IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.10.2018

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam
and
The Hon'ble Mrs.Justice V.Bhavani Subbaroyan

C.M.A. No. 2682 of 2016

M/s.Jeevan Diesels and Electricals Ltd.,
Rep by Authorised Signatory,
R.S.No.55/1A, Cuddalore main road,
Pillaiyarkuppam, Mmanapet Post,
Puducherry – 607 402.
...Appellant

Vs.

1. The Commissioner of Central Excise,
Puducherry Commissionerate,
No.1, Goubert Avenue,
Puducherry – 605 001.

2. The Customs, Excise and Service
Tax Appellate Tribunal, Shastri Bhavan Annexe,
Chennai – 600 006.
...Respondents

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 against the final order No. 40408/2016, dated 04.03.2016, passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai.

For Appellant : Mrs. R.Charulatha

For Respondent : Mr.A.P.Srinivas

ORDER

This appeal by the assessee is filed, under Section 35G of the Central Excise Act, 1944 (herein after “the Act” for brevity), against the final order No. 40408/2016, dated 04.03.2016, of the Customs, Excise & Service Tax Appellate Tribunal (herein after “the Tribunal” for brevity), Chennai.

2.The appeal has been admitted, vide order dated 02.12.2008, on the following Substantial Questions of Law:

> "1. Whether the second respondent is correct in imposing penalty of Rs. 5,00,000/- under Rule 25 of Central Excise Rules, 2002 without any finding on the reason and justification for imposition of penalty?
>
> 2. Whether the second respondent is correct in imposing penalty of Rs. 5,00,000/- under Rule 25 of Central Excise Rules, 2002 when none of the situations of Rule 25 is prevalent?
>
> 3. Whether the second respondent is correct in holding that the penalty of Rs. 5,00,000/- is payable under Rule 25 of Central Excise Rules, 2002 without considering the fact that the appellant is a sick company and the proceedings are pending before BIFR?"

3.The short question which falls for consideration is as to whether the Tribunal was justified in confirming the penalty of Rs.5,00,000/- under Rule 25 of the Central Excise Rules, 2002 (herein after 'the Rules' for brevity). The said Rule reads as follows:

> "1. Subject to the provisions of Section 11 AC of the Act, if any producer, manufacturer, registered person of a ware house or a registered dealer,-
> (a)removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules;or
> (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; (d)contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,
> then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse 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 *[rupees two thousand], whichever is greater.
> 2.An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of

natural justice."

4.Heard Mrs.R.Charulatha, the learned counsel for the appellant and Mr.A.Srinivas, the learned Counsel for the respondent.

5.In order to attract penalty under Rule 25 of the Rules, the Department should have made out a case against the appellant that they have,

(a) removed any excisable goods in contravention of the provisions of the Rules;
(b)did not account for any excisable goods produced or manufactured or stored by them,
(c)engaged in manufacture, production or storage of excisable goods, without obtaining registration certificate; or
(d)contravened any of the Provisions of the Rules or Notifications issued under the Rules with intent to evade payment of duty.

6.Admittedly, there is no allegation that the assessee removed excisable goods in contravention of the provisions of the Rules. Therefore, Sub-Clause (a) of Rule 25(1) would not be attracted.

7.The record of the proceedings shows that the assessee had accounted for the excisable goods. Therefore, contingency contemplated in Clause (b) of Rule 25(1) of the Rules also will not be attracted. As the assessee possesses a registration certificate, Clause (c) of Rule 25(1) cannot be invoked. Thus, the Revenue, to sustain the penalty, should bring the case of the assessee under Clause (d) of Rule 25(1) of the Rules, where they could show that the assessee contravened the provisions of the Rules with intent to evade payment of duty. Admittedly, the Tribunal while passing the impugned order did not give any reason as to why the penalty of Rs.5,00,000/- should be confirmed.

