In the High Court of Judicature at Madras

Dated: 30.01.2015

Coram

The Honourable Mr.JUSTICE R.SUDHAKAR
and
The Honourable Mr.JUSTICE R.KARUPPIAH

Civil Miscellaneous Appeal No.3417 of 2006

The Commissioner of Central Excise,
Chennai II Commissionerate,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 600 035. .... Appellant

Vs.

1. M/s.Raj Metal and Alloys,
38, Sattana Naicken Street,
Chennai - 600 112.

2. Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shasthri Bhawan Annex, 1st Floor,
Chennai - 600 006. .... Respondents

APPEAL under Section 35G of the Central Excise Act, 1994 against the order dated 15.06.2005 made in Final Order No.846 of 2005 on the file of the Customs, Excise & Service Tax Appellate Tribunal, Chennai, against the order of the Commissioner of Central Excise (Appeals), Chennai-34 dated 29/10/2003 in Appeal No.124/2003(M II) against the order of the Joint Commissioner, office of the Commissioner of Central Excise, Chennai-II, chennai-35 dated 24/03/2003 and made in C.No.V/15/54/2001 CX.Adj-order in Original No.6/2013.

For Appellant : Mr.E.Vijay Anand
Standing Counsel

For Respondents : Mr.S.Gurumoorthy
for Mr.S.Venkatachalam-R1

J U D G M E N T

(Delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal filed by the Revenue as against the order of the Customs, Excise and Service Tax Appellate Tribunal was admitted by this Court on the following substantial questions of law:

"(i). Whether the CESTAT is correct in setting aside the penalty imposed under section 11AC of the Central Excise Act, 1944 and Rule 173Q of the Central Excise Rules, 1944 in the case of clandestine removal of goods contravening the provisions of the Central Excise Law?

(ii) Whether the CESTAT is correct in upholding the Commissioner (Appeals) Order No.124/2003 M-II dated 29/10/2003 relying on the case laws which all deal with irregular imposition of penalty under Section 11AC of the Central Excise Act, 1944 for the demands made prior to its enactment, whereas in the present case occurrence and detection of clandestine removal itself is after the enactment of section 11AC of the Central Excise Act, 1944?

(iii) Whether the CESTAT is correct in not considering and restoring the observations of Member Technical made in the case of M/s.Sutham Nylocots - vs - CCE, Coimbatore (2003 (161) ELT 287 (Tri-Chennai) and remanding the case to original authority?"

2. The brief facts of the case are as follows:

The first respondent/assessee is engaged in the manufacture of tin wires, lead plates, strips, zinc plates, strips, lead plates and strips etc. They are availing input credit under Cenvat Rules. For the wrongful availment of Cenvat credit, show cause notice was issued demanding duty, interest and penalty under Section 11AC of the Central Excise Act and Rule 173Q of the Central Excise Rules.

3. After taking into consideration the response filed by the assessee, the Adjudicating Authority, passed the following order:
"In view of the above findings,

a) I confirm the demand of Rs.1,32,622/- (Rupees One lakh thirty two thousand six hundred and twenty two only) under Rule 57AH(2) read with proviso to section 11A of the Central Excise Act, 1944 as per Annexure to this order and drop the demand of Rs.4,356/- (Rupees Four thousand three hundred and fifty six only)

b) I also adjust the amount of Rs.82,187/- (Rupees Eighty two thousand one hundred and eighty seven only) paid by M/s.Raj Metals & Alloys, against the duty confirmed above and order them to pay balance amount of Rs.50,435/- (Rupees fifty thousand four hundred and thirty five only) immediately.

c) I also impose a penalty of Rs.1,32,622/- (Rupees One lakh thirty two thousand six hundred and twenty two only) on M/s.Raj Metals & Alloys under section 11AC of Central Excise Act, 1944 and Rule 173Q of Central Excise Rules 1944.

d) M/s.Raj Metals & Alloys are also liable to pay interest on the duty determined under column (a) above in terms of section 11 AB read with Rule 57AH (i) after deducting the amount of Rs.1,675/- already paid by them."

4. Aggrieved by the said order of the Adjudicating Authority, the assessee preferred an appeal before the Commissioner (Appeals), who by order dated 29.10.2003, upheld the order of the Adjudicating Authority with regard to the demand of duty, but set aside the demand of interest on the portion of the duty already paid and vacated the imposition of penalty.

5. As against the said order of the Commissioner (Appeals), the Revenue preferred an appeal before the Tribunal, which by following the earlier decisions of the Tribunal, dismissed the appeal.

6. Aggrieved by the said order of the Tribunal, the Revenue is before this Court raising the above-mentioned questions of law.

7. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

8. Before going into the merits of the case, for better clarity, we extract hereunder the relevant provisions, namely, 11AC and 11AB of the Central Excise Act.

"SECTION 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 shortpaid 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 shall 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 which the order determining the duty under shall also apply to cases in 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 to the date of communication of the order referred the Central Government prior to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

SECTION 11AB. Interest on delayed payment of duty. -

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under subsection

(2), or has paid the duty under sub-section (2B), of section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below [ten per cent.] and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 11A till the date of payment of such duty :

Provided that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid.

(2) The provisions of sub-section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.

9. Section 11AC of the Central Excise Act was introduced by Finance (No.2) Act, 1996 with effect from 28.9.1996. Section 11AC of the Central Excise Act gets attracted 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.

