

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
and
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.100 of 2016

M/s.AP Steels,
No.18, SIDCO Industrial Estate,
Tiruverumbur,
Tiruchirapalli-620 014. ... Appellant

Vs.

The Commissioner of Central Excise,
No.1, Williams Road, Cantonment,
Tiruchirapalli. ... Respondent

Prayer : Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944, praying to set aside the Final Order 40691/2015, dated 22.06.2015, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Ms.Cynduja Crishnan
for M/s.K.Magesh

For Respondent : Ms.Hemalatha,
Senior standing Counsel

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. This is an appeal filed by the Assessee, i.e., A.P.Steels against the judgment and order dated 22.06.2015, passed by the Customs, Excise and Service Tax Appellate Tribunal (in short, "the Tribunal").

1.1. By virtue of the said appeal, the Tribunal has allowed the Revenue's appeal on the issue pertaining to penalty. The Revenue had assailed the order passed by the Commissioner of Central Excise (Appeals) [in short, "the Commissioner (Appeals)] dated 31.05.2010, in an appeal, to the Tribunal, on a singular ground, which is, the direction contained therein, whereby, an

option was given to the Assessee to pay penalty equivalent to 25% of the duty, so determined by the Adjudicating Authority, albeit, within a period of thirty (30) days. In other words, the fact that the Commissioner (Appeals) had reduced the quantum of penalty to 25% of the duty payable by the Assessee, provided the said sum was paid within a period of thirty (30) days, had caused grievance to the Revenue.

2. It was the contention of the Revenue before the Tribunal that this option could not have been given by the Commissioner (Appeals), as it was a case of clandestine removal of goods.

2.1. The Tribunal, via the impugned judgement, has accepted the stand of the Revenue and, accordingly, reversed the order of the Commissioner (Appeals), on this aspect of the matter, by relying upon the judgement of the Bombay High Court in the matter of : Commissioner of Central Excise and Customs, Aurangabad Vs. V.V.Patil S.S.K. Limited, 2007 (215) E.L.T. 23 (Bom.).

2.2. The Assessee, being aggrieved, has preferred an appeal to this Court.

2.3. The instant appeal was admitted on 29.01.2016, when, the following questions of law were framed for consideration by this Court:

"1) Whether the order of the Tribunal rejecting option to pay penalty which is granted as a matter of right under Section 11AC is valid in law?

2) Whether the order of the Tribunal is right in allowing the appeal filed by the respondent in the absence of any appeal against the order of the adjudicating authority reducing the penalty to 25% under Section 11AC of the Central Excise Act, 1944?"

3. In order to adjudicate upon the appeal, the following broad facts are required to be noticed :

3.1. The Assessee is in the business of manufacturing CTD Bars of various kgs., which fall under Heading No.72141090 of the First Schedule to the Central Excise Tariff Act, 1985. Evidently, it had cleared/removed some goods clandestinely.

3.2. Accordingly, the Revenue served upon the Assessee a Show Cause Notice dated 20.08.2008 (hereafter referred to as, "SCN").

3.3. The SCN, as indicated above, alluded to the fact that the Assessee had removed CTD Bars clandestinely, during the period spanning between January 2007 and January 2008. The allegation was that the said removal was made with the intent to evade payment of excise duty.

3.4. Upon adjudication, the demand raised via the SCN was confirmed vide order dated 15.05.2009. As a matter of fact, this was a common order, which confirmed the assessment made,

not only against the Assessee, but also its Manager, one, Mr.D.Purushothman.

3.5. We may only note that D.Purushothman, lost right upto the Tribunal, and had, consequently, preferred an appeal with this Court, which was numbered as : C.M.A.No.101 of 2016. The said appeal has been dismissed as not pressed, by a separate order passed by this Court, today.

3.6. Continuing with the narrative, the Order-in-Original, in so far as the Assessee was concerned, confirmed the demand not only qua duty, but also vis-a-vis penalty and interest. Since, the Assessee had paid, out of the total demand of Rs.12,53,255/-, which included Education Cess and Secondary and Higher Education Cess, a sum of Rs.6,00,000/- prior to the issuance of SCN, the said amount was adjusted. We are informed that after the issuance of SCN, a further sum amounting to Rs.6,53,684/- has been paid to Revenue. The said amount also stands adjusted towards demand raised against the Assessee. This fact is not disputed before us, by the learned counsel for the Revenue.

