

REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

{CEAC 10/2006}

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Date of Decision: July 19,2010

M/S NOBLE MOULDS PVT. LTD.

....APPELLANT

Through: Mr. C. Hari Shankar, Advocate with Mr.
Jagdish and Mr. P.K. Singh, Advocates

Versus

THE COMMISSIONER OF CENTRAL EXCISE,

...RESPONDENT

Through: Mr. Satish Kumar, Sr. Standing Counsel
for Customs & Central Excise

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)

1. By means of this appeal the appellant has challenged the Misc. Order No. M/158/05-B dated 27th May, 2005 and Final Order No. 605-606/04-B dated 8th July, 2004 passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'the CESTAT'). The facts leading to the present appeal may be recapitulated as under:-

2. The appellant is engaged in manufacturing of TV Cabinets for which polystyrene is an input. The appellant was clearing polystyrene to its job workers and private challans and same was receiving back from the job worked product under similar private challans. Thereafter, the appellant was

manufacturing the TV Cabinets and, on their clearances, availing MODVAT Credit of the duty originally paid on the polystyrene.

3. A show cause notice dated 27th March, 2000 was issued to the appellant alleging therein that 1,07,925 kg of polystyrene shown to have been removed by the appellant to its job workers *namely* M/s Novice Polymers, was not actual so cleared and that, consequently, the appellant had availed Rs. 9,31,500/- thereon. In the said show cause notice the Department proposed to take two actions *namely:-*

- (i) The Modvat Credit of Rs. 9,31,500/- availed against the inputs removed under 57F (4) Challan No.2 dated 20.6.98, 8 dated 10.11.98, 9 dated 11.11.98, 10 and 11 both dated 12.11.98 and 12 dated 21.11.98, 13 dated 26.11.98, 14 dated 28.11.98 should not be disallowed under rule 57-1 of the Central Excise Rules, 1944; and
- (ii) The Modvat Credit amounting to Rs. 9,31,500/- utilized for payment of Central Excise duty should not be demanded under rule 57-1 of the Central Excise Rules, 1944; and
- (iii) Penalty should not be imposed on M/s Noble Moulds Pvt. Ltd. K-87, Udyog nagar, Delhi presently situated at E-14, DSIDC Complex, Nangloi, New Delhi for contravention of Central Excise Rules, 1944 under the provisions of rule 57-1 read with rule 173 Qibid.
- (iv) Interest @ 18% per annum should not be charged as per provisions of rule 57-1(5) of the Central Excise Rules, 1944.
- (v) Penalty should not be imposed upon Shri Sarbjit Singh, Director and Shri Lal Jha, Authorised Signatory of M/s Moble Moulds Pvt. Ltd. New Delhi under rule 209A of the Central Excise Rules, 1944.

4. The appellant was called upon to show cause as to why Modvat Credit of Rs.9,31,500/-availed by the appellant be not refunded back by the

appellant; penalty be not imposed under Rule 57-5 read with Rule 173 Q of the Central Excise Rules and interest be not charged and penalty under Rule 209A of the Central Excise Act, 1944 be not imposed upon him. The appellant filed reply to this show cause notice and contested the matter.

5. After adjudication, the learned Additional Commissioner passed adjudication orders dated 30th October, 2000 confirming the demand of Revenue of the refund of Modvat Credit availed by the appellant. The Additional Commissioner also imposed penalty upon the appellant under Section 11AC of the Act. The appellant preferred appeal there against before the Commissioner of Central Excise (Appeals). It was *inter alia* submitted that the Modvat Credit was rightly claimed. It was also contended by the appellant that no so cause notice under Section 11 AC of the Act for imposing penalty was ever issued and, therefore, such a penalty cannot be imposed upon the appellant. The appeal preferred by the appellant was however dismissed by the Commissioner of Central Excise (Appeals). The order of the Commissioner (Appeals) reveals that in so far as the first aspect *namely the* availment of Modvat Credit is concerned, no satisfactory evidence was produced by the appellant in this behalf. The second argument was answered by holding that while it was true that Rule 571 of the Rules which had been invoked in the show cause notice, I did not apply Section 11AC could be invoked, even though it did not find mention in the show cause notice. According to the Commissioner (Appeals) it was permissible because of the reason that Rule 173Q of the Central Excise Act had been made subject to Section 11 AC of the Act. The appellant preferred further appeal before the CESTAT which was dismissed by the Tribunal vide orders dated 8th July, 2004. Reading of this order would demonstrate that only first question was argued before the

Tribunal. Though in the appeal filed by the appellant, the appellant had specifically taken the ground of non-permissibility of imposing the penalty under Section 11AC of the Act, the said order does not deal with this issue, because of the reason that it was not argued. The appellant approached this Court and filed CEAC 12/2005 challenging the orders of the Tribunal. In this appeal the appellant had taken the plea that necessary documents were produced before the Tribunal but the Tribunal did not look into the same. The issue regarding penalty under Section 11AC of the Act was also raised. The appeal was however dismissed as withdrawn with the liberty to the appellant to move the Tribunal by way of Rectification of Mistake Application (RMA). Armed with this order, the appellant went back to the Tribunal and moved an application of RMA. Again the appellant raised both the issues. The appellant pleaded before the Tribunal that the Tribunal should accept the documents filed before it and on that basis set aside the order of directing the appellant to deposit back the Modvat Credit availed by it. This application has been dismissed by the Tribunal vide a short order dated 27th May, 2005 which is produced in its entirety:-

“Applicants filed this application for rectification of mistake in the Final Order. The applicant’s contention is that the Tribunal wrongly held that there is no evidence on record to show that the goods which were sent for job worker were received by the manufacturer. The contention of the applicant is that now the applicant are having in possession and are here the previous records showing the return of the goods. The other contention of the applicant is that regarding penalty imposed under Section 11AC was not considered by the Bench.

