

**(2014) 02 CAL CK 0056**

**Calcutta High Court**

**Case No:** CEXA No. 13 of 2012 and G.A. No. 2723 of 2012

Commissioner of Central Excise

APPELLANT

Vs

Kusum Products Ltd.

RESPONDENT

---

**Date of Decision:** Feb. 17, 2014

**Citation:** (2014) 309 ELT 487

**Hon'ble Judges:** Sudip Ahluwalia, J; G.C. Gupta, J

**Bench:** Division Bench

**Advocate:** P.D. Mukherjee, Advocate for the Appellant

---

### **Judgement**

@JUDGMENTTAG-ORDER

1. The appeal is directed against a judgment and order dated 26th March, 2012 (2012 (283) E.L.T. 433(Tri. - Kol.) ). The matter had, in fact, earlier been heard on 13th September, 2011, but the learned Members could not agree. The matter as such was referred to a third Member, who by his order dated 22nd February, 2012 has opined as follows:

"Undisputedly the proposal in the show cause notice was for imposition of penalty for contravention of Rule 4 and Rule 8 ibid, under Section 11AC read with Rule 25(1) ibid Ld. Commr. in para (v) of para 2.9 of the impugned order, has found that ... "Regarding the question of imposition of penalty, there is no suppression of facts before the Department or willful mis-statement or fraud or evasion of duty. In the overall facts and circumstances of the case including the complexity of the issues involved, I come to the conclusion that this is not a case where the penal provisions can be upheld or that where the penalty can be imposed. Therefore, I refrain from imposing penalty in the instant case".

In this regard the Ld. Advocate appearing for the appellant contended that there is no challenge to the above findings of Ld. Commr. (Appeal) in the grounds of appeal filed by the Department. Para 5 and para 15 of order proposed by Ld. Member (J) and Ld. Member (T) respectively also supports the view of the Ld. Advocate. It is

pertinent to mention here that the provisions of Section 11AC are *pari materia* to the provisions of Rule 25(1)(d) so far as the contravention of any of the provisions of Rules with intent to evade payment of duty is concerned. In view of the above, I find that penalty is not imposable under Rule 25 *ibid*, considering the facts and circumstances of the instant case. Thus, I agree with the Member (J) to the extent, alone".

The learned Judicial Member in his judgment and order dated 20th September, 2011 had opined as follows:

"In this case, it is clear that while passing the impugned order, the Commissioner has clearly held that there is no willful mis-statement, fraud or found any contravention of evasion of duty and there is no suppression of facts also. In that case, the penalty was dropped. The Department has not challenged the findings of the Commissioner of the issue. Therefore, without complying the provisions of Section 11AC, the penalty under Rule 25 of the Central Excise Rules, 2002 is not imposable".

2. Finally, on the basis of the views of the third Member, the appeal of the Revenue was dismissed on 26th March, 2012 against which the present appeal has been preferred.

3. The Commissioner came to the finding that there was no willful misstatement or fraud or any contravention or any evasion of duty nor was there any suppression of fact. The aforesaid view of the Commissioner was upheld by the learned Tribunal. The question, whether there has been any willful misstatement or fraud or any contravention or any evasion of duty or there is any suppression of fact are essentially questions of fact. These questions are concluded by the views expressed by the learned Tribunal. There is no question of law involved in this appeal. We are, as such, of the opinion that this appeal is altogether without any merit. Both the appeal and the application are therefore dismissed.