3.7. Be that as it may, we may also note that in so far as penalty was concerned, the Order-in-Original imposed the penalty equivalent to the demand, i.e., a sum amounting to Rs.12,53,255/-.

3.8. Being aggrieved, the Assessee carried the matter in appeal, and as indicated at the outset, the Commissioner (Appeals) confirmed the order of the Adjudicating Authority, save and except to the extent it pertained to imposition of penalty. The Commissioner (Appeals), as alluded to above, accorded an option to the Assessee of paying the penalty equivalent to 25% of the duty imposed, provided the same was paid within thirty (30) days of communication of the order passed by him. Admittedly, the Assessee has paid the penalty amount, in terms of the option granted by the Commissioner (Appeals).

3.9. The Revenue, as indicated right at the outset, aggrieved by this option of reduced penalty amount, carried the matter in appeal. The Tribunal, as noticed above, ruled in favour of the Revenue.

4. The question, therefore, which we are required to deal with, veers around the interpretation to be given to the provisions of Section 11AC of the Central Excise Act, 1944 (in short, '1944 Act').

4.1. For the sake of convenience, the said provision is extracted hereafter, as it obtained during the relevant period :

"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 shall be twenty-five per cent of the duty so determined.

Provided further XXXXX

Provided also XXXXX

Provided also XXXXX

Explanation XXXXX"

4.2. A careful perusal of the provisions of Section 11AC would show that it operates in two parts. First, where, a determination is made to the effect that duty 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, in view of contravention of any of the provisions of the Act or the rules made thereunder with the intent to evade duty, then, the person, who is liable to pay duty under Section 11A(2), would also be liable to pay penalty equivalent to the amount of duty so determined.

4.3. Second part of the Section is contained in the first proviso to Section 11AC. The said proviso states that where duty, as determined under Section 11A(2) and the interest payable thereon, under Section 11AB, is paid within thirty (30) 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 Section 11AC, shall be twenty-five per cent of the duty so determined.

4.4. Thus, a conjoint reading of the main provision with the first proviso would have us conclude that, in the ordinary course, where, duty has not been levied or paid, or has been short-levied and/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 the Act and the Rules made thereunder with the intent to evade the payment of duty, the Assessee is liable to pay penalty equivalent to 100% of the duty so determined. The first proviso, however, carves out an exception to the main section - perhaps, to maximise the revenue, by holding out to the Assessee

that, if, it were to accelerate the payment of dues, (i.e., duty and interest), by paying the same within the outer limit of thirty (30) days of the communication of the order of the Central Excise Officer, the penalty imposed would get reduced to 25% of the duty so determined.

5. The question, which arises for consideration is, when does the period of thirty (30) days commence ? The other inter-related question, which arises, is does the period of thirty (30) days provided in the first proviso to Section 11AC, commence from the date of the Adjudication Order, or, the date, when, the Appellate Authority passes the order ?

5.1. Ms.Hemalatha, who appears for the Revenue, says that the period of thirty days would commence from the date, when, the order of adjudication is passed in the matter. In other words, it is the learned counsel's submission that the Commissioner (Appeals) could not have given an option of payment of scale down penalty in terms of the first provisos to Section 11AC.

5.2. Learned counsel for the Assessee, Ms.Cynduja, argues to the contrary. In support of her submission, Ms.Cynduja, draws our attention to Section 2(b) of the 1944 Act, which defines the expression "Central Excise Officer". For the sake of convenience, the provision is extracted hereafter :

"2.

(b) "Central Excise Officer" means Principal Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act."

5.3. Based on the aforesaid, Ms.Cynduja, submits that the Central Excise Officer would include the Commissioner of Central Excise (Appeals).

