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(2014) 03 RAJ CK 0124

In the Rajasthan High Court

Case No : DB Central Excise Appeal No. 30 of 2011

Ajmer Industrial Gases (P.) Ltd. APPELLANT

Vs

Commissioner of Central Excise-I RESPONDENT

Date of Decision : 31-03-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 11AC, 35G

Citation : (2014) 310 ELT 872 : (2014) 46 GST 110 : (2014) 28 GSTR 307

Hon'ble Judges : J.K. Ranka, J;Ajay Rastogi, J

Bench : Division Bench

Advocate : P.K. Kasliwal, Advocate for the Appellant

Judgement

J.K. Ranka, J.—Instant Central Excise Appeal u/s. 35G of Central Excise Act, 1944 (for short, ''CE Act'') is directed against the order of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, Principal Bench, New Delhi (for short, ''CESTAT'') dt. 01/11/2010 passed in Excise Appeal No. E/427 of 2006-Excise (Branch) and it pertains to penalty imposed u/s. 11AC of the CE Act amounting to Rs. 1,15,155/-. The brief facts, which can be culled out on perusal of the impugned order and on the basis of the arguments advanced by counsel for the appellant, are that the appellant is engaged in the manufacturing of Oxygen Gas and Dissolved Acetylene Gas falling under Sub-Heading 2804.10 & 2901.10 respectively of Central Excise Tariff Act. The claim of the respondent-revenue is that the assessee received additional consideration from their buyers in the name of "cylinder maintenance charges'' and on account of the suppression/mis-declaration of assessable value of the excisable goods, they had short paid Central Excise duty amounting to Rs. 10,13,699/- on the clearance of excisable goods made during the period from 01/01/1997 to 31/01/2001. The above discrepancy was noticed by the audit team of AG Rajasthan that the assessee, against the sale of their excisable goods, had been receiving additional consideration from their buyers in the name of maintenance charges which was not included while computing the assessable value for the purposes of calculating

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Central Excise Duty. The assessee was also charging, inter alia, from their buyers, the cylinder rental charges in addition to the basic price per cubic meter for supply of gases. The goods (gases) were supplied by them in their own cylinders as well as in the buyers'' cylinders. The rental charges and cylinder maintenance charges were being charged in terms of per cubic meter of gas. The rental were charged only in the cases where the gases were supplied in their own cylinders but cylinder maintenance charges were charged from all the buyers including the buyers who purchased the gases in their own cylinders. Thus, prima facie, the revenue came to the conclusion that on the basis of the special audit carried by the AG Rajasthan, the appellant had short paid Central Excise Duty to the tune of Rs. 10,13,699/-.

2. The facts on record also came to be noticed that the assessee did not disclose these facts earlier at all while filing their returns under Form RT-12 and mis-declared the excisable value in the said returns with sole intend to evade payment of Central Excise Duty on the additional sale consideration received from the buyers in the name of the maintenance charges. Though during the course of adjudication and after much persuasion, the assessee came out with the fact that it had collected the additional consideration of Rs. 36,16,511/- in the name of maintenance and depreciation charges but insisted that these were maintenance charges.

3. It was also noticed by the revenue authorities during the course of adjudication proceedings that addition of Acetone in Dissolved Acetylene Gas Cylinder has nothing to do with the maintenance of cylinders but it works as a compressing agent to facilitate flow-out of Dissolved Acetylene Gas from the cylinder and this fact was never revealed to the department and the assessee was not including its (i.e. Acetone''s) cost in the assessable value. The adjudicating authority accordingly, on the basis of judgment rendered by the Hon''ble Delhi High Court in the case of 2000 (121) ELT 369 , held that the cylinder maintenance charges so also rental charges are certainly required to be included in the assessable value of the goods and in view of this decision, the assessable value for the purpose of Central Excise Duty, would also include cylinder maintenance charges and rental charges and since the provisions of section was quite clear as also supported by the judgment rendered by the Hon''ble Apex Court, the adjudicating authority came to the conclusion that the assessee suppressed the facts and accordingly, after detailed analysis and considering other facts and circumstances, not only affirmed duty of Rs. 1,18,420/- against the appellant but also imposed penalty u/s. 11AC amounting to Rs. 1,15,155/-.

4. This order was assailed by the appellant before the Commissioner (Appeals). The Commissioner (Appeals), after recording detailed findings, also came to the conclusion that the appellant, with a view to evade duty, suppressed the vital information of the use of Acetone as dissolving agent and accordingly approved the penalty on the appellant. It also upheld penalty in respect of maintenance

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charges, however, with direction to the Assessing Authority to re-work out the penalty by treating the value thereof-cum-duty price.

5. Dissatisfied with the said order, the appellant carried the matter in further appeal before the CESTAT, who also, vide order dt. 01/11/2010 affirmed the penalty u/s. 11AC, however, it expressed the view that the appellant would be eligible for Modvat Credit of duty on the Acetone. Hence this appeal.

