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

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\+ **CEAC 7/2016**

COMMISSIONER OF CENTRAL EXCISE DELHI-II ..... Appellant
Through: Mr. Rahul Kaushik, Senior Standing counsel.

versus

GANPATI ROLLINGS PVT. LTD. & ANR. ..... Respondents
Through: Mr. Abhishek Anand, Mr. M.P. Devnath and Mr. Yogendra Aldak, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **31.05.2016**

<u>Dr. S. Muralidhar, J.</u>:

<u>CM No. 21897/2016 (for exemption)</u>

1. Exemption allowed subject to all just exceptions.

<u>CEAC 7/2016 & CM No. 21896/2016 (for stay)</u>

2. The challenge in this appeal is to an order dated 27th October 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') in Appeal Nos. E/2126/2009 & E/2149/2009 filed by the Respondents.

3. By the impugned order, the CESTAT allowed the appeals and set aside the Order-in-Original dated 27th March 2009 passed by the Commissioner of

Central Excise imposing penalties on the Respondents and requiring them to pay redemption fine in lieu of confiscation of the goods.

4. The case against the Respondents, as set out in the Show Cause Notice ('SCN') dated 16th November 2007, is that in a search conducted in their premises on 27th June 2007 they were found in possession of the excess stock of copper rods and copper ingots which had not been accounted for in their statutory records. They were asked to show cause why they should not be penalised for having contravened the provisions of the Cenvat Credit Rules, 2004 ('Cenvat Rules') read with Central Excise Rules, 2002 ('CE Rules').

5. As far as contravention of Rule 15 of the Cenvat Rules is concerned, the CESTAT has found, as a matter of fact, the Appellants have not taken the Cenvat Credit and, therefore, the question of contravention of Rule 15 of the Cenvat Rules did not arise. The CESTAT then discussed Rule 25 of the CE Rules, which reads as under:

> "***RULE 25. Confiscation and penalty***. (1) Subject to the provisions of section 11AC of the Act, if any producer manufacturer, registered person of a warehouse or an importer who issues an invoice on which CENVAT credit can be taken or a registered dealer, -
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> (a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or
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> (b) does not account for any excisable goods produced or Manufactured or stored by him; or

> (c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or
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> (d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,
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> then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or an importer who issues an invoice on which CENVAT credit can be taken or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or two thousand rupees, whichever is greater.
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> (2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice."

6. In the impugned order, the CESTAT has held that since there were no findings by the adjudicating authority as regards violation of Section 11AC of the Central Excise Act, 1944 ('CE Act'), Rule 25 of the CE Rules could not have been invoked.

7. Mr Rahul Kaushik, learned Senior standing counsel for the Department relies on a judgment of the Full Bench of the CESTAT in ***Commissioner of Central Excise, Delhi v. Ganpati Rolling Pvt. Ltd. 2014 (303) ELT 240 (Tri.-Del)***, of the High Court of Punjab & Haryana in ***S.K. Sacks (P) Ltd. v. Commissioner of Central Excise 2012 (276) ELT 186 (P&H)*** and the decision of the High Court of Jharkhand in ***Dayal Alloy & Steel Castings v.***

Commissioner of Central Excise, Ranchi 2014 (305) ELT 12 (Jhar.) and urges that the CESTAT erred in placing a restrictive interpretation on Rule 25 of the CE Rules. He also pointed out that against the Full Bench decision of the CESTAT in ***Commissioner of Central Excise, Delhi v. Ganpati Rolling Pvt. Ltd.*** (*supra*), an appeal was filed in this Court which was dismissed as withdrawn on 24th February 2015 in CEAC No. 59-60/2014*)*. According to him, there was no need to read the requirement of "with intent to evade payment of duty" occurring in Rule 25(1)(d) of the CE Rules into Rule 25 (1) (a) to (c). Also according to him the ingredients of Section 11AC of the CE Act were not required to be satisfied in order to proceed with confiscation and levy of penalty under Rule 25 of the CE Rules.

8. Mr Abhishek Anand, learned counsel for the Respondents, on the other hand placed reliance on the decisions of the Gujarat High Court in ***Commissioner of Central Excise & Customs v. Saurashtra Cement Ltd. 2010 (260) ELT 71 (Guj.)*** and ***Prince Multiplast Pvt. Ltd. v. Union of India 2012 (276) ELT 48 (Guj.)*** to urge that the CESTAT's interpretation of Rule 25 of the CE Rules in the instant case merits acceptance.

