IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 54 OF 2018

M/s. Intervalve Poonawalla Ltd. .. Appellant

v/s.

The Commissioner of Central Excise
Pune-IV, Commissionerate ..Respondent

Ms. Padmavati Patil for the appellant
Mr. Dhananjay Deshmukh for the respondent

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.
DATED : 21st NOVEMBER, 2018.

P.C.

1. This appeal under Section 35G of the Central Excise Act, 1944 (the Act) challenges the order dated 24th November, 2017 passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal).

2. The appellant has urged the following questions of law for our consideration :-

"(i) Whether the Tribunal was correct in upholding imposition of penalty by holding that the excess credit was taken deliberately and there was mala fide intent, in a case where, on being pointed out by the Audit, the entire amount of credit was reversed and interest thereon paid before issuance of notice to show cause;

(ii) Whether the Tribunal was justified in upholding

> *imposition of penalty when entire amount of credit was reversed and interest thereon paid before issuance of show-cause notice and the fact of the said payment was informed to the dept. in a case where, under such circumstances, show cause notice itself ought to be issued in light of section 11A(1)(b) read with section 11A(2) of Central Excise Act.”*

3. The impugned order of the Tribunal upheld the penalty imposed under Section 11AC of the Act for wrong availment of credit of duty. This after not accepting the appellant's case that the mistake in taking excess credit in respect of 42 invoices was an inadvertent error. The impugned order of the Tribunal records that a mistake in a couple of invoices can be indicative of an inadvertent error, but not where such large number of invoices are involved. In the aforesaid circumstances, the impugned order indicates that even where the duty and interest on the excess credit taken, was paid into the treasury prior to issue of show-cause notice, the penalty under Section 11AC of the Act would be imposable as there is *mala-fide* intention on the part of the appellant in having taken excess credit.

4. Ms. Patil, learned Counsel appearing in support of the appeal submits that even before an audit report was received by the appellant, the appellant have paid necessary duty to the extent excess credit of duty was taken and interest thereon was also paid to the Department.

It is submitted that under Section 11A(1)(b) of the Act, once the duty has been paid along with the interest before service of notice, then no occasion to issue any show cause notice or impose any penalty can arise.

5. We find that the Authorities have come to a finding of fact that the error claimed to be an inadvertent error on the part of the appellant is actually not so. This finding of fact cannot be said to be a perverse. Moreover, the contention on behalf of the appellant that Section 11A(1)(b) of the Act would be applicable in the facts of this case, is not acceptable for the reason that Section 11A(1)(b) of the Act would not apply where short payment of duty has been on account of fraud, collusion, mis-statement with mala fide intention so as to evade the duty. In the circumstances, the view taken by the Tribunal on facts is a possible view and, therefore, cannot be found fault with. In view of the above, we see no reason to entertain the appeal.

6. Accordingly, the appeal is dismissed. No order as to costs.

(M.S. SANKLECHA, J.) **(AKIL KURESHI, J.)**