6. Ld. Counsel for the appellant submitted that the penalty u/s. 11AC is not automatic and merely because the appellant has been found liable to duty for one reason or the other, the penalty cannot be imposed. He contended that the assessee was under the bona fide belief that the maintenance charges as also the rental charges so also Acetone, is not liable to be included and on such bona fide belief, no penalty in law can be said to be levied. He contended that immediately when this fact came to be noticed, the assessee deposited the entire duty but insofar as the penalty is concerned, had reasonable cause and therefore, it ought not to have been levied. He contended that all the three authorities are sailing in the same boat and for imposition of penalty something more is required by the authorities. The penalty is quasi-criminal proceedings and therefore, one has to prove the guilt to the hilt that the intention was to evade the duty in such circumstances. He contended that two views are possible and when two views are possible, then the assessee has a good case for deletion of penalty and contended that substantial question of law arises for consideration and needs consideration of this Court.

7. We have considered the arguments advanced by counsel for the appellant and perused the impugned order so also the other orders passed by the adjudicating authorities.

8. It would be fruitful to quote section 11AC of the CE Act, as it stood then, which is reproduced ad infra:--

"11 AC. Penalty for short-levy or non-levy of duty in certain cases.--

Where any duty of excise has not been levied or 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 u/s 11AB, 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 shall 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

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period of thirty days referred 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.

Explanation.--For the removal of doubts, it is hereby declared that--

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Bill, 2000 receives the assent of the President;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

9. The above section provides that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intend to evade payment of duty.....On perusal of the facts, which have been noticed by us and which have been observed hereinabove, it clearly transpires that the aforesaid facts of inclusion of cylinder rental charges, cylinder maintenance charges and Acetone, were not at all disclosed by the appellant in the facts disclosed during the course of their filing of the return in Form RT-12. Not only in the said returns but also later on, when questioned on the basis of the audit undertaken by the audit team of AG Rajasthan, the assessee went on denying the said facts and as observed by the AO, after much persuasion, came with the figures from the books of account. The said charges were within special knowledge of the appellant and if two views were possible, as claimed by the appellant, then, at least, it could have disclosed the figures and could have put a note that in view of the view, favourable to the assessee, the said amount is not required to be included and thus no duty is leviable on such amount collected by the appellant. However, as observed hereinabove, nothing was disclosed and the appellant continued to object the very levy of the said inclusions. The Assessing Officer, in its order dt. 06/08/2004, while levying the excise duty so also levying penalty, has observed about the judgment rendered by the Hon''ble Apex Court in the case of Kota Oxygen (P.) Ltd. (supra) and in

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view of the same, the said amounts were liable to be included.

10. It is also noticed that as regards the period from 01/07/2000 to January, 2001, while the Original Adjudicating Authority had confirmed the entire duty demand of Rs. 1,15,155/-, the Commissioner (Appeals) has upheld the duty demand only in respect of the portion of the maintenance charges and has set aside the duty demand on account of cylinder rental charges which has not been challenged by the department. Thus, not only the Original Adjudicating Authority as also the Commissioner (Appeals) drastically reduced the amount in question and the only demand, which remained, is as to whether the cylinder maintenance charges" being collected from all the customers and which represented the value of the Acetone used for dissolving Acetylene are includible in the assessable value or not. When the products being sold is dissolved Acetylene gas and the Acetylene gas for being marketed is required to be dissolved in Acetone, the Acetone would have been treated as an input for the Acetylene which is marketed and, therefore, the CESTAT has rightly held that the cost of Acetone would be includible in the assessable value. We are in full agreement with the finding of the CESTAT which is based on facts found by it so also by the First Appellate Authority that in the present case, the duty demand has been upheld only on the amounts being collected as Cylinder Maintenance Charges which are the cost of Acetone used for dissolving Acetylene gas and since from the records of the case it is clear that the appellant had suppressed the fact that in case of Acetylene, the bulk of the amount collected as "cylinder maintenance charges" was the cost of Acetone and therefore, there was no infirmity in imposing of penalty and sustaining the same by the CESTAT. The aforesaid penalty has been levied after analyzing the facts on record and is on the material based on appreciation of the facts on record and in our view, the said cannot be said to be involving a substantial question of law much less a substantial question of law. In view of the aforesaid facts, we find no infirmity in the order of the CESTAT.

11. The Hon''ble Apex Court, in the case of CCE v. Pepsi Foods Ltd. [2001] 1 SCC 601, has observed that its is well settled that when the statutes create an offence and an ingredient of the offence is a deliberate attempt to evade duty either by fraud or misrepresentation, the statute requires mens rea as a necessary constituent of such an offence but when factually no fraud or suppression or misstatement is alleged by the Revenue against the respondent in the show-cause notice, the imposition of penalty u/s 11AC is wholly impermissible. However, in the present case, the Revenue has clearly expressed in the adjudication order itself that the assessee suppressed the facts from day one not only in the returns RT-12 but also later on during the course of adjudication proceedings and kept on denying when facts revealed otherwise and collection of such sums was revealed in the accounts. Consequently, the appeal, being devoid of merit, is hereby dismissed in limine.

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