(2013) 01 P&H CK 0078

In the Punjab And Haryana At Chandigarh

Case No : Central Excise Appeals No''s. 7, 9, 28 to 30 of 2012

Antarctic Industries Ltd. — APPELLANT

Vs

Commissioner of Central Excise — RESPONDENT

Date of Decision : 30-01-2013

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

Citation : (2013) 294 ELT 365 : (2014) 43 GST 576 : (2013) 19 GSTR 133

Hon'ble Judges : Ritu Bahri, J;Hemant Gupta, J

Bench : Division Bench

Advocate : Jagmohan Bansal for the Appellants in C.E.A. Nos. 7 and 30 of 2012, Deepak Sibal for the Appellants in C.E.A. No. 9 of 2012 and Sudeep Singh for the Appellants in C.E.A. Nos. 28 and 29 of 2012, for the Appellant;

Judgement

Hemant Gupta, J.—This order shall dispose of the aforementioned five appeals u/s 35G of the Central Excise Act, 1944 arising out of an order dated August 12, 2011 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "the Tribunal"). Since the facts are identical, therefore, all the appeals are taken up for hearing together. The factory premises of M/s. Mahajan Steel Rolling Mills (P) Ltd. (for short "the Mill") was visited by the preventive staff of Central Excise Division-I, Ludhiana on September 4, 2001. It was noticed that there was no weighbridge in the factory. On enquiry, it was informed that for weighment of goods cleared and inputs received, the mill was utilising the services of a nearby weighbridge, i.e., M/s. Mola Computerized Dharam Kanda, Singla Cycle Lane, Dhandari Kalan (for short "the weighbridge") on payment of weighment charges. Thereafter, the preventive staff visited the said weighbridge and the statement of an employee was recorded. In the statement it was stated that the abbreviations mentioned in the notebooks, i.e., "B.B." and "M.S." meant "Big Ben Exports" and "Mahajan Steel" respectively. The visiting staff resumed five used weighment slip pads and three note books containing credit account of weighment charges for the period from June 1, 2000 to September 4, 2001 from the weighbridge. On September 6, 2001, the preventive staff seized 20.815 MT. of rectangular bars and also took into possession some record/documents from the mill. The entries in the three note books maintained by the weighbridge for credit account of weighment charges were compared with the corresponding weighment slips issued and were found to be matching. It was observed that some of the transactions regarding which weighment slips have been issued from the weighbridge were not being reflected in the Central excise records maintained by the mill. The business and residential premises of the owners of the weighbridge were searched on September 11, 2001 and the weighment slips pertaining to the period commencing from April 1, 2000 onwards were recovered and taken into possession. From the records of the mill after comparison with the record recovered from the weighbridge, it was found that the mill has manufactured and clandestinely cleared 8818,995 MT. of their finished goods, i.e., rectangular bars valued at Rs. 11,42,38,110. involving Central excise duty amounting to Rs. 1,82,78,098 and that the mill has received 5961.291 MT. of raw material, i.e., non-alloy steel ingots without account in the Central excise records and without the cover, of any Central, excise invoice/bill. Some of the manufacturers of non-alloy steel ingots, who had cleared their goods clandestinely were identified. Three of such manufacturers are M/s. Renny Steel Castings (P) Ltd., M/s, Antarctic Industries Ltd. and M/s Paramount Steels Ltd. are the appellants before this court and whereas Dev Raj Gupta--the appellant in C. E. A. No. 28 of 2012, is the director of M/s. Renny Steel Castings (P) Ltd.

2. The Revenue issued separate but identical show-cause notices to the manufacturers and to the mill as also to Dev Raj Gupta in respect of the proceedings under the Central Excise Act, 1944, (for short "the Act") including notice for imposing penalty.

