

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 22.01.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NO. 2874 OF 2007

Commissioner of Central Excise
Salem Commissionerate
Salem 636 001.

.. Appellant/Respondent

- Vs -

1. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Chennai 600 006.

2. M/s. Chandra Prabha Cottage
Spinning Mills
Chittode, Erode 638 102.

.. Respondents/Appellant

Appeal filed under Section 35-G of the Central Excise Act, against the order dated 26.04.2007 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.465 of 2007.

For Appellant : Mr.Vikram Ramakrishnan

For Respondents: No Appearance

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in modifying the penalty imposed on the assessee, the Revenue is before this Court by filing the present appeal. This Court, vide order dated 27.11.2007, while admitting the appeal, framed the following substantial question of law for consideration:-

"1) Whether the CESTAT was right in reducing the penalty to Rs.1,00,000/= contrary to the mandatory provision of Section 11AC of the Central Excise Act, 1944 and in view of the decision of the Supreme Court in the case of Sony India Ltd. - Vs - Commissioner of Central Excise, Delhi reported in 2004 (167) ELT 385 (SC) ?

2. The case relates to a claim for duty against the respondent assessee on the ground that he adopted a lower value for clearing cotton yarn from the factory during October, 1994 to December, 1999. A show cause notice was issued for recovery of duty short levied invoking the provisions of Section 11A of the Central Excise Act together with penalty under Section 11AC of the Act read with Rule 173Q of the Central Excise Rules. Before the Original Authority, the 2nd respondent/assessee sought waiver of penalty imposed under Section 11AC read with Rule 173Q and interest under Section 11AB on the ground that differential duty has been paid before the demand notice was agitated. However, after due process of law, the Original Authority passed the order confirming the duty of Rs.2,03,692/= with appropriate interest and penalty of Rs.2 Lakhs.

3. Aggrieved against the said order, the 2nd respondent herein preferred an appeal before the Commissioner (Appeals), who concurred with the findings of the Original Authority and confirmed the order and thereby dismissed the appeal preferred by the 2nd respondent.

4. Aggrieved against the said order, the 2nd respondent preferred appeal before the Tribunal. The Tribunal, while confirming the order of the lower authorities, insofar as penalty under Section 11AC of the Act is concerned, held that the duty liability has been discharged immediately on receipt of show cause notice and, therefore, was inclined to reduce the penalty from Rs.2 Lakhs to Rs.1 Lakh stating that imposition of penalty at Rs.2 Lakhs was too harsh. Aggrieved against that portion of the order by which the penalty portion was modified, the Revenue is before this Court by filing the present appeal.

5. Heard Mr.Vikram Ramakrishnan, learned standing counsel appearing for the appellant/Revenue. In spite of notice, the 2nd respondent has not chosen either to appear in person or through counsel.

6. For appreciating the case on hand, it is relevant to extract the portion of the order passed by the Tribunal by which the penalty was modified. For better clarity, the relevant portion of the impugned order is extracted hereunder :-

"3. After hearing both sides and studying the case records, I find that the appellants are one of a large number of textile units engaged in the manufacture of cotton yarn in Erode. The appellants have not established that they had short paid the duty over a period of above three years owing to communication error with their commission agents. This plea is obviously erroneous and not acceptable. Therefore, the findings of the lower authorities in their respective orders are not assailable. However, the Ld. Consultant submitted copies of decisions of the Tribunal in the case of Hemant Plastics & Chemicals Ltd. - 2001 (131) ELT 57 (Tri) and

M/s.Shiva Steel Rolling Mills - Vs - CCE, Kol - II, reported in 2005 TIOL 438- CESTAT-Kol, wherein a learned single Member of the Tribunal had held that as the parties therein had discharged the duty liability immediately on receipt of the show cause notice, penalty was not imposable. The above view, however is not a settled legal position and there are several contradictory decisions to the effect that in cases of evasion of duty penal liability is not dependent on the stage of making payment of evaded amount. I find for instance that the ratio of judgments of the Hon'ble Punjab & Haryana High Court in CCE, Delhi - Vs - Machino Montell (2006 (202) ELT 398 (P&H)) and Allahabad High Court in Pee Aar Steels Pvt. Ltd. - Vs - CCE, Meerut (2004 (170) ELT 406 (All.)) is to that effect. However, I find that penalty equal to duty demanded is little too harsh and I reduce the penalty to Rs.1,00,000/= (Rupees One Lakh). The impugned order is otherwise sustained."

7. It is brought to the notice of the Court by the learned standing counsel appearing for the appellant/Revenue that the issue stands covered by the decision of the Supreme Court in Union of India - Vs - Dharamendra Textile Processors (2008 (231) ELT 3 (SC) and Union of India - Vs - Rajasthan Spinning and Weaving Mills (JT 2009 (7) SC 314 :: 2009 (238 ELT) 3 (SC)).

8. In view of the subsequent decision of the Supreme Court in Dharmendra Textiles case and Rajasthan Spinning & Weaving Mills case (supra), the core issue that arises for consideration is whether penalty under Section 11AC of the Central Excise Act becomes mandatory in a case of demand confirmed by invoking proviso to Section 11A?

9. This Court had occasion to deal with similar issue in CMA No.1099 of 2008, wherein the decisions relied on by the learned standing counsel for the appellant/Revenue in Dharmendra Textiles case and Rajasthan Spinning & Weaving Mills case (supra) were taken into consideration and this Court, in the said judgment held as under :-

"8. While considering the pari materia provision, namely, Section 11AC of the Central Excise Act, the Supreme Court in the decision reported in 2008 (231) E.L.T. 3 (S.C.) (Union of India V. Dharamendra Textile Processors), 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 V. Rajasthan Spinning and Weaving Mills reported in JT 2009 (7) SC 314 = 2009 (238) E.L.T. 3 (S.C.), 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."

10. In the light of the above, following the abovesaid decisions, the substantial question of law raised and admitted is 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. However, there shall be no order as to costs.

Sd/-
Assistant Registrar
Dated:6.2.15

True Copy

Sub Assistant Registrar

To

1. Commissioner of Central Excise
Salem Commissionerate
Salem 636 001.
2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Chennai 600 006.

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