(2012) 01 GUJ CK 0067

In the Gujarat High Court

Case No : Tax Appeal No. 56 of 2011

C.C.E. and C, Vadodara-II APPELLANT

Vs

Gujarat Narmada Fertilizers Co. Ltd. RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 11A(2B), 11AC

Citation : (2012) 285 ELT 336

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant;

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—Draft amendment dated 18-11-2011 is granted. Department is in appeal, against the judgment of the Tribunal dated 14-7-2010 [2010 (262) E.L.T. 829 (Tribunal)]. Following questions have been framed for our consideration.

(a) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in not considering the voluntary payment of duty made by the respondent u/s 11A(2B), as correct, and as held in the Order-in-Original by the Commissioner?

(b) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in allowing the appeal filed by the respondent on the grounds of limitation when as per the reading of Section 11A(2B), it can be observed that there is no limitation on voluntary payment of duty by any party on their own or on being pointed out by the Department?

(c) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in not confirming the interest, on the duty paid voluntarily, by the respondent as per the provisions of Explanation 2 to Section 11A(2B) of the Central Excise Act, 1944?

2. Briefly stated the facts are as under :-

2.1 Respondent M/s. Gujarat Narmada Fertilizers Co. Ltd. (hereinafter referred to as "the manufacturer") is engaged in the manufacture of excisable goods. It emerges from the record that with respect to its clearance between 1-7-2000 to 30-6-2004, the respondent manufacturer had short-paid the excise duty. After correspondence between Excise authorities and the respondent, the respondent voluntarily paid duty of Rs. 1,23,94,163/- in two installments on 21-2-2005 and 22-9-2005. This duty was paid admittedly before issuance of show cause notice. The Commissioner of Central Excise issued show cause notice on 30-12-2005 why duty of Rs. 1,14,14,496/- for the period between December, 2000 and June, 2004 to be not recovered under sub-section (1) of Section 11A of the Central Excise Act, 1944 ("the Act" for short). He also called upon the respondent to state why the duty paid by the respondent on 21-2-2005 and 22-9-2005 not be adjusted towards such payment and interest amounting to Rs. 41,84,975/- on such short payment of duty not be recovered. He also proposed to impose penalty under Rule 25 of the Central Excise Rules and Section 11AC of the Act.

3. After hearing the respondent, the Commissioner passed an order-in-original on 28-2-2006. He held that there was no material to hold that there was any intent on the part of the respondent to evade payment of duty. Though such an allegation was made in the show cause notice, the same was not supported by any evidence on record. He, however, held that respondent was liable to pay interest on the delayed payment of duty. He recalculated the interest and confirmed interest demand of Rs. 41,13,932/- u/s 11AB of the Act. After giving adjustment of Rs. 2,43,023/- paid towards education cess, which was not payable during the period in question, he raised the interest demand of Rs. 38,70,909/-. He, however, imposed no penalty u/s 11AC of the Act or under Rule 25 of the Central Excise Rules.

4. The assessee approached the Tribunal against the order of the Commissioner. Significantly, the Department did not file any appeal though the Commissioner had dropped the proposal for imposition of penalty. In that view of the matter, the question of penalty achieved finality. In other words, the findings of the Commissioner that there was no intention on the part of the assessee to evade duty was not questioned by the Department.

5. The Tribunal, by the impugned order allowed the appeal of the respondent manufacturer. The Tribunal was of the opinion that when the Commissioner himself had held that there was no suppression or misdeclaration attributable to the respondent, invocation of the longer period was not justified. The Tribunal was, therefore, of the opinion that provisions of sub-section (2B) of Section 11A would not apply.

6. Counsel for the Department referring to the statutory provisions applicable submitted that the Tribunal committed a grave error in deleting the interest demand confirmed by the Commissioner. He submitted that the interest was

correctly charged under sub-section (2B) of Section 11A of the Act. Heavy reliance was placed on Explanation-2 to sub-section (2B) in this regard.

7. Having heard Learned Counsel for the Department and having perused the documents on record, as already noted, the finding of the Commissioner that there was no suppression or misdeclaration on the part of the respondent has achieved finality. We have, therefore, proceeded on such basis. To recapitulate, the respondent had short paid the excise duty for the period between 1-7-2000 and 30-6-2004. Though such short-payment was not on account of any misdeclaration or suppression on the part of the respondent and that therefore extended period of limitation was not available for its recovery to the Department, the manufacturer voluntarily paid the entire duty in two installments on 21-2-2005 and 22-9-2005 even before the issuance of notice. It is under these circumstances, the question arises whether interest u/s 11A(2B) could be charged. Section 11A of the Act pertains to recovery of duties not levied or not paid or short levied or short-paid or erroneously refunded. Relevant portion of Section 11A reads as under :-

11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason 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 intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, for the words one year, the words " five years" were substituted :

Explanation - Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

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(2B) Where any duty or excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him under sub-section(1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid :

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and the, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. - Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was erroneously refunded by reason 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 intent to evade payment of duty.