3. The Deputy Commissioner, Central excise returned a finding in his separate orders that the manufacturers have manufactured and cleared non-alloy steel ingots clandestinely without issuing Central excise invoice and, thus contravened the provisions of rules 9(1), 49, 52, 52A, 53 and 173G of the Central Excise Rules,. 1944 (for short "the Rules") with the intention to evade Central excise duty. The mill and the manufactures were also found liable for penal action u/s 173Q of the Rules read with section 11AC of the Act. Similarly, the mill was found to have received goods clandestinely removed by the manufacturers and used the same goods in the manufacture of finished goods and, therefore, such goods are liable for confiscation and penal action under rule 209A of the Rules.

4. The Commissioner (Appeals) allowed the appeals filed by the appellants herein holding that the impugned orders are violative of the principles of natural justice, as the same have been passed without supplying the copies of relied upon documents and without affording opportunities of cross-examinations of the persons, whose versions have been relied upon. In further appeal by the mill against the order of the Commissioner (Appeals) and by the Revenue against the order setting aside the order of assessment, the Tribunal considered the respective contentions in two parts. Part I was in relation to the appeal of the

mill, whereas Part II was in relation to the appeals of the Revenue against the findings recorded in the appeals of the manufacturers. The Tribunal has. returned the following finding:

20. Considering the above aspect we are convinced that it will be reasonable to restrict the demand to correspond to the production of final products that is possible from the unaccounted inputs demonstrated to be received by MSRMPL based on annexures C and C1. Here the problem is that the appellant demonstrates that some of the instances of goods coming in related to furnace oil being brought in, rather than steel ingot coming in. It will be proper to re-work the figures in annexures C and C1 to remove such erroneous entries. The appellants have pointed out 24 such cases totalling to 370 MTs of raw material. Once this quantity is deducted the receipt of raw material detected is to the extent of 5591 MTs. Then adopting the calculation presented by the appellant in paragraph 15 n of their appeal the calculation of duty evaded is made as follows. After giving an allowance of ten per cent, towards process loss the quantity of final products that can be made from this raw material works out to 5036 MTs and the assessable value ''will ''get reduced from Rs. 11,42,38,110 to 7,24,81,307. It is to be noted that this calculation involves some approximation. But the consequence of this approximation is in favour of the appellants. In this type of cases, it is quite often not possible to arrive at precise figures because such activities are carried on without maintaining any records.

21. Once calculation is based on figures in annexure C and annexure CI, after correcting the mistakes pointed out regarding tanker lorries, the objection recorded in paragraphs 17(i), 17(iii) and 17(iv) are answered. What remains are the objections raised in paragraphs 17(h) and 17(v).

5. Mr. Deepak Sibal, learned counsel representing the appellant-mill, has vehemently argued that the Tribunal itself has returned a finding in respect of some of the manufacturers that there is violation of the principles of natural justice. It is contended that till such time the issue of liability of such manufacturers is finally decided, the appellant-mill cannot be held responsible for evasion of excise duty. It is contended that the contradictory orders in respect of the mill and other manufacturers are not sustainable. It is also contended that the finding of the Tribunal that the mill has not sought right of cross-examination of the owner and the employee of the weighbridge is untenable, as the same is apparent from the reading of the order passed in M/s. Antarctic Industries Ltd. and M/s. Paramount Steels Ltd. The appellant-mill has raised the following substantial question of law:

Whether on the facts and in the circumstances of the case, the Tribunal was right in deciding (1) the question of non-joinder of necessary parties against the appellant; (2) that third party rough note books or weighing slips of Mola Kanda and oral admissions made by the representative of Mola Kanda can form evidence against the appellants even if the same are not corroborated; and (3) that the entries in the note books maintained at Mola Kanda are reliable, even if the same are not authenticated by any body and has upheld the impugned order, annexure A1 passed by the learned Commissioner.