5.4. In the rejoinder, Ms.Hemalatha, drew our attention to the provision under Section 12E of the 1944 Act, based on which, it was argued by her that the Commissioner (Appeals) could exercise only those powers of the Central Excise Officer, which are specified in Section 14, or Chapter VIA of the 1944 Act. Learned counsel, thus, submitted that the contention of Ms.Cynduja, that the expression "Central Excise Officer", as

found in the first proviso to Section 11AC of the 1944 Act, should be read to include Commissioner (Appeals), (based on the provisions of Section 2(b) of the 1944 Act), was erroneous.

5.5. The way, we look at the issue raised before us, has, in our view, got nothing to do with Section 2(b), or Section 12E of the 1944 Act. What is required to be considered, in our opinion, is whether the appellate proceedings can be considered as a continuation of the original proceedings ?. And therefore, would the Appellate Authority have the same powers, as the Original Authority ?. In our view, the answer has to be that, if, the original proceedings are challenged in appeal, the order of the Original Authority is in jeopardy, till such time, it attains finality, upon conclusion of the appellate proceedings. (See Santoshi Tel Utpadak Kendra V. Deputy Commissioner of Sales Tax and Another, (1981) 3 SCC 466 Paragraph 11; Commissioner of Wealth Tax, Gujarat V. Vimlabeen Vadilal Mehta, AIR 1984 SC 302; Union of India and Others V. West Coast Paper Mills Ltd., (2004) 2 SCC 747 Paragraph 41; and the Full Bench Judgment of this Court in : State of Tamil Nadu Vs. Arumugham & Co., Jayalakshmi Sago Factory, Salem and Another, 1982 (51) STC 381). In other words, duty, as determined under Section 11A(2) of the 1944 Act, will attain finality, only, if, it is sustained by the Appellate Authority. In this case, the Appellate Authority was the Commissioner (Appeals). Therefore, in the instant case, when, the Commissioner (Appeals) gave the option to pay penalty, albeit, for a reduced amount equivalent to 25% of the duty so determined, in our opinion, no fault could be found with such a direction.

5.6. To illustrate the validity of this proposition, we may assume, in a given case, the Show Cause Notice proposes to impose duty in the sum of Rs.12,00,000/- on an Assessee. The Assessee challenges the imposition of duty and the Adjudicating Authority, after hearing the Assessee and the representative of the Revenue, comes to the conclusion that the demand should be confirmed only to the extent of Rs.10,00,000/-, as against what was proposed in the Show Cause Notice. If, the Revenue were to carry the matter in appeal, and the Appellate Authority held that the original proposal ought to be sustained, which is that, the demand ought to be confirmed at Rs.12,00,000/-, would then, the Revenue contend that the penalty should be imposed keeping in mind, the order of the Adjudicating Authority and not that of the Appellate Authority. In our understanding, the answer, would, necessarily, be that, the Revenue would press for penalty equivalent to the demand as confirmed by the Appellate Authority. The rationale for this stand can only be that the Order-in-Original, if, challenged, can only attain finality on the conclusion of the appellate proceedings. Quite logically then, the time frame for the option given in proviso to Section 11AC will also commence from the date of the Appellate Order.

6. In this context, we may say that the reliance placed by

the Tribunal on the judgement of the Bombay High Court in : Commissioner of Central Excise and Customs, Aurangabad Vs. V.V.Patil S.S.K. Limited, 2007 (215) E.L.T. 23 (Bom.) was misdirected. According to us, the Tribunal has completely misunderstood the ratio of the judgement. This was a case, in which, the Bombay High Court held that there was no discretion vested in the Authorities to reduce the penalty below the minimum prescribed under the Act. The Court was not called upon to deal with the issue, that we have been called upon to decide. According to us, the judgement is completely distinguishable from the facts obtaining in the present case.

6.1. An apposite judgement, in our view, would be the judgement of the Division Bench of the Delhi High Court in K.P.Pouchers (P) Ltd. V. Union of India, 2008 (228) E.L.T. 31 (Del). In this, none of the statutory authorities had given an option to the Assessee to pay duty at a scaled down amount in terms of the first proviso to Section 11AC. In the background of these broad facts, the Court made the observations :

"..... 17. We are of the opinion that Section 11AC of the Act and its two provisions have to be given a meaningful interpretation. The purpose of the Section and the provisos is to give a benefit to the Assessee if he pays the duty demanded within 30 days of the adjudication order. In that event, the Assessee would be liable to pay only 25% of the duty amount by way of penalty, otherwise he would be liable to pay 100% of the duty amount by way of penalty.

