IN THE HIGH COURT OF BOMBAY AT GOA

EXCISE APPEAL NO.8 OF 2008

Commissioner of Central Excise,
ICE, House, E.D.C. Complex, Patto Plaza,
Panaji-Goa. ... Appellant

Versus

M/s. Sunrise Zinc Ltd.,
L-2 and 3, Cuncolim Industrial Estate,
Cuncolim, Goa-403 703. ... Respondent

Ms. S. Linhares, Advocate for the Appellant.
Mr. R. Srivastava, Advocate for the Respondent.

Coram:- F. M. REIS &
M. S. SANKLECHA, JJ.

Date:- 27th March, 2015

JUDGMENT :

This is an appeal under Section 35G of the Central Excise Act, 1944 (the Act) challenging the order dated 2/07/2007 passed by the Customs Excise & Service Tax Appellate Tribunal (Tribunal).

2. The appeal was admitted on 30/06/2008 on the following substantial questions of law:

> (1) Whether there is any discretion with the authorities to waive off penalty under Rule 57U(6) of the Central Excise Rule, 1944 read with Section 11AC of the Central Excise Act, 1944?

> (2) Whether penalty can be set aside merely because the evaded excise duty is paid before issuance of the Show Cause Notice by the Department?

3. Briefly the facts leading to the present appeal are that on 18/02/1999 the Officers of Central Excise Department intercepted a tempo van bearing registration no.GJ/5U/675. On examination, it was found that the said van was loaded with 20 drums of chemicals under the brand name of DEHPA (spent) (hereinafter referred to as 'goods') which had been loaded from the factory of the respondent. However, the goods were not accompanied with any document evidencing the payment of central excise duty. On inquiry with M/s. Sunrise Zinc Ltd. it was confirmed that the goods were removed without payment of central excise duty and only on a commercial invoice. As the goods were valued at approximately Rs.13.60 lakhs, the same were seized by the Officers of Central Excise Department under the belief that they are liable for confiscation.

4. Consequent to an inquiry carried out by the Department show case notice dated 2/06/1999 came to be issued to the respondent-Assessee. The show cause notice called upon the respondent-Assessee to show cause as to;

(a) why Central Excise duty of Rs.2.44 lakhs on the 4000 kgs of the said goods being removed clandestinely in the said tempo should not be recovered under Section 11A of the Act?

(b) to disallow and recover inadmissible modva credit availed amounting to Rs.72,599/- under Rule 57U of the Central Excise Rules, 1944 (Rules),

(c) to impose penalty under the provisions of Rules 57U and Rule 173Q read with Section 11AC of the Act, and;

(d) recover interest on the duty not paid under Rule 57U read with Section 11AB of the Act.

5. The basis of the above notice was that the respondent-Assessee had removed goods without payment of duty and, therefore, they are liable not only for payment of duty but also penalty. The respondent-Assessee filed its reply to the show cause notice and inter alia pointed the fact that they had paid the duty amount payable on the 4000 kgs of the goods much before the issue of the show cause notice. Besides, they were under a bonafide belief that the said goods had become unserviceable being in nature of waste/sludge therefore, not dutiable. Thus non-payment of duty was on the basis of bonafide understanding that the said goods were waste. In these

circumstances, the respondent-Assessee prayed that no penalty be imposed upon them.

6. The Commissioner of Central Excise by an order dated 13/02/2006 confirmed the show cause notice. However, the demand was reduced from Rs.2.44 lakhs to Rs.52,000/- and, consequently, an equivalent penalty of Rs.52,000/- was also imposed upon the respondent under Rule 57U read with 173Q of the Rules read with Section 11AC of the Act.