6. We have heard learned counsel for the appellant at length and found no merit in the appeal (C. E. A. No. 9 of 2012) filed. Though the Tribunal may not be right in observing that the appellant-mill has not sought right of cross-examination of the persons, who have produced the record, but the said aspect is wholly immaterial in respect of determination of liability of the appellant. In fact, the liability of the appellant-mill is based upon proof of 5961.291 MT. of raw material, i.e., non-alloy steel ingots valued at Rs. 6,57,72,574 involving Central excise duty amounting to Rs. 1,05,23,612 received in the mill premises and the manufacturing and clearance of 8818.995 MT. of finished goods, i.e., rectangular bars valued at Rs. 11,42,38,110 involving Central excise duty amounting to Rs. 1,82,78,098. The details of ingots received are mentioned in annexures C and CI to the show-cause notice for the period from June 1, 2000 to March 31, 2001 and April 1, 2001 to September 4, 2001. In fact the Tribunal has restricted the demand corresponding to the production of final products possible from the unaccounted inputs demonstrated to be received by the mill based on annexure C and annexure C1 after giving the benefit of inputs of furnace oil. The Tribunal has recorded a finding of fact regarding the receipt of unaccounted raw material and production of unaccounted finished goods after the compounded levy scheme came to an end on March 31, 2000.

7. The question of the receipt of the raw material by the mill from the other manufacturers, whose appeals were accepted so as to comply with the principles of natural justice, is to determine, identify and fix the liability of such manufacturers in supplying the material through unaccounted processes. But the fact remains that as against the mill, it is wholly inconsequential whether such other persons are made liable for clearance of excisable goods without payment of excise duty. Once, it is proved that the mill has utilised unaccounted raw material and has unaccounted finished goods, the allegations of evasion of duty by the mill stand established. The said fact is sufficient to justify the imposition of levy by the Tribunal. Such finding does not give rise to any substantial question of law.

8. Mr. Jagmohan Bansal, learned counsel for the appellant in C. E. A. No. 7 of 2012 and C. E. A. No. 30 of 2012, has vehemently argued that the appellants have been wrongly denied the right to cross-examine the witnesses though such right has been considered in respect of others. It is argued that the Tribunal has wrongly recorded that the appellant has not sought cross-examination of the persons, whose statements are being relied upon. In C.E.A. No. 7 of 2012, the appellant has raised the following substantial questions of law;

(a) Whether the impugned order is perverse and contrary to the facts and record?

(b) Whether demand against the appellant is justified on the basis of the record of the third party, when the writer of third party was not allowed to be crossexamined?

(c) Whether the appellant is entitled to the benefit of cum-duty?

(d) Whether the appellant is entitled to reduced amount of penalty?

9. The first substantial question of law, i.e., question No. (b) is in respect of right to cross-examination of the record of third party. The third party is the weighbridge. Though the appellant has vehemently argued that the right of cross-examination was demanded by the appellant, but a reading of the order of the assessing officer does not support such contention. The appellant is noticee No. 1 before the Deputy Commissioner, Central excise, whereas the mill is noticee No. 2. The Deputy Commissioner has taken note of the statement of Shri Sandeep Jain, director of the appellant admitting that vehicle Nos. PJL - 3686 and PBL - 2541 are owned by them and are used for transportation of steel ingots to their buyers. It has been recorded that he was evasive to the question as to how their vehicle was weighed at the weighbridge and tried to mislead the Department that slag/waste must have been weighed. The Deputy Commissioner returned a finding that slag/waste carries no commercial value, therefore, he concluded that entries of weighment recorded in the weighbridge are of transaction between the mill and the appellant. After recording such finding, the Deputy Commissioner dealt with the plea of mill in respect of cross-examination of the employee of the weighbridge. The appellant has not sought the cross-examination of the employee of the weighbridge, as the appellant has never disputed the correctness of the record of the weighbridge, which is apparent from the findings recorded by the Deputy Commissioner based upon the statement of Shri Sandeep Jain. Therefore, question No. (b) does not arise for consideration.

