IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.01.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

Civil Miscellaneous Appeal No.2538 of 2016

Commissioner of Central Excise,
Anai Medu, Salem - 636 001. ...Appellant/Respondent

Vs

M/s.Aswin Textiles Pvt. Ltd.,
(now sought to be changed as R.S.Mills Ltd),
Therpattipirivu, Palani Road,
Dharapuram - 638 673. ...Respondent/Appellant

Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944 against the impugned order of the Hon'ble Tribunal in Final Order No.40660/2015 dated 18.06.2015 on the file of the Customs, Excise & Service Tax Appellate Tribunal, Chennai and to uphold the order of Commissioner (Appeals) in O-I-A.Nos.65-67/2007-CE(SLM) dated 24.12.2007.

For Appellant: Mr.V.Sundareswaran
For Respondent: Mr.J.Shankarraman

JUDGMENT
(Delivered by T.S.Sivagnanam,J)

This appeal filed by the appellant under Section 35G of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 is directed against the order dated 07.01.2016 made in Final Order No.40660/2015 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai ('the Tribunal' for brevity).

2.The revenue has filed the appeal by raising the following substantial questions of law:

> "(A) Whether the Tribunal is correct in allowing the appeal of the assessee/respondent by dropping the mandatory penalty imposed on them?
>
> (B) Whether the Tribunal committed an error of law in ignoring the explanation 1 appended to

Sec.11AC for deleting mandatory penalty on respondent?

(C) Whether the Tribunal was justified in assuming "bonafides"ignoring the categorical finding by the authorities below that the conduct of the respondent amounts to "suppression"?

(D) Whether the Tribunal was correct in following the decisions reported in 2011 (297) ELT 481 (Kar) and 2012 (280) ELT 297 (Tri-Del) which does not apply to the facts of the case nor was it the correct law?

3.The facts which are necessary for disposal of the appeal are hereunder:

The respondent is engaged in the manufacture of cotton yarn. They import certain capital goods under the Export Promotion of Capital Goods Scheme [EPCG Scheme] and paid 5% concessional rate of duty of 5% of basic customs duty and cess only. The respondent availed CENVAT credit of the countervailing duty [CVD] on the basis of amount mentioned in the bills of entry dated 04.09.2002, 18.10.2002 and 26.03.2003. The internal audit party of the appellant Department visited the factory of the respondent between 12.01.2004 to 14.01.2004 and found the CENVAT credit of CVD was availed by the respondent without payment of CVD. On 31.01.2004 presumably on advise given, the respondent reversed the CENVAT credit availed by them by debit entry in Profit and Loss Account in Sl.No.30. On 20.02.2004, the respondent remitted the interest which was payable on the wrongly availed CENVAT credit. After more than 2-1/2 years, the appellant Department issued show cause notice dated 30.10.2006 calling upon the respondent, its Managing Director and the Administrative Manager to show cause as to why the extended period under the Proviso to Section 11A(1) of the Central Excise Act, 1944 should not be invoked; amount of Rs.48,52,516/- being the credit wrongly availed on the CVD in respect of the three bills of entry should not be demanded under Rule 12 of the Erstwhile CENVAT Credit Rules, 2002 r/w. Section 11A(1) and Section 38A of the Act; why interest of Rs.6,20,739/- involved on the credit wrongly taken should not be demanded; why the amount of Rs.48,52,516/- paid by the respondent vide PLA Debit No.30 dated 31.01.2004 and the interest of Rs.6,20,739/- paid by challan dated 20.02.2004 should not be appropriated against recovery of CENVAT credit and interest; why penalty should not be imposed on the respondent under Rule 13 of the Erstwhile CENVAT Credit Rules, 2002 and Rule 25 of Central Excise Rules, 2002 r/w. Section 11AC of the Act; why the capital goods should not be confiscated and why penalty should not be imposed on the Managing Director and the Administrative Manager of the respondent.

