

\$~41.

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

+ CEAC 2/2012

SRI SAI ENTERPRISES & ANR. Petitioners
Through Mr. R. Krishnan, Advocate.

versus

COMMISSIONER OF CENTRAL EXCISE.. Respondent
Through Mr. Satish Kumar, Sr. Standing
Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

% **ORDER**
01.02.2012

The present appeal under Section 35G of the Central Excise Act, 1944 (Act, for short), is directed against the order dated 29th July, 2011, passed by the Customs, Excise and Service Tax Appellate Tribunal (tribunal, for short) dismissing the rectification application filed by the appellant. The appellant had earlier impugned order dated 1st July, 2010 dismissing their appeal, before this Court in CEAC No. 4/2011. The said appeal was dismissed by the High Court vide order dated 25th January, 2011, inter alia, recording as under:-

“ In this appeal preferred by the

appellants the only issue which is raised relates to penalty imposed upon the appellants which is equal to duty under Section 11AC of the Central Excise Act, 1944. The order of the Tribunal, however, does not show that such a contention if made was dealt with.

Learned counsel for the appellant makes a statement at the Bar that the issue was specifically raised. If that is so, it would be appropriate for the Tribunal to deal with the same in the first instance.

In these circumstances, we permit the appellant to move an application under the appropriate provisions of law seeking review of the order on the aforesaid term.

While granting the aforesaid liberty, this appeal is dismissed.”

2. Learned counsel for the appellant has drawn our attention to the order in original dated 5th March, 2004, the operative portion of which reads as under:-

“ In view of the above discussion and findings, I proceed to pass the following order:-

- (i) I confirm duty of Rs.17,88,262/- involved on the goods cleared without payment of duty during the period 1999-2000 and 2000-01 under proviso to Section 11A(1) of the Central Excise Act, 1944.
- (ii) I appropriate an amount of Rs.2,50,000/- voluntarily paid by the party as duty which may be adjusted against the above confirmed demand.

- (iii) I impose penalty of Rs.17,88,262/- upon the party under Rule 173Q of Central Excise Rules, 1944 and Section 11 AC read with Section 38A of the Central Excise Act, 1944.
- (iv) I also demand interest at the appropriate rate under Section 11AB of the Central Excise Act, 1944.
- (v) I also impose penalty of Rs.10,000/- (Rupees Ten thousand only) upon Shri Raj Kumar, Partner of the firm under Rule 209A of Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944 for the reasons stated above.”

3. It is submitted that the operative portion did not give benefit of Section 11 AC of the Act and our attention is drawn to a judgment of this Court in ***K.P. Pouches (P) Limited versus Union of India***, 2008 (228) ELT 31 (Del), judgment of the Punjab and Haryana High Court in ***Commissioner of Central Excise, Rohtak versus J.R. Fabrics (P) Limited***, 2009 (238) ELT 209 (P&H) and several judgments of the Gujarat High Court in ***Commissioner of Central Excise & Customs, Daman versus R.A. Shaikh Paper Mills Private Limited***, 2010 (259) ELT 53 (Guj.), ***Commissioner of Central Excise & Customs, Surat-II versus Suncity Synthetics***, 2011 (273) ELT 211 (Guj.), ***Commissioner of Central Excise & Customs, Surat-I versus Bhagyoday Silk Industries***, 2010 (262) ELT 248 (Guj.),

Commissioner of Central Excise & Customs, Surat-I versus Palav Synthetics, 2010 (258) ELT 59 (Guj.), ***Exotic Associates versus Commissioner of Central Excise***, 2010 (252) ELT 49 (Guj.), ***Commissioner of Central Excise & Customs, Surat-II versus Gopal Fibres Private Limited***, 2010 (256) ELT 10 (Guj.).

4. Section 11AC of the Act, reads as under:-

“11AC. Penalty for short-levy or non-levy of duty in certain cases.—Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful 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, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section be twenty-five per cent of the duty so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the

period of thirty days referred to in that proviso:

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, for the purposes of this section, the duty, as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent. of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation.—For the removal of doubts, it is hereby declared that—

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]”

5. The contention of the appellant is that the Assessing

Officer in terms of the first proviso to Section 11AC should have, while passing ultimate directions and in the final portion of the order, should have specifically stated that in case the appellant assessee pays the disputed tax and interest along with 25% penalty, they would not be liable to pay 100% penalty which had been imposed under Rule 173Q of the Central Excise Rules, 1944 and Section 11AC read with Section 38A of the Act. This it is submitted vitiates the order in original and the tribunal should have interfered.

6. In the present case, as notice above, the order in original was passed on 5th March, 2004 and was duly communicated to the appellant assessee. The appellant did not approach the Assessing Officer with a request that he wanted to pay the duty amount and the interest and, therefore, only 25% penalty should be imposed. The total duty demand as per order in original was Rs.17,88,262/-. In addition, the appellant was liable to pay interest on the said amount. The allegation against the appellant was that he had suppressed production/clearance of finished goods i.e. man-made fabric laminated with PU foam and these were clandestinely removed during the period 1999-2001. The appellant thereafter filed first appeal before the

Commissioner of Central Excise (Appeals). In the first appeal also the appellant did not question or challenge the order in original for failure to give the option or make the computation to enable the appellant to make payment under Section 11AC of the Act. The appellant challenged the order in original on merits, questioning the duty liability, interest and penalty. The appeal was dismissed vide order dated 20th December, 2004. Thereafter, the appellant filed the second appeal before the tribunal on or about 18th March, 2005. At that stage also the appellant did not deposit the duty demand or the interest. An application for waiver of pre-deposit was moved. The appellant had paid Rs.2.5 lacs during investigation. The tribunal asked the appellant to make pre-deposit of Rs.4 lacs. At the first appellate stage, the appellant had made payment of Rs.1.5 lacs. Thus, in all the appellant had deposited Rs.8 lacs, out of the total duty demand of Rs.17,88,262/-. As noticed above, the appeal of the appellant was dismissed on merits vide order dated 1st July, 2010.

