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HIGH COURT OF CHHATTISGARH, BILASPUR

WPT No.7190 of 2010

M/s Seleno Steels Limited, a Company registered under Companies Act, 1956 having it's place of business At/Vill-Taraimal, P.O.: Naya Ganj, P.S.: City Kotwali Dist: Raigarh, Chhattisgarh – 496 001 represented through it's Director Shri Rajesh Kumar Agrawal, S/o Sri Ramniwas Agrawal, aged about 42 years who is a citizen of India

----Petitioner

Versus

1. The Assistant Commissioner, Central Excise & Customs, Bilaspur Division, Rishi Bhawan, Nehru Chowk, Bilaspur, Chhattisgarh – 495 001
2. Union of India, Secretary, Through the Ministry of Finance, Department of Revenue, North Block, New Delhi – 110 001
3. The Commissioner (Appeal-I), Central Excise & Customs, Central Excise Building, Dhamtari Road, Tikrapara, Raipur, Chhattisgarh

---- Respondents

For Petitioner : Mr.Kartik Kurmy, Mr.S.B.Sharma and Mr.Dharmesh Srivastava, Advocate

For Respondents : Mr.Vinay Pandey, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

04/07/2018

1. The extraordinary jurisdiction of this Court is invoked calling in question the order passed by the Adjudicating Authority levying the duty under first proviso to Section 11AC of the Central Excise Act, 1944 (hereinafter called as 'the Act of 1944') and also levying interest under Section 11AB of the

Act of 1944 and imposing penalty of ₹ 2,07,648/- for having committed fraud with intent to evade Central Excise Duty.

2. Mr.Kartik Kurmi, learned counsel for the petitioner restricting his submission to a singular contention, would submit that learned Adjudicating Authority while passing the impugned order has failed to comply with the circular dated 22.5.2008 issued by the Central Board of Excise & Customs which has been read by the Delhi High Court in the matter of **K.P. Pouches (P) Ltd. v. Union of India**[1] and therefore, the part of impugned order not quantifying the interest and not giving option as per first proviso to Section 11AC (unamended) of the Act of 1944 be set aside and the matter be remanded back to the Adjudicating Authority for passing the order afresh in accordance with the above-stated circular issued by the Central Board of Excise and Customs and the writ petition be allowed to that extent.

3. Mr.Vinay Pandey, learned counsel for the respondents, would submit that the order passed by the Adjudicating Authority is strictly in accordance with law and no interference is called for and the writ petition deserves to be dismissed.

4. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

5. In order to appreciate the point in dispute, it would be appropriate to notice unamended Section 11AC (as it stands

[1] 2008 (228) E.L.T. 31 (Del.)

on 8.4.2011 and applicable to the case in hand) which states as under:-

> "11AC. **Penalty for short-levy or non-levy of duty in certain cases**.-Where any duty of excise has not been levied for 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 11B, 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:
>
> 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 preferred 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."

6. The first proviso to Section 11AC of the Act of 1944 as quoted herein-above was considered by the Delhi High Court in **K.P. Pouches (P) Ltd.** (supra) and it has been held as under:-

> "27. To obviate any similar situation from arising in future, we are of of the opinion that in its adjudication order the adjudicating authority under the Act should explicitly state the options available to the Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself."

7. Thereafter, taking cognizance of the order of the Delhi High Court in **K.P. Pouches (P) Ltd.** (supra), the Central Board of Excise & Customs on 22.5.208 issued a circular in which it has been held as under:-

> "3. In view of the points as discussed above, Board has decided that in all the cases, wherein penalty under section 11AC of the Act is imposed, the provisions contained in first and second proviso to section 11AC should be mandatorily mentioned in the Order-in Original itself by the adjudicating authority."

Thus Delhi High Court has directed the adjudicating authority to comply with first and second provisos mandatorily and further held that it must be mentioned in order-in-original.