10. In respect of the claim of the appellant for cum-duty, suffice it to state that no such plea was raised either before the Deputy Commissioner or before the Tribunal, The entitlement to the benefit of cum-duty is dependent upon the bona fide payment of duty. Since such fact has not been asserted or discussed, the appellant cannot be permitted to raise a question of law, which is based upon a fact.

11. In respect of question No. (d), the learned counsel for the appellant relies upon section 11AC to contend that the appellant has deposited the amount of duty in terms of the order passed by the Tribunal, therefore, only 25 per cent, penalty could be levied. In. support of such contention, reliance is placed upon an order passed by this court in C. E. A. No. 1 of 2012 titled Commissioner of Central Excise Vs. M/s Beas Scientific Dyers, Section 11AC of the Act reads as under:

11AC 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 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.

12. In terms of the first proviso, 25 per cent, penalty is leviable only in case the amount of duty is paid in terms of an order passed by the Central Excise Officer. The Central Excise Officer is the person, who makes assessment for the first time, i.e., the Deputy Commissioner in the present case. The appellant has not deposited the amount of duty in pursuance of such an order passed by the Deputy. Commissioner. Therefore, the benefit of the proviso is not available to the appellant. The proviso is meant for a person, who complies with the order forthwith so as to conclude the proceedings. Since the issue was disputed by the appellant before the Commissioner (Appeals), therefore, the appellant is not entitled to reduced penalty in terms of the proviso to section 11AC of the Act. Thus, we hold that an assessee is entitled to reduced amount of penalty only if the amount of duty is paid in terms of the order, of, adjudication by the Central Excise Officer, i.e., the adjudicating authority and not in terms of the appellate order passed by the Tribunal.

13. The judgment of this court in Commissioner of Central Excise Vs. M/s Beas Scientific Dyers, was in respect of an order passed by the Tribunal directing the assessee to pay the penal amount within a period of 30 days from the date of the order failing which the penalty payable shall be equivalent to the amount of duty. It was observed that the Tribunal was fully justified in granting opportunity to the assessee to pay the amount of penalty in terms of the proviso to section 11AC of the Act within a period of 30 days. However, in the present case, the Tribunal has

not ordered the payment of penalty within a period of 30 days. The appellant has not deposited the penalty within 30 days from the date of the order of the adjudicating authority. Consequently, the appellant is not entitled to reduced amount of penalty.

14. In C. E. A. No. 29 of 2012, the arguments of the assessee are substantially the same, as are raised by Mr. Bansal in C. E. A. No. 7 of 2012 and C. E. A. No. 30 of 2012 except that the appellant does not claim that the order is vitiated on account of denial of opportunity of cross-examination. For the reasons recorded in C. E. A. No. 7 of 2012 and C. E. A. No. 30 of 2012 above, we do not find that any substantial question of law arises for consideration in the present appeal.

15. In C. E. A. No. 28 of 2012, the learned counsel for the appellant has vehemently argued that in terms of rule 26 of the Central Excise Rules, 2002, any person who clandestinely removes any excisable goods is liable to pay penalty. It is contended that in the show-cause notice, no specific role was attributed to the appellant in respect of clandestine removal of excisable goods. The appellant has been made liable to penalty apart from the penalty on the firm without any justified reason.

16. We do not find any merit in the said argument as well. The appellant was associated during the course of investigation and made a statement on January 24, 2002, wherein he has admitted that truck No. PB 10 U 9913 is owned by him and has been weighed at the Weighbridge. It is not the stand of the appellant that he is not connected with the affairs of the firm or was not actively working for the firm. The finding recorded shows that in fact the appellant was in the know of the entire things and was actively associated with the working of the firm. He was served with the show-cause notice. Though the reply of the appellant was not on record, but the orders passed by the Deputy Commissioner and the Tribunal leave no manner of active role of the appellant in clandestine removal of excisable goods. Thus, he has been rightly made liable for payment of penalty. In view of the above observations, we do not find that any substantial question of law arises for consideration by this court in the present appeals. The same are accordingly dismissed.

