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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

IA NO:GA/1/2017 (OLD NO: GA/2406/2017)
IN
CEXA/25/2017
M/S. PRAKASH STEEL PRODUCTS PVT. LTD. & ANR.
Vs.
COMMISSIONER OF CENTRAL EXCISE, KOLKATA-II COMMISSIONERATE

BEFORE :
THE HON'BLE JUSTICE T.S.SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATED : DECEMBER 01, 2021.
[*Via Video Conference*]

Appearance :
Mr. N.K. Chowdhury, Advocate
Mr. Arijit Chakraborty, Advocate
Mr. N. Chowdhury, Advocate
Mr. Prabir Bera, Advocate
…for petitioners
Mr. Somnath Ganguly, Advocate
Mr. Abhradip Maity, Advocate
…for respondent/revenue

The Court :- This appeal filed by the assessee under Section 35G of the Central Excise Act, 1944 (the Act) is directed against the order dated 15th December, 2016 in Excise Appeal No. 383-384/07 passed by the Customs Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata (Tribunal). The appellant/assessee has framed the following substantial questions of law for our consideration:-

1) Whether imposition of penalty on the company and its Director is maintainable in law when the initiation of proceeding was not permissible under Section 11A since there was no short-levy or non-levy of short payment of duty was existing on the date of initiation of proceeding ?
2) Whether the finding of the Tribunal is perverse while saying the imposition of penalty is likely to be mandatory when penalty under Rule 25 is not mandatory?
3) Whether imposition of penalty under Rule 25 without any proposal for confiscation and/or confiscation of the goods and without mentioning any sub-rule is maintainable?
4) Whether separate penalty on the Director is imposable, when penalty has been imposed on the company?

We have heard Mr. Chowdhury, learned Counsel appearing for the appellant/assessee and Mr. Ganguly, learned standing counsel appearing for the respondent/department.

The short question is involved is whether the penalty imposed on the assessee and director was justified and whether the adjudicating authority was right in invoking the relevant provisions of the Act and the Central Excise Rules in imposing the penalty. The facts are not in dispute as there has been clandestine removal of excisable goods without payment of excise duty. This aspect has been admitted by the director and when the disputed premises of the assessee was inspected it was found that finished goods have been cleared without payment of excise duty. The explanation offered by the assessee and the director was that the concerned person who was dealing with the excise matters was absent during the said period and the rules have been cleared. After such a statement was recorded from the director of the assessee/company they voluntarily handed over a cheque dated 29th August, 2005 to the officers of the Central Excise Officers for an amount of Rs.4,88,264/- being the duty which was payable in respect of those goods which was cleared without payment of duty. The matter thereafter proceeded further by issuance of show-cause notice. The assessee submitted its reply and contended that since the excise duty has been paid even prior to the issuance of the show-cause notice no penalty or interest is leviable and payable. This contention did not find favour with the adjudicating authority, who passed the order dated 15th December, 2016 confirming the proposal in the show-cause notice. Aggrieved by the same the assessee preferred an appeal to the Commissioner(Appeals- II) of Central Excise, Kolkata. The contention advanced by the first appellate authority was that no penalty and interest was payable when the amount of excise duty was paid much earlier to the issuance of the show-cause notice. Therefore, it is submitted that the assessee should have been exonerated and no payment of penalty and interest could have demanded or leviable from appellant. The first appellate authority did not agree with the contention advanced by the assessee and by order dated 30th March, 2017 dismissed the appeal. In the said order it has been recorded by the first appellate authority that assessee had admitted their liability of discharging central excise duty or the goods which were clearly clandestinely removed violating the provisions of the Central Excise Act and the Rules and the only issue was whether interest and penalty were imposable. The assessee placed reliance on the decision in the matter of *RASHTRIYA ISPAT NIGAM LTD. vs. COMMISSIONER OF C. EX., VISAKHAPATNAM* and contended that the payment of penalty and interest should be set aside. The contention was considered by the first appellate authority and it was pointed out that there is no denial of the fact that assessee has evaded the payment of Central Excise Duty by suppressing the fact and contravening the provisions of the rules. Furthermore, they have not paid the excise duty voluntarily and it was paid after it was detected by the department and therefore, evasion of the duty was a deliberate act. Thus it was held penalty was imposable. Aggrieved by the same the assessee preferred an appeal before Tribunal and the same was dismissed by order dated 15th December, 2016 confirming the order passed by the first appellate authority. Aggrieved by the same the assessee is before us by way of an appeal and the contention advanced by the learned Counsel for assessee that show-cause notice itself was defective and Rule 25 of the Central Excise Rules and Section 11AC of the Central Excise Act should not have been read together as both operate in different fields and in so far as the penalty imposable under Rule 25 of the Central Excise Rule is concerned, the four contingency contemplated therein had to be satisfied for imposing penalty wherein Section 11AC of the Act is on an entire different footing. We find from the order of adjudication which has referred to the reply given by the assessee to the show-cause notice that such an alleged defect in the show-cause notice was never a ground raised by the assessee. That apart undisputed fact being that the assessee admitted clandestine removal. Merely because duty was paid prior to the issuance of the show cause notice cannot exonerate the assessee from the levy of penalty and interest. We find from the order passed by the Tribunal, impugned before us, that the assessee was ready to pay interest and the Tribunal has recorded such a concession. Therefore, the only issue whether penalty was rightly imposed or not is the crux of the matter which needs consideration. Considering the facts and circumstances of the case we find that the penalty was rightly imposed on the assessee. The only other issue which remains with us is whether the assessee would be entitled to the benefit of paragraph 2 of the order of adjudication dated 15th December, 2016 by which the adjudicating authority stated that if the duty determined under Section 11A is paid within thirty days from the date of communication of the order of adjudication the amount of penalty liable to be paid by the assessee shall be 25% of the duty so determined provided further if the reduced penalty is also paid within 30 days from the date of receipt of the order of adjudication. Admittedly the duty has been paid much earlier by cheque dated 29th August 2005 i.e. much prior to the issuance of the show-cause notice. Therefore, the appellant should be granted the benefit of 25% of the duty so determined by the adjudicating authority. The other condition which has been stipulated in the order of adjudication is that reduced penalty should be paid within 30 days from the date of receipt of the order of adjudication. Though such may be the condition but the same cannot negate the appellant/assessee's right to prefer a statutory appeal provided under the Act. Two tiers of appeal, have been provided for under the Act and, therefore, the proper interpretation to compute the period of thirty days for payment of the reduced penalty is that such period shall start from the date on which the matter attains finality. The present proceeding is an appeal against the order of the Tribunal which is a continuation of the original proceeding though strictly not in the nature of first appeal under the Code of Civil Procedure as in the instant appeal the Court is to be satisfied that substantial question of law is involved. Nevertheless, this appeal has been pending before this Court from 2017. Therefore, we are of the view that if the appellant is permitted to pay reduced penalty i.e. 25% of the duty so determined within 30 days from the date of receipt of server copy of this order, the benefit should enure in favour of the appellant/assessee. In the result, the appeal stands dismissed and the substantial question of law are answered against the assessee and the only relief granted to the assessee is permitting them to pay 25% of the duty determined by the adjudicating authority in this order of 15th December, 2016 within 30 days from the date of receipt of the server copy of this judgement and order. If the appellant/assessee fails to do so, the benefit of this order will not enure in favour of the appellant/assessee and the appeal will stand dismissed in its entirety.

Consequently, all applications stand disposed of.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

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