8.We may note that the Tribunal has granted full relief to the assessee, insofar as the penalty, which was imposed under Section 11AC of the Act, on the ground that there is no menserea. The finding in this regard, as recorded by the Tribunal, is as follows:

"5.2. . . . . we also find that the department came to know the non-payment of duty only from the said ER-2 returns and initiated proceedings. The adjudicating authority recorded in is findings that they have indicated the duty amount in the column "duty payable" but the column under "duty paid" was left blank. We find that the entire case is basically of delayed payment under Rule 8 and the consequential demand by the department. We find that the show cause notice was issued on 20.01.2012. Before the issue of SCN itself, the appellant paid Rs. 25,00,000/-, Rs. 20,00,000/- was proposed for appropriation in the SCN and the balance amount was paid with interest before issue of adjudication order. Therefore, we hold that there is no mensrea or intention to evade payment of duty so as to invoke penalty under Section 11AC. Accordingly, the penalty imposed under Section 11AC is not sustainable and liable to be set aside."

In the same paragraph 5.2, the Tribunal stated that the assessee is liable for penalty under Rule 25 of the Rules.

9.As observed earlier there is no reason assigned by the Tribunal as to why it was satisfied that such penalty is sustained. We find from the factual position placed before us that the assessee is in deep financial distress and they are before BIFR. The Summary record of the proceedings of the BIFR are also placed before us. In somewhat identical circumstances, the Division Bench of this Court, in the case of Commissioner vs. Ramanasekar Steels Ltd. [2014 (33) STR J220 (Mad)] tested the correctness of the order passed by the Tribunal and the question which was framed for consideration was whether declaration of the assessee company therein as sick industry by the BIFR could be construed as 'reasonable cause' for the purposes of invoking Section 80 of the Finance Act, 1994 and whether the Tribunal was right in setting aside the penalty in full, solely on the ground that the assessee therein was declared as a sick industry. The Division Bench found that the Tribunal was justified in setting aside the penalty, as the assessee was going through financial constraint and accordingly, dismissed the appeal filed by the Revenue.

10.The appellant/assessee before us is more or less in the identical position as that of Ramanasekar steels ltd., and we are of the considered view that similar benefit can be granted to the assessee in this appeal.

11.In the case of Amrit Foods vs. Commissioner of Central Excise [2005(190) ELT 433 (SC)], the Hon'ble Supreme Court considered as to whether there was justification for levy of penalty under Rule 173Q of the Central Excise Rules, 1974 on the assessee therein. The Hon'ble Apex Court pointed out that neither the show-cause notice nor the order of the Commissioner specified as to which particular Clause of Rule 173Q had been allegedly contravened by the assessee, as Rule 173Q contains six Clauses, the contents of which are not the same.

12.As pointed out earlier, in the instant case, the Tribunal has not recorded any finding as to which of the clauses under Rule 25 of the Rules were attracted. Therefore, the decision in the case of Amrit Foods also comes to the aid of the assessee.

13.In the case of Commissioner of Central Excise, Guntur Vs. Andhra Cements Limited 2007 (216) E.L.T 362(A.P.), the High Court of Andhra Pradesh was dealing with the similar case as that of the assessee, wherein also the assesse was before the BIFR and the Division Bench of this Court agreed with the interpretation given by the Tribunal to Rule 25 of the Rules.

14.In the preceding paragraph we have extracted Rule 25 of the Rules and on a perusal of the same, it is clear that the evasion of payment of duty is not sufficient to impose penalty on a producer or manufacturer and there should be an element of intention to evade payment of duty. The Tribunal in the assessee's case, while partly allowing the appeal, filed before it, observed that there was no mensrea on the part of the assessee or intention to evade payment of duty and accordingly vacated the penalty imposed under Section 11AC of the Act. The said reasoning will equally enure in favour of the assessee in respect of penalty under Rule 25 of the Rules. For the above reasons we hold that there is no ground to impose penalty on the assessee under Rule 25 of the Rules.

15.Accordingly, the Civil Micellllaneous Appeal filed by the assessee is allowed and that portion of the order of the Tribunal, imposing penalty under Rule 25 of the Rules, is set aside and the Substantial Questions of Law are answered in favour of assessee. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner of Central Excise,
Puducherry Commissionerate,
No.1, Goubert Avenue,
Puducherry - 605 001.

2. The Customs, Excise and Service
Tax Appellate Tribunal, Shastri Bhavan Annexe,
Chennai - 600 006.

+1 cc to M/s.Lakshmi Kumaran, Advocate Sr.No.71185
+1 cc to Mr.A.P.Srinivas, Standing Counsel Sr.No.71271

CP(CO)
CSL/19.11.2018