10. This provision was subject matter of several interpretations before the Tribunal and finally to resolve the issue as to the mandatory nature of penalty under Section 11AC of the Central Excise Act, the Larger Bench of the Supreme Court in the case of Union of India and Others V. M/s Dharamendra Textile Processors and Others reported in 2008 (231) ELT 3 (SC) came to hold that penalty under Section 11AC of the Central Excise Act is mandatory and there is no element of discretion. Thus the question of law that was referred to the Larger Bench was answered holding that the decision in the case of Chairman, SEBI V. Shriram Mutual Fund reported in 2006 (5) SCC 361 is correct. In fact, in paragraph Nos.26 and 27 of the decision the Supreme Court referred to the object behind the introduction of this provision and we extract the relevant portion as such, hereunder:

"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. The mater shall now be placed before the Division Bench to deal with the matter in the light of what has been stated above, only so far as the cases where challenge to vires of Rule 967Q(5). In all other cases the orders of the High Court or the Tribunal, as the case may be, are quashed and the matter remitted to it for disposal in the light of present judgments. Appeals except Civil Appeal Nos. 3388 of 2006, 3397 of 2003, 3398-99 of 2003, 4096 of 2004, 4316 of 2007, 4317 of 2007, 5277 of 2006, 675 of 2007, 1420 of 2007 and appeal relating to SLP (C) No.21751 of 2007 are allowed and the excepted appeals shall now be placed before the Division Bench for disposal."

11. This decision was rendered by the Supreme Court on 29.9.2008. At the time of admission of this appeal, this Court did not have the benefit of this decision. Apparently, the Tribunal was also deciding the issue on the basis of law that was prevailing at that point of time and the various Tribunals took a view that the element of discretion was available while imposing penalty under Section 11AC of the Central Excise Act.

12. With regard to the issue that once Penalty is imposed under Rule 173Q of the Central Excise Rules, no penalty could be imposed under Section 11AC of the Central Excise Act, when Section 11AC was introduced by Finance (No.2) Act, 1996 with effect from 28.9.1996, there is no bar in Section 11AC of the Central Excise Act to impose of penalty under Rule 173Q of the Central Excise Rules. Nevertheless, when Finance (No.2) Act 1996 brought in amendment by way of introduction of Section 11AC and other provisions, there was no corresponding amendment to Rule 173Q holding that if penalty is leviable under Section 11AC, no penalty could be levied under Rule 173Q of the Central Excise Rules.

13. We also have to notice the scope of penalty under Rule 173Q of the Central Excise Rules and Section 11AC of the Central Excise Act on the basis of the decision of the Supreme Court in the case of Zunjarrao Bhikaji Nagarkar Union of India & Ors reported in 1999 (112) ELT 772, wherein the Supreme Court held as follows:

"21. Two principal issues arise for our consideration : (1) if levy of penalty under Rule 173Q was obligatory and (2) was there enough background material for the Central Government to form a prima facie opinion to proceed against the officer on the charge of misconduct on his failure to levy penalty under Rule 173Q. Appellant has contended that it is only now after insertion of Section 11AC in the Act that levy of penalty has become mandatory and that it was not so under Rule 173Q. This contention does not appear to be correct. In both Rule 173Q and Section 11AC the language is somewhat similar. Under Rule 173Q "such goods shall be liable to confiscation" and the person concerned "shall be liable to penalty" not exceeding three times the value of excisable goods or five thousand rupees whichever is greater. Under Section 11AC the person, who is liable to pay duty on the excisable goods as determined "shall also be liable to pay penalty equal to the duty so determined". What is the significance of the word "liable" used both in Rule 173Q and Section 11AC? Under Rule 173Q apart from confiscation of the goods the person concerned is liable to penalty. Under Section 11AC the word "also' has been used but that does not appear to be quite material in interpreting the word "liable" and if liability to pay penalty has to be fixed by the adjudicating authority. The word "liable" in the Concise Oxford Dictionary means, "legally bound, subject to a tax or penalty, under an obligation". In Black's Law Dictionary (sixth edition), the word "liable" means, "bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution... Obligated; accountable for or chargeable with. Condition of being bound to respond because a wrong has occurred. Condition out of which a legal liability might arise.... Justly or legally responsible or answerable".

22. When we examine Rule 173Q it does appear to us that apart from the offending goods which are liable to confiscation the person concerned with that shall be liable to penalty upto the amount specified in the Rule. It is difficult to accept the argument of the appellant that levy of penalty is discretionary. It is only the amount of penalty which is discretionary. Both things are necessary : (1) goods are liable to confiscation and (2) person concerned is liable to penalty. We may contrast the provisions of Rule 173Q and Section 11AC with Section 271 of the Income-tax Act, 1961."

14. In an identical circumstance, this Court, by following the above-said decision of the Supreme Court, by order dated 27.11.2014 in C.M.A.Nos.272 and 273 of 2007, dismissed the appeals filed by the assessee holding that the penalty under Rule 173Q of the Central Excise Rules is consequent to confiscation of goods, whereas penalty under Section 11AC of the Central Excise Act is equivalent to the duty determined. Therefore, there appears to be no mutual exclusion in relation to levy of penalty under Rule 173Q and Section 11AC.

15. Accordingly, following the above-said decision of the Supreme Court and the decision of this Court dated 27.11.2014, we answer the first and second substantial questions of law in favour of the Revenue and against the assessee. Consequently, the third substantial question of law becomes academic.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

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To

1. The Customs, Excise & Service Tax Appellate Tribunal, Chennai.

2. The Commissioner Central Excise (Appeals),
26/1, Mahatma Gandhi Road, Chennai - 34.

3. The Joint Commissioner, Central Excise, (Appeals), Chennai II Commissionerate,692, MHV Complex, Anna salai, Nandanam, Chennai 600 035.

+1cc to M/S.E.Vijay Anand, Advocate Sr.4873

C.M.A.No.3417 of 2006

JSV(CO)
rvr 23/02/2015