The respondent, the Managing Director and the

Administrative Manager submitted their reply to the show cause notice. The sum and substance of the reply is that it was a bonafide mistake committed since the head office of the respondent was at Coimbatore and the imported machinery was installed and functioning at Dharapuram, more than 60 kms away and the Managing Director was not taking care of the day-to-day affairs of the respondent Mill at Dharapuram and as soon as the audit party had pointed out the mistake, the respondent had promptly reversed the wrongly availed CENVAT credit and also remitted the interest on the same. Further, it was pointed out that the CENVAT credit which was wrongly availed was reversed and the interest paid much prior to the issuance of show cause notice. The respondent also contended that there is no justification for invoking extended period of limitation, that too, after more than 2-1/2 years after the respondent had reversed the wrongly availed CENVAT credit and remitted the interest. The original authority, namely, the Additional Commissioner of Central Excise, Salem was not convinced with the explanation and by order dated 18.12.2006 confirmed the demand of duty, directed appropriation of the amount which was reversed by way of PLA debit, imposed penalty of Rs.48,52,516/- on the respondent equivalent to that of the duty demanded by invoking Section 11AC of the Act and imposed penalty of Rs.48 lakhs on the Managing Director and Rs.48 lakhs on the Administrative Manager.

The respondent as well as the Managing Director and the Administrative Manager filed an appeal before the Commissioner of Central Excise (Appeals), Salem and the grounds raised before the original authority was once again canvassed and certain decisions were relied on. The First Appellate Authority by order dated 24.12.2007 confirmed the order of the original authority in so far as the respondent is concerned, vacated the penalty imposed on the Managing Director and reduced the penalty imposed on the Administrative Manager to Rs.1 lakh from Rs.48 lakhs. The penalty imposed on the Administrative Manager was not challenged by him and the said order has been accepted. The respondent filed an appeal before the Tribunal. The Tribunal after noting the facts held that the explanation offered by the respondent was acceptable and it can be held to be a bonafide mistake of an employee of the Company and therefore, exercised discretion considering the factual scenario and vacated the penalty imposed against the respondent and upheld the penalty of Rs.1 lakh imposed on the Administrative Manager. The revenue is before us challenging the order passed by the Tribunal vacating the penalty imposed on the Managing Director.

4.We have heard Mr.V.Sundareswaran, learned Senior Standing Counsel appearing for the appellant and Mr.Shankaraman, learned counsel appearing for the respondent.

5.The learned senior standing counsel, by placing reliance on the decision of the Hon'ble Supreme Court in the case of Union of India vs. Rajasthan Spinning and Weaving Mills [2009 238 ELT 3(SC)] submitted that the earlier decision of the Hon'ble Supreme Court in the case of Union of India vs. Dharamendra Textile Processors [2008 231 ELT 3(SC)] was clarified and it has been held that once Section 11AC is applicable in a case, the concerned authority would have no discretion in quantifying the amount and penalty imposed must be equal to the duty determined under sub-section (2) of Section 11A of the Act. Therefore, it is submitted that the penalty imposed is a mandatory penalty and the Tribunal committed an error in allowing the respondent's appeal.

6.Mr.Shankararaman, learned counsel for the respondent would submit that the appeal filed by the revenue cannot be pursued by them on account of the circular issued by Central Board of Excise and Customs [CBEC], wherein monetary limits have been fixed for the revenue to prosecute the appeals and in the instant case, the quantum involved is less than the threshold limit and the revenue cannot pursue the appeal.

7.In reply, the learned senior standing counsel would submit that he has got no instructions to withdraw the appeal but has been orally informed by the appellant Department that prosecution has been launched against the respondent and therefore, no instructions can be given to withdraw the EP.

