are remitted to the respective Tribunals for fresh consideration, in accordance with law, and in the light of this judgment...."

10. In view of the categorical statement of law and taking note of the specific provision of Section 11AC where there is a specific mandate that the assessee shall be liable to pay penalty, the mere payment of duty even after the show cause notice is not a ground to waive penalty. Hence, the Tribunal is not justified in deleting the penalty imposed under Section 11AC of the Central Excise Act. Such a mandate under the Statute cannot be given a go-by by the Tribunal. We therefore, answer the question of law in favour of the Revenue.

11. In the light of the above, following the above-said decisions, the questions of law raised and admitted are answered in favour of the Revenue and against the assessee. Accordingly, the order of the Tribunal stands set aside and this Civil Miscellaneous Appeal stands allowed. No costs.