7. We have noted the aforesaid facts in view of the legal contention raised by the appellant that benefit of Section 11AC of the Act has been denied to him, because of the fault of the

respondent and he being compelled to pay 100% penalty equal to Rs.17,88,262/-, whereas in case benefit of the first proviso is given, the appellant would be liable to pay Rs.4.47 lacs, in addition to duty demand of Rs.17,88,262/- plus interest.

8. We may have issued notice on the present appeal and examined the said contention, but in view of the facts stated above, we are of the opinion that the conduct of the assessee shows that he was not interested and did not want to take advantage or benefit of the first proviso to Section 11AC. He never intended and wanted to make payment of the duty amount or the interest. As noticed above, the order in original was passed on 5th March, 2004 and his conduct since then does not show that he was inclined to pay Rs.17,88,262/- (less Rs.2.5 lacs already paid) or the interest payable thereon along with 25% penalty. Since March, 2004 till today the only amount paid by him is Rs.8 lacs (Rs.2.5 lacs, Rs.1.5 lacs and Rs.4 lacs).

9. The decision of the Delhi High Court in the case of ***K.P. Pouches (P) Limited*** (supra) is distinguishable. In the said case, the assessee had paid the full duty even before issue of the show cause notice. In these circumstances, the High Court felt that imposition of 100% penalty was contrary to the terms of Section 11AC. The contention that the duty must be paid after

the order in original is passed, was rejected. Obviously, an assessee, who has paid the duty in advance, cannot be denied the benefit of Section 11AC on the ground that duty was paid earlier in point of time. The Court also noticed that the order in original did not refer to Section 11AC and in these circumstances in paragraph 27 of the judgment it was observed as under:-

“27. To obviate and similar situation from arising in future, we are of the opinion that in its adjudication order the adjudicating authority under the Act should explicitly state the options available to the Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself.”

10. Pursuant to the aforesaid observations, the respondent had issued instructions vide file No. 208/07/2008-CX-6 dated 22nd May, 2008, which reads as under:-

“It is seen that these provisos to Section 11AC of the Act have been specifically inserted to ensure speedy recoveries of the disputed amount. It is an incentive given to the assessee that if he pays the duty amount along with interest, the penalty is reduced to

25% of the duty. This provision is beneficial to the Department as well as the assessee as rightly pointed out by Delhi High Court and therefore, the assessee should be made aware of the option available to him.”

11. Subsequently, the tribunal issued circular No. 898/18/09-CX dated 15th September, 2009. For the sake of convenience, paragraphs 2 and 3 of the said circular are reproduced:-

“2. The matter has been examined. The provisions relating to reduction of penalty to 25% are contained in proviso (1) to (4) of Section 11AC. In terms of proviso (1) and (2), a penalty imposed under Section 11AC can be reduced to 25% on fulfillment of following conditions.

- i. Duty determined under Section 11A(2) and interest payable thereon has been paid within 30 days.
- ii. The said period of 30 days is calculated from the date of communication of the order passed by a Central Excise Officer determining the duty.
- iii. The reduced 25% penalty is also paid within 30 days of the date of communication of the order passed by the Central Excise Officer.

3. From the above it is clear that in order to avail the benefit of 25% penalty, the duty, interest and penalty are required to be paid within 30 days of communication of the order passed by the adjudicating authority. Further, the reading of proviso (4) would also support this interpretation because the said proviso stipulate that wherever duty amount is increased at any appellate stage, in that case in order to avail the benefit of 25% penalty, the assessee is required to pay

differential amount within 30 days of the passing of the order by the appellate authority. A combined reading of all the 4 proviso would, therefore, make it clear that the benefit of 25% penalty is applicable only when the assessee has paid duty, interest and the reduced penalty within 30 days of communication of the order passed by the adjudicating authority. However, if the penalty amount is increased at the appellate stage, in that case the 25% of differential amount of penalty can be paid within 30 days of communication of said appellate order. Therefore, the view taken by the Commissioner (Appeal) is not as per the provision of law.”

12. The decision of the Delhi High Court and the aforesaid circulars do not support the case of the appellant in view of the factual background noticed above. The decision of the Punjab and Haryana High Court in ***J.R. Fabrics (P) Limited*** (supra) is also distinguishable as the assessee in the said case had conceded and accepted their defaults and deposited the entire duty amount before issue of the show cause notice. Similarly, the decisions of the Gujarat High Court can be distinguished on the ground that they pertain to the factual matrix applicable to the said cases. In the present case, as noticed above, it is clear from the conduct of the assessee that he never wanted or showed any inclination to pay the duty amount or the interest

and was throughout contesting the order in original on merits. In case the appellant assessee had any grievance with regard to non-compliance of Section 11AC, the said grievance should have been raised at the earliest opportunity. The appellant should have deposited the duty amount. In view of the above factual matrix, we hold that no substantial question of law arises.

The appeal is accordingly dismissed. No costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

**FEBRUARY 01, 2012
VKR**