Explanation 2. - For the removal of doubts, it is hereby declared that the interest u/s 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.

From the perusal of the said statutory provision, it can be seen that under subsection (1) period of limitation for issuing notice for recovery of duty not paid, short-paid or erroneously refunded is one year unless, of course, such nonpayment, short-payment, or erroneous refund of duty arises by the reason of fraud, collusion or willful misstatement or suppression of facts or contraventions of the provisions of the Act or the Rules with intent to evade payment of duty. In other words, in absence of such circumstances, normal period of limitation for issuance of notice for recovery of unpaid duty is 1 year.

8. Sub-section (2B) of Section 11A of the Act provides that with respect to such unpaid, short-paid or erroneously refunded duty, if the manufacturer pays the sum on the basis of his own ascertainment before issuance of notice by the Central Excise Officer, the Officer, on receipt of such information, shall not serve any notice under sub-section (1) in respect of duty so paid. In other words, upon voluntary payment of duty by the manufacturer, no show cause notice for recovery thereof would be issued to the extent of duty so paid.

Explanation-1 to sub-section (2B) of Section 11A makes it abundantly clear that the provisions contained therein would not apply in cases of unpaid duty on account of fraud, collusion, willful misstatement or suppression of facts or contravention of statutory provisions with intent to evade duty.

Explanation-2 is in the nature of clarification declaring that interest u/s 11AB shall be payable on the amount paid by the person under subsection (2B) and also on the amount of short-payment of duty as may be determined by the Central Excise Officer but for the said sub-section. Thus Explanation only clarifies that despite voluntary payment of duty by a manufacturer the liability to pay interest on such delayed payment of duty is not absolved. It, therefore, provides that the manufacturer shall still pay interest on the voluntarily paid duty to the extent of delay as also shall pay further interest on any excise duty demand confirmed by the Excise Officer, over and above what may have been voluntarily paid.

To our mind this Explanation cannot be used in interpreting the ambit of the main body of sub-section (2) of Section 11A. The Explanation itself is in the nature of a clarification and is thus a clarificatory provision.

9. In essence, what sub-section (2) of Section 11A provides for is for non-issuance of notice by the Central Excise Officer to the extent a manufacturer might have voluntarily paid duty even before issuance of show cause notice. When Explanation-2 provides that said provision would not apply in case of fraud, collusion, willful misstatement, suppression and intention to evade duty, it clearly means that sub-section (2B) is applicable where the normal period of limitation of 1 year is provided.

10. In the present case, when the period of limitation had already expired and when the extended period beyond one year was not available to the department as held by the Commissioner himself in his order-in-original, to our mind the respondent was not liable to pay even the basic duty. But for the respondent voluntarily making payment of such duty short-paid, it was not open for the Department to recover the same under sub-section (1) of Section 11A of the Act. In absence of any such voluntary payment, recovery of the unpaid duty would not have been possible. In that view of the matter, we do not find the case would fall under sub-section (2B) of Section 11A of the Act. Sub-section (2B) of Section 11A of the Act applies in a case where there is voluntary payment of unpaid duty before issuance of show cause notice under sub-section (1) of Section 11A. When the provision refers to show cause notice, it means a show cause notice which could have been validly issued and surely not a notice which had become time-barred. If by efflux of time and in absence of availability of extended period of limitation, such show cause notice itself had become time-barred, any payment made voluntarily by the manufacturer cannot be viewed as one made under sub-section (2B) of Section 11A of the Act.

11. In the present case, we have already held that time for issuing such a notice was one year, which period had already expired.

12. Accepting the stand of the Department that even in such a case once the payment of duty is made, interest liability would follow would bring about an incongruent situation. The recovery of the unpaid or short paid duty would become time-barred. If the manufacturer does not pay it voluntarily, it would not

be possible for the Department to recover the same. But if he does it voluntarily despite completion of period of limitation, he would, further be saddled with the liability to pay statutory interest. Surely, this was not the intention of the Legislature while sub-section (2B) was introduced in Section 11A of the Act. In the result, we do not find that the Tribunal committed any error in reversing the order of the Commissioner dropping interest demand. Tax Appeal is, therefore, dismissed.