9. The opening words of Rule 25 is "Subject to the provisions of Section 11AC of the CE Act" and not an non-obstante clause which would have begun with the words "Notwithstanding the provisions of Section 11AC of the CE Act". It is plain that the CE Rules are subordinate legislation and have to abide the discipline of the statute under which they are made. Where Rule 25(1) expressly begins with "Subject to the provisions of Section 11AC of the CE Act", obviously the requirements of Section 11AC will have to

constitute a condition subject to which the power under Rule 25 can be exercised. Rule 25 of the CE Rules itself came up for interpretation before the Gujarat High Court in ***Saurashtra Cement Ltd.*** (*supra*) wherein para 17 it was observed as under:

> "17. It is also to be borne in mind that Rule 25 starts with the word "Subject to the provisions of Section 11AC.....". Section 11AC of the Central Excise Act deals with penalty for short levy or non-levy of duty in certain cases. It says that 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 misstatement 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 11AC, shall also be liable to pay a penalty equal to the duty so determined. For the purpose of invoking Section 11AC of the Act, the condition precedent is that the duty has not been levied, or paid or short-levied or short-paid or the refund is erroneously granted by reasons of fraud, collusion or any wilful misstatement or suppression of facts. If these ingredients are not present, penalty under Section 11AC cannot be levied. Since Rule 25 can be invoked subject to the provisions of Section 11 AC of the Act, as a natural corollary, the ingredients mentioned in Section 11AC are also required to be considered while determining the question of levying of penalty under Rule 25 of the Central Excise Rules."

10. In other words, if the ingredients of Section 11AC are not shown to be fulfilled, the penalty under Section 11AC cannot be levied. Therefore, given the wording of Rule 25 of the CE Rules, the ingredients mentioned in Section 11AC have to be considered before determining the question of penalty. In the instant case it is not in dispute that the show cause notice

('SCN') made no reference to Section 11AC and, therefore, there was no occasion to adjudicate the issue of imposition of the penalty under Section 11AC of the Act.

11. In ***Prince Multiplast Pvt. Ltd.*** (*supra*) the Gujarat High Court was considering Rule173Q of the Central Excise Rules 1944 (CE Rules 1944) which begins with the expression "subject to the provisions contained in Section 11AC of the Act and sub-rule (4) of Rule 57-I and sub-rule (6) of Rule 57-U". After referring to the judgment of the Supreme Court in ***S.N. Chandrashekhar v. State of Karnataka (2006) 3 SCC 208*** and ***Ashok Leyland v. State of Tamil Nadu (2004) 3 SCC 1***, the Gujarat High Court interpreted Rule 173Q as under:

> "20. Thus as laid down by the Supreme Court the use of the words "subject to" has reference to effectuating the intention of the law and the correct meaning, is "conditional upon". Rule 173Q opens with the words "subject to the provisions contained in Section 11AC of the Act and sub-rule (4) of Rule 57-I and sub-rule (6) of Rule 57-U". Thus, confiscation of goods and levy of penalty under Rule 173Q of the Rules is conditional upon the requirements of Section 11AC and sub-rule (4) of Rule57-I and sub-rule (6) of Rule 57-U being satisfied. Thus, the words "subject to" used in the said rule express a limitation on the power to confiscate goods and levy of penalty under the said rule."

12. The Court finds that the Full Bench of the CESTAT which decided the Respondent's case in 2014 relied on the decision of the Punjab & Haryana High Court in ***S.K. Sacks (P) Ltd. v. Commissioner of Central Excise*** (*supra*), but made no reference to the either of the decisions of the Gujarat High Court or the above noted decisions of the Supreme Court. As far as the

decision of the Punjab & Haryana High Court in ***S.K. Sacks (P) Ltd.*** (*supra*) is concerned, there is no discussion of the expression “subject to Section 11AC" occurring in Rule 25 of the CE Rules, 2002. As far as the decision in ***Dayal Alloys*** (*supra*) is concerned, the High Court there was interpreting the unamended Rule 173Q of the CE Rules, 1944 which did not open with the words “subject to Section 11AC". Therefore, the said decision too is of no assistance to the Appellant herein. Likewise, when this Court dismissed the appeal against the decision of the Full Bench of the CESTAT in ***Commissioner of Central Excise, Delhi v. Ganpati Rolling Pvt. Ltd.***(*supra*) as withdrawn, there was obviously no occasion to consider any of the above decisions of the Gujarat High Court, which in the considered view of the Court merit acceptance.

13. In that view of the matter, the Court is unable to find any infirmity in the impugned order of the CESTAT. No substantial question of law arises for determination by the Court.

14. The appeal is dismissed.

S. MURALIDHAR, J

VIBHU BAKHRU, J

MAY 31, 2016
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