7. Being aggrieved, the respondent-Assessee filed an appeal to the Tribunal only with regard to penalty. The demand of duty of Rs.52,000/- was accepted. By the impugned order dated 2/07/2007 the Tribunal held that the respondent-Assessee had recorded the sale of the said goods in their books of account and had cleared the same on commercial invoice. This clearance of the goods without payment of duty was on the basis of a bonafide belief that the said goods were not excisable. Besides, the impugned order also recorded the fact that as the entire amount of duty and interest had been paid before the issue of show cause notice no occasion to impose any penalty could arise. Thus the Tribunal by the impugned order set aside the penalty

imposed upon the respondent-Assessee. Being aggrieved on dropping of the penalty the Revenue had filed the present appeal which was admitted on the substantial questions of law as mentioned herein above.

8. So far as question no.(1) is concerned, Ms. Susan Linhares, learned Counsel for the Revenue submits that in view of Section 11AC of the Act which was invoked along with Rule 57U of the Rules for the purposes of imposing penalty does not give any discretion to the authorities to waive penalty. In support of the aforesaid submissions she placed reliance upon the decision of the Supreme Court in the case of ***Union of India V/s. Rajasthan Spinning & Weaving Mills*** reported in ***2009 (238) E.L.T. 3(S.C.)***. According to her there is no discretion left with the authorities under the Act to waive penalty once Section 11AC of the Act has been invoked. She further submits that merely because the duty along with interest has been paid before the issue of show cause notice penalty does not stand automatically waived. In support of the above she relied upon the decision of the Supreme Court in ***Rajasthan Spinning & Weaving Mills*** (supra) wherein it has been observed that where duty has been paid before issue of show cause notice, but the original

non-payment was with an intent to evade duty, then the mere payment of duty prior to issue of show cause notice would not absolve the Assessee from being liable for penalty.

9. As against the above, Mr. Srivatava, learned Counsel for the respondent-Assessee also placed reliance upon the decision of the Supreme Court in ***Rajasthan Spinning & Weaving Mills*** (supra) to point out that provisions of Section 11AC of the Act would be invoked only where duty of excise has not been paid by reason of fraud, collusion and willful misstatement or suppression of facts. In this case, the impugned order has recorded that the non-payment of duty arose on account of bonafide belief on the part of the respondent that no duty is payable on the said goods. Consequently, mandatory penalty under Section 11AC of the Act would not have any application where the non-payment of duty was bonafide. In such cases, authorities would be correct in not imposing any penalty.

10. So far as the question no.(2) is concerned, the learned Counsel for the respondent does not dispute the fact that merely because excise duty has been paid before the issue of show cause notice would not by itself warrant non-imposition of penalty. However, it is

submitted that in the absence of any intent to evade duty no penalty can be imposed where duty has been paid prior to the issue of show cause notice.

11. We have considered the rival submissions. The issue arising before us is no longer res integra as a Division Bench of this Court in the case of ***Commissioner of Central Excise, Mumbai-V V/s. Guru Plastics Work*** reported in ***2010 (261) E.L.T. 60 (Bom.)*** had occasion to consider an identical issue. This Court after considering the decision of the Supreme Court in ***Rajasthan Spinning & Weaving Mills*** (supra) held that where non-payment of duty is not with an intent to evade of payment then there can be no occasion to impose penalty under Section 11AC of the Act. In the present facts, the impugned order has recorded a finding of fact that the non-payment of duty on the goods by the respondent-Assessee was on account of bonafide understanding that the said goods are not chargeable to excise duty. Thus, the condition precedent for invoking Section 11AC of the Act is not satisfied in the present facts. Consequently, in such cases the authority cannot impose a penalty under Rule 57U read with Section 11AC of the Act. In fact, it is pertinent to note that even under Rule 57U of the Rules penalty is imposable only when there

has been an intent to evade payment of duty. The factual finding arrived at in the impugned order has not been shown to be arbitrary or perverse.

12. Accordingly, in the present facts question no.(1) is answered in the affirmative, that is, in favour of the respondent-Assessee and against the Revenue. So far as question no.(2) is concerned, answer to it become academic in the present facts in view of our answer to question no.(1). Accordingly, the same is not required to be answered. The appeal is dismissed in the above terms.

M. S. SANKLECHA, J. **F. M. REIS, J.**

NH/-