18. In the present case, as we have already noticed, the Assessee deposited the entire duty amount well before the show cause notice was issued and, therefore, the Assessee would be liable to pay only 25% of the duty amount as penalty.

19. It is quite clear that under these circumstances, the Assistant Commissioner could not have demanded more than 25% of the duty amount by way of penalty, in view of the first proviso to Section 11AC of the Act. Unfortunately, for reasons that are not available on record, the Assistant Commissioner demanded 100% of the duty amount by way of penalty. This was incorrect and contrary to the benefit that the Assessee was statutorily entitled to under the first proviso to Section 11AC of the Act.

20. Since the Assistant Commissioner had wrongly demanded 100% of the duty by way of penalty and the Assessee was under no obligation to pay it, the Assessee preferred an appeal

before the Commissioner (Appeals) as well as before the Tribunal. Neither of these authorities paid heed to the terms of the first proviso to Section 11AC of the Act.

21. As far as we are concerned, no one can say that if the Assistant Commissioner had in fact imposed only 25% of the duty amount by way of penalty (as he should have), the Assessee would not have paid the penalty amount within 30 days of the adjudication order. However, the benefit of doubt in this regard must go to the Assessee considering the bona fides, which are obvious from the fact that the Assessee debited the duty amount on the date of the search, well before a show cause notice was issued to it. Under these circumstances, we can only inter that if the correct penalty had been imposed upon the Assessee, he could have paid it within the time prescribed.

22. The fact that the Assistant Commissioner levied an incorrect penalty left the Assessee with no option but to challenge it otherwise he would have had to pay the full penalty amount, which is statutorily not leviable, and then claim a refund of 75% excess penalty paid. Having rightly challenged the imposition, it cannot be said that the Assessee had no intention of paying the penalty within time and saddle itself with an avoidable liability. On the contrary, it could easily be assumed (given the conduct of the Assessee) that if the correct penalty has been imposed, the Assessee would have paid it during the time prescribed.

23. Since the statutory authorities have themselves acted illegally and contrary to the first proviso to Section 11AC, the Assessee cannot be faulted for challenging the order passed by the Assistant Commissioner. Unfortunately, the error committed by the Assistant Commissioner was repeated by the Commissioner (Appeals) as well as by the Tribunal.

24. Consequently, the failure of the Assessee to pay the penalty amount within 30 days of the adjudication order cannot be held against the Assessee on the facts of the present case."

(emphasis is ours)

6.2. As would be evident from the observations extracted

above from the judgement of the Delhi High Court in K.P.Pouchers case, the Court seems to have gone further, by observing that it is incumbent on the part of the statutory authorities to bring to the notice of the Assessee that it is entitled to a statutory "benefit" under the first proviso to Section 11AC.

6.3. We may only note that this aspect of the matter does not arise strictly in the instant case. What we were called upon to decide was whether the Commissioner (Appeals) could have given an option to the Assessee to pay lesser amount of penalty in terms of the first proviso to Section 11AC.

7. In view of our discussion above, we are inclined to agree with the Assessee that the impugned order of the Tribunal cannot be sustained. It is, accordingly, ordered.

8. Thus, in so far as Question No.1 is concerned, the same is answered in favour of the Assessee and against the Revenue. As regards Question No.2, in our view, the same has been rendered redundant, in the wake of the conclusion arrived at vis-a-vis Question No.1.

9. Resultantly, the impugned order is set aside. The captioned appeal is allowed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Customs, Excise and Service Tax Appellate Tribunal,
Southern Bench, Chennai.
2. The Commissioner of Central Excise,
No.1, Williams Road, Cantonment,
Tiruchirapalli.

+2cc to Mr.S.Muthuvenkataraman, Advocate, S.R.No.45510

C.M.A.No.100 of 2016

SR(CO)
GN(05/09/2017)