IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2017

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
AND
THE HON'BLE Dr.JUSTICE ANITA SUMANTH

C.M.A.No.1637 of 2011
& C.M.A.No.1638 of 2011

M/s.Sitalakshmi Mills Ltd.,
Mills Premises
Tirunagar, Madurai-625 006 ..Appellant/Appellant in both the above CMAs

vs

1.Customs, Excise and Service Tax
Appellate Tribunal
Shastri Bhavan Annex
No.26, Haddows Road,
Chennai-600 006

2.The Commissioner of Central Excise
Lal Bahadur Shastri Marg
Central Revenue Building
Bibikulam, Madurai ..Respondents/Respondents in both the above CMAs

Civil Miscellaneous Appeals filed under section 35G of the Central Excise Act, 1994, against the Final Order No.65 & 66 of 2011 dated 20.01.2011 on the file of Customs, Excise and Service Tax appellate Tribunal.

For Appellant : Mr.Muthu Venkataraman
Assisted by Ms.Cynduja Crishnan for
M/s.Mohammed Shaffizn

For Respondents : Mr.T.Pramod Kumar Chopda for R2
R1-Tribunal

JUDGMENT

(Delivered by Dr.ANITA SUMANTH,J.)

These Civil Miscellaneous Appeals come to us at the instance of the assessee, challenging an order of the CESTAT dated

20.01.2011, raising the following substantial questions of law for adjudication:-

> '1. Whether the order of the Tribunal confirming the levy of interest is without jurisdiction inasmuch as it fails to see that the petitioner had paid the duty even before the issuance of show cause notice ?
>
> 2. Whether determination of duty under Sub section (2) to section 11 AC which requires a show cause notice followed by determination by the adjudicating authority is a condition precedent for invoking penalty under section 11 AC ?
>
> 3. Whether imposition of penalty is impermissible when duty has been paid even before issuance of show cause notice inasmuch as there would be no determination under section 11 AC?
>
> 4. Whether the impugned order passed by the first respondent which is contrary to the decision of the Hon'ble Karnataka High Court in the case of CCE., Bangalore Vs. Geneva Fine Punch Enclosures Ltd., reported in 2011 (267) ELT 481 (Kar.) is legal and proper ?'

2. (a) The assessee is a company registered under the provisions of the Companies Act 1956, and engaged in the manufacture of Cotton yarn and Polyester Cone yarn. In the course of audit by the Central Excise Authorities, it was noted that an amount of Rs.1,01,74,796/- had been collected from Ekadantha Synthetics, Bhiwandi, towards additional conversion charges for the period 01.04.2005 to 31.12.2005 through debit notes raised for the aforesaid period. Insofar as the assessee had not offered the additional conversion charges for payment of duty in terms of the Central Excise Act, 1994 (hereinafter referred to as 'Act'), the same was pointed out by the Department, whereupon, the amount of duty was remitted. No interest for the period of delay in payment in terms of section 11 AB has been remitted. The order-in-original confirms the demand of duty of an amount of Rs.8,30,264/- invoking the provisions of section 11A(1) of the Act along with interest and penalty in terms of section 11 AB and 11 AC of the Act respectively.

2.(b) In appeal before the Commissioner of Central Excise (Appeals) the levy of interest was confirmed and the levy of penalty of an amount of Rs.8,30,264/- under section 11 AC of the Act was reversed on the ground that the pre-conditions for the levy did not exist in the present case.

2. (c) In further appeal before the CESTAT by the assessee and the revenue, the Tribunal confirmed the levy of interest but restored the levy of penalty. The Assessee is in appeal against the aforesaid order of the CESTAT.

3. We have heard Mr.Muthu Venkataraman, learned counsel assisted by Ms.Cynduja Crishnan for the appellant and Mr.T.Pramod Kumar Chopda, learned Standing counsel for the 2nd respondent.

4. The stand of the assessee in the present case is the duty had been remitted prior to the issuance of a demand for the same and thus, the levy of penalty in terms of section 11AC is not warranted. Reliance has been placed by the assessee upon the provisions of section 11 AC and the proviso thereunder, both extracted below:-

11AC. Penalty for short-levy or non-levy of duty in certain cases.—

> (a) 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:
>
> 2 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 be twenty-five per cent of the duty so determined

5. The assessee would argue that in terms of the proviso to section 11 AC of the Act, where the duty determined in terms of section 11 A(2) of the Act has been paid and the interest payable in terms of section 11 AB also remitted within 30 days from the date of communication of the order of the Authority, the amount of penalty liable to be paid shall be twenty-five per cent of the duty so determined. The decision of the Delhi High Court in the case of K.P.Pouches (P) Ltd., Vs. Union of India 2008 (228 ELT 31) is relied upon in support of the applicability of the proviso.

6. Mr.Pramod Kumar Chopda, learned counsel appearing for the department would however point out that two pre-conditions exist for the application of the proviso - one, the payment of duty and the second, the payment of interest as per section 11 AB of the Act. The latter, according to him, has not been satisfied in the present case.

7. In this context, the judgments of the Supreme Court in the case of Commissioner of Central Excise, Pune Vs. SKF India Ltd., 2009 (239 ELT 385), as well as Steel Authority of India Ltd., Vs. Commissioner of Central Excise, Raipur 2015 (326 ELT 450), have been brought to our attention. The judgments deal with liability to interest on differential duty upon amounts collected under supplementary invoices on account of a price variation clause in the contract between the parties. The Supreme Court, in SKF India (supra) had upheld the levy of interest on differential duty under the provisions of sub-section (2B) of section 11A of the Act. The Supreme Court, in the case of Steel Authority of India (supra), has, however, referred the matter to the Hon'ble the Chief Justice of India for constituting a larger Bench for re-consideration of the issue.

8. The learned counsel appearing for the assessee would urge that in view of the aforesaid position, the liability to interest is in itself is unclear and in such a situation, the benefit of the proviso should not be denied with regard to the levy of penalty.

9. The provisions of section 11 AC of the Act are attracted only in the event of the revenue establishing fraud, collusion, wilful mis-statement, suppression of facts or contravention of statutory provisions with an intent to evade payment of duty. This has not been done in the present case. Moreover, the duty itself has been remitted on 27.02.2007 even prior to the issuance of SCN by the authorities.

10. In the facts and circumstances of this case and in view of the submissions made, we confirm the levy of interest and delete the penalty levied.

11. This Civil Miscellaneous Appeals are disposed of in the above terms. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

nvsri/sl

To

1.The Commissioner of Central Excise
Lal Bahadur Shastri Marg
Central Revenue Building
Bibikulam, Madurai

2.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan, Annexe, 1st floor,
26,Haddows Road, Chennai-600 006.

Copy to:
The Section Officer,
V.R.Section,
High Court, Madras.

+2cc to Mr.Mohamed Shaffiq, Advocate Sr. 6815, 6816
+1cc to Mr.T.Pramod Kumar Chopda, Advocate Sr. 6598

C.M.A.No.1637 of 2011

SSI(CO)
VR(01/11/2017)