8.Nevertheless, since we have heard the matter on merits, we proceed to decide the correctness of the order passed by the Tribunal. The learned senior standing counsel is right in his submission which is based on the decision in Rajasthan Spinning and Weaving Mills, wherein the earlier decision in Dharamendra Textile Processors was clarified and it was held that once the provision of Section 11AC is found to be applicable, the concerned authority has no discretion in the matter of quantum of penalty and it has to be equal to the duty determined under Section 11A(2). There can be no quarrel over the said proposition. However, in the instant case, this issue does not arise. The question would be as to whether the provision of Section 11AC stood attracted in the case of the assessee. It is no doubt true that the assessee would not have availed CENVAT credit without payment of CVD. This factual position is admitted by the assessee and reiterated by the learned counsel appearing for the respondent. Thus, the assessee accepted the mistake. Therefore, we have to examine as to whether the Tribunal was right in taking note of the facts to hold that Section 11AC(1) would not stand attracted.

9.Section 11AC of the Act deals with penalty for short levy or non-levy of duty in certain cases and the amount of penalty for such non-levy or short levy or non-payment or short payment or erroneous refund is in terms of Clauses (a) to (e) of the said provision. If we take a look at Clause (a) of Section 11AC, it states that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded for any reasons other than fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the 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 penalty.

10.In the case on hand, there is no allegation of fraud or collusion or wilful misstatement or suppression of facts. The revenue seeks to bring the assessee's case under the caption contravention of the provisions of the Act or the rules made thereunder. The statute further states that such contravention should be with an intent to effect payment of duty to make the person liable for payment of penalty which will be equivalent to the amount of duty payable at the relevant point of time. As stated above, the assessee has accepted the fact that they are not entitled to avail CENVAT credit without payment of CVD. Their case initially was that they have set right the mistake and reversed the credit and also remitted the interest much prior to the audit party inspection. However, this has been found factually incorrect by the Commissioner of Appeals because the credit was reversed only on 31.01.2004 and interest was remitted only on 20.02.2004 whereas the audit party visited the factory between 12.01.2004 to 14.01.2004. On realizing that a wrong statement has been given, the respondent while accepting the mistake would state that the head office of the Company is at Coimbatore and the Managing Director does not come over to Dharapuram to take case of day-to-day affairs and the employee taking note of the quantum of CVD mentioned in the EPCG license had wrongly availed the CENVAT credit. It is pointed out that normally when the license is issued against the entry regarding the quantum of duty, it is normally mentioned as NIL, but however, in the respondent's case, the CVD components was quantified in the bill of entry so as to enable the Customs Department to recover the same in the even of non-fulfillment of the conditions stipulated in the EPCG Scheme. The Tribunal took note of the overall facts and circumstances of the case and found that availment of CENVAT credit without payment of CVD was done by an employee of the Company and it was a bonafide mistake. Furthermore, the Department took more than 2-1/2 years to issue show cause notice when they were fully aware that the CENVAT credit was wrongly availed by the respondent. Therefore, the finding rendered by the Tribunal on the facts and circumstances cannot be termed to be perverse for us to interfere in an appeal filed under Section 35G of the Act.

11.The Tribunal has referred to the decision of the Karnataka High Court in the case of CCE Bangalore vs. Geneva Fine Punch Enclosures Limited [2011 (267) ELT 481 (Kar.)] and in the case of Panasonic AVC Networks India Company Limited vs. CCE Meerut [2012 (280) ELT 297 (Tri.-Del.)]. On going through the facts of the said case, we find that those two decisions cannot be applied to the case on hand. Be that as it may, we do not find any substantial question of law arising for consideration in this appeal to interfere with the factual finding recorded by the Tribunal.

12.For the above reasons, we hold that no substantial question of law arises for consideration in this appeal. Accordingly, the civil miscellaneous appeal is dismissed. No costs.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To

1.Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai

2.Commissioner of Central Excise,
Anai Medu, Salem - 636 001.

+1 cc to Mr.V.Sundareswaran Advocate sr3591

C.M.A.No.2538 of 2016

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