

(2014) 10 AHC CK 0002

In the Allahabad High Court

Case No : Central Excise Appeal No. 204 of 2014

Bakewell Agro Ltd.

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11AC

Citation : (2015) 323 ELT 128

Hon'ble Judges : D.Y. Chandrachud, C.J.; Pradeep Kumar Singh Baghel, J

Bench : Division Bench

Advocate : Shubham Agarwal, Advocate for the Appellant; Vinod Kant Srivastava, Advocate for the Respondent;

Judgement

1. This appeal arises from an order of the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (the Tribunal) on an application for waiver of pre-deposit. There was a difference of opinion between the Member (Judicial) and Member (Technical) which resulted in a reference being made to a third member of the Tribunal. The third member has agreed with the view of the Member (Technical). The issue in dispute relates to a direction that has been issued to the appellant to deposit an amount of Rs. 25 lacs by way of pre-deposit of penalty as against the full amount of penalty of Rs. 88.80 lacs. In the present case, the facts, briefly, are that during the course of the scrutiny of ER-1 Forms between March, 2008 and June, 2008, it was found that the assessee had defaulted in the payment of excise duty. The assessee submitted details of the duty demand which were got verified from the bankers. On verification, it was found, admittedly, that out of 32 cheques in all, 18 had consistently been returned by the Bank for insufficiency of fund and only one cheque in the amount of Rs. 92,700/- was honoured. In the case of 13 cheques, the assessee produced counterfoils of the Bank with stamps to evidence payment of duty but, on enquiry, it was found that the cheques had not been presented to the Bank at all for payment. During the course of the adjudication proceedings, following the issuance of a notice to show cause, the Commissioner, Central Excise confirmed a

duty demand of Rs. 88.80 lacs together with interest under Section 11AB of the Central Excise Act, 1944 (the Act) and imposed a penalty in the like amount under Rule 25(1) of the Central Excise Rules, 2002 (the Rules) read with Section 11AC of the Act besides personal penalty of Rs. 10 lacs on the Managing Director under Rule 26 of the Rules.

2. The submission which has been urged on behalf of the assessee is that the non-payment of the duty was occasioned as a result of the financial stringencies faced by the assessee which led to a reference before the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. In this connection, reliance was sought to be placed on a decision of the Division Bench of the Gujarat High Court in Commissioner of C. Ex. and Customs Vs. Saurashtra Cement Ltd., , in support of the submission that where the assessee had defaulted in the payment of duty only because of the financial stringency, the imposition of the penalty could be justified only under Rule 27 of the Rules, in which case a maximum of Rs. 5000/- could have been imposed by way of penalty. In the present case, it was further submitted that the assessee had eventually deposited the entire duty of Rs. 88.80 lacs.

At the outset, it would be necessary to clarify that the observations made in the present order are confined only to the disposal of the appeal against the order of the Tribunal on an application for waiver of pre-deposit.

3. Rule 8 of the Rules provides inter alia that the duty on goods removed from the factory or warehouse during a month shall be paid by the sixth day of the following month, if duty is paid electronically and by the fifth day of the following month, in any other case. Sub-rule (3) of the Rule 8 provides that if the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government by a notification issued under Section 11AB of the Act. Moreover, sub-rule (3A) of the Rules provides that where there is a default in the payment of duty beyond 30 days from the due date, as prescribed in sub-rule (1), the assessee shall pay the excise duty for each consignment at the time of removal, without utilizing the Cenvat credit till the date the outstanding amount including interest thereon is paid. In the event of failure, it shall be deemed that the goods have been cleared without payment of duty and the consequences and penalties as provided in the Rules have to follow.

4. In the present case, it is not in dispute that out of the total duty demand of Rs. 88.80 lacs, an amount of Rs. 16.70 lacs was deposited from the Cenvat credit, which was not permissible in view of the provisions of Rule 8(3A) of the Rules. Moreover, it is also necessary to note that this is not a case where there was a default simpliciter. The assessee furnished details of 32 cheques, out of which, it is an admitted position that only one cheque of Rs. 92,700/- was honoured; 18 cheques for the payment of duty in the amount of Rs. 34.37 lacs were not honoured due to insufficiency of funds. But, what reflects on the wilful misstatement of the assessee is that, in the case of the balance 13 cheques, the

assessee produced counterfoils of the Bank with stamps and it was, on enquiry, found that the cheques were never presented with the Bank at all for the payment of duty.

5. In these circumstances, the Member (Technical) of the Tribunal was, in our view, justified in coming to the conclusion that the provisions of Rule 25 of the Rules were attracted since there was an intent to evade the payment of duty. For these reasons, *prima facie*, we are of the view that no substantial question of law would arise in the appeal. However, in order to facilitate compliance with the order of the Tribunal, we extend time for making deposit by further period of two months from today.

6. We once again clarify that all observations contained in this order are confined to the issue of pre-deposit and shall not affect the merits of the appeal when it is heard by the Tribunal. The appeal is, accordingly, dismissed. There shall be no order as to costs.