8. Not only this, subsequently, the High Court of Gujarat in the matter of **Commissioner of C.Ex.& Cus., Surat-II v. Gopal Fibres Pvt. Ltd.**[2] dealing with similar issue has held that

[2] 2010 (256) E.L.T. 10 (Guj.)

Assessee could not be expected to pay interest in absence of its calculation. It was observed as under:-

> “10. However, Mr.Oza has made two more submissions in this Tax Appeal. He has emphatically stated that the respondent has not complied with pre-condition for availment of benefit of reduced penalty under proviso to Section 11AC of the Central Excise Act, 1944. As per the first proviso, the duty amount was not paid with interest and even the reduced penalty of 25% is not deposited by the respondent within 30 days from the date of such determination, as required under second proviso to Section 11AC of the Act. So far as second issue is concerned, Mr.Oza submitted that the adjudicating authority is not under any statutory obligation to set out in its order the availability of benefit of reduced penalty prescribed under proviso to Section 11AC of the Central Excise Act and to give an option to such person liable for penalty under that Section. Both these issues were dealt with by this Court in Tax Appeal No.572 of 2007 with tax appeal No.869 of 2007 decided on 18-11-2009 [2010 (252) E.L.T. 49 {Guj.]). It is also important to note that the adjudicating authority has not calculated the interest neither in the order-in-original nor even thereafter. It is, therefore, too much to expect from the respondent-assessee to pay the interest along with the duty amount in absence of such calculation of interest. As far as statutory obligation of the adjudicating authority is concerned, the Central Excise Department itself has issued Circular on 22-5-2008 wherein it is clarified that in all cases wherein penalty under Section 11AC of the Act is imposed the provisions contained in the first and second proviso of section 11AC should be mandatorily mentioned in the order-in-original itself by the adjudicating authority. It is, therefore, not open for the revenue to agitate this issue before the Court in contradiction of the Circular issued by the Central Excise Department. This Court is Messers Exotic Associates (supra) has directed the adjudicating authority to pass a fresh order giving option to the assessee to pay the duty amount within 30 days by making it explicitly clear in the order itself that if the assessee wants to avail such option he is permitted to do

> so. In the case on hand since the duty amount has already been paid by the respondent-assessee and if the interest and/or reduced penalty of 25% were not paid by the respondent-assessee, the adjudicating authority may send a communication to the respondent-assessee indicating therein that the particular amount of interest and/or 25% of the penalty of the duty amount is not paid by the respondent assessee and hence if the assessee wants to avail the benefit of the reduced penalty of 25%, such amount of interest and /or penalty of 25% should be paid within 30 days from the date of receipt of such communication, failing which they would be liable to pay penalty under Section 11AC equivalent to the amount of duty."

9. Following the principle of law laid down by the Delhi High Court and the Gujarat High Court in the aforesaid judgments (supra), reverting to the facts of the present case, it is quite vivid that the adjudicating authority while passing the order neither quantified the interest payable under proviso to Section 11B nor gave option to the petitioner to pay the reduced penalty in terms of first proviso to Section 11AC of the Act of 1944, which is in breach of the circular of the Central Board of Excise & Customs and contrary to the judgment rendered by the Delhi High Court in **K.P. Pouches (P) Ltd.** (supra). In fact, the adjudicating authority ought to have quantified the statutory interest payable by the petitioner and further given option to the petitioner in the original order as mandatorily required by the judgment of the Delhi High Court in **K.P. Pouches (P) Ltd.** (supra) and later explained by the Central Board of Excise & Customs.

10. In view of above-stated legal analysis, the order passed by the adjudicating authority non-quantifying statutory interest payable to the petitioner and not giving option to pay reduced penalty is held to be bad. The matter is remitted to the adjudicating authority who shall quantify the interest payable under Section 11B of the Act of 1944 by the petitioner and shall also give option to the petitioner to reduce penalty in terms of proviso to Section 11AC of the Act of 1944. The adjudicating authority will pass order afresh after hearing the parties within 60 days from the date of production/receipt of certified copy of this order and it will be communicated to the petitioner.

11. No other point was pressed into service.

12. The writ petition is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-