2. We find that evidence showing that the goods were received by the manufacturer are now produced first time. This evidence was not produced before the lower authorities as well as at the time of final hearing of the appeals. Further we find that the issue of penalty was not argued, therefore, it cannot be said

that there is mistake in the final order for him considering the issue of penalty. In these circumstances, we find no merit in the application. The same is dismissed.”

Challenging this order, present appeal is preferred.

6. In so far as the first issue is concerned, it is a matter of record that the appellant had never filed any document in support of this plea either before the Additional Commissioner or before the Commissioner (Appeals). It is for the first time that the appellant wanted to file these documents before the Tribunal. The Tribunal, in these circumstances, rightly rejected the prayer of the appellant and held that there was no evidence on record that the goods which were sent for job workers were received by manufacturer, the Modvat Credit was wrongly availed by the appellant.

7. We may also note at this that before the Assistant Commissioner, statement of authorized signatory of M/s Novice Polymers was recorded wherein he had categorically stated that they had not received any inputs. It's a pure question of facts and, therefore, we do not find any merit in this contention of the appellant.

8. In so far as imposition of penalty under Section 11 AC of the Act is concerned, we are of the opinion that this appeals warrants to be allowed. Admitted facts are that the show cause notice which was served upon the appellant, only the provisions of Rule 173 Q of the Central Excise Act, 1944 were invoked. There was no mention of Section 11 AC of the Act in the show cause notice. Thus, the Department purposed to levy penalty in terms of Rule 173Q of the Rules and the appellant was not put to any notice of the intention of the Department for levying any penalty under Section 11AC of the Act as

well. It is quite obvious that when a particular provision is not invoked in the show-cause notice and the person is not called upon to give any explanation in respect thereof, no order under such provision can be passed. It would clear amount to violation of principle of natural justice that a person without issuing show-cause notice under Section 11AC of the Act is fastened with the penalty in those proceedings. In a recent judgment rendered by the Apex Court in ***Kushal Fertilisers (P) Ltd. Vs. The Commissioner of Customs and Central Excise, Meerut 2009 (7) SCALE 476*** this aspect has been dealt by the Supreme Court in the following manner:-

“19. Section 11A of the Central Excise Act, 1944 provides for penalty. It, therefore, requires strict consideration. Period of limitation provided for in the Act bars the jurisdiction of the Commissioner to initiate a proceeding for imposition of penalty on the expiry thereof. The proviso appended to Section 11A (1) of the Act makes an exception to the said Rule, the ingredients whereof are thus required to be established for invoking the extended period of limitation. If on the materials produced by the parties, the Tribunal had arrived at a finding of fact that there had been no suppression on the part of the appellant after 22nd January, 1991, the question of invoking the extended period of jurisdiction did not arise. The show cause notice dated 28th March, 1994 thus having been issued after the expiry of the period prescribed under Section 11A of the Act, was clearly barred by limitation”.

“20. In any view of the matter, whether a party is guilty of suppression of fact or not is essentially a question of fact. It does not per se give rise to substantial question of law per se.”

9. We may, with advantage, referred to another judgment of the Apex Court in the case of ***Amrit Foods Vs. Commissioner of Central Excise, U.P. 2005 (190) E.L.T. 433 (S.C.)***. In that case, penalty was imposed under Rule 173Q of the Central Excise Rules, 1944 without mentioning that provision in the

show cause notice. The said penalty was set aside and in the process, the Court made the following observations:-

“5. The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under Rule 173Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither the show cause notice nor the order of the Commissioner specified which particular clause of Rule 173Q had been allegedly contravened by the appellant. We are of the view that the finding of the Tribunal is correct. Rule 173Q contains six clauses the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of the 173Q. This not having been done the Tribunal's finding cannot be faulted. The appeal is, accordingly, dismissed with no order as to costs.”

10. Learned counsel for the respondent sought to argue that in the appeal filed before the Tribunal though this contention was raised, it was not argued when the appeal was decided on 8th July, 2004. This is so recorded by the Tribunal in its orders dated 27th May, 2005 while dismissing the RMA. However, we have still permitted the appellant to raise this issue because of the following provisions:-

- (i) The appellant has raised this issue in all proceedings. It was raised in the appeal filed before the Tribunal also. After the dismissal of the appeal by the Tribunal on 8th July, 2004 when the appellant had filed CEAC 12/2005 in this Court, it was again raised specifically. At that stage the appellant was permitted to withdraw the appeal with the liberty to file application for RMA before the Tribunal. Thus, impliedly, permission was given by this Court to raise an issue before the Tribunal;

- (ii) More importantly, the issue raised is a pure question of law and such an issue could be raised for the first time even before this Court in the present appeal.

11. In these circumstances, orders of the authorities below including that of Assistant Commissioner to the extent levying penalty under Section 11AC of the Act is set aside. However, it would be open to the Assistant Commissioner to pass orders in accordance with Rules after hearing the appellant in respect of which show cause notice was given to the appellant.

(A.K.SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

JULY 19, 2010
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