

(2011) 12 AHC CK 0244
In the Allahabad High Court

Commisisoner of Central Excise, Allahabad

APPELLANT

Vs

Basti Sugar Mills Ltd.Basti U.P.

RESPONDENT

Date of Decision : 20-12-2011

Acts Referred:

Citation : (2011) 12 AHC CK 0244

Hon'ble Judges : R.K.Agrawal, J and B.Amit Sthalekar, J

Final Decision : Allowed

Judgement

R.K. Agrawal and B. Amit Sthalekar, JJ.—The present appeal filed under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act") against the order dated 11th February, 2004 passed by the Custom Excise and Service Tax Appellate Tribunal, New Delhi has been admitted on the following substantial questions of law:

"(a). Whether mere mention of wrong provision of law (Section 11AC) in the show cause notice dated 23.1.2002 takes away th power to levy/realise interest when Section 11AB of the Act specifically provides for mandatory levy of interest?

(b). Whether in order to charge interest under Section 11AB of the Act it is necessary to invoke the provisions of Section 11AB in the adjudication order itself?"

2. Briefly stated, the facts giving rise to the present appeal are as follows:

3. The respondent assessee is engaged in manufacture of sugar by vaccum pan process and molasses falling under Chapter Central Excise Tariff heading No. 1701.31/1701.39 and 1703.10 of Central Excise Tariff Act (5) of 1985. It filed an application in the prescribed form 335(U)(1) for condonation of Central Excise duty to the tune of Rs. 2,41,337/ on storage loss of 482.674 MT of molasses out of 24196.995 MT produced during Sugar Season 19992000 which comes 1.99%. The claim was supported by the report of the State Excise Officer. The Assistant Commissioner, Central Excise Division, Faizabad issued a demandcumshow cause notice dated 23rd January, 2002 calling upon the respondent assessee to show

cause as to why the application seeking condonation of Central Excise duty be not rejected and further Central Excise duty amounting to Rs. 2,41,337/ be not demanded/recovered under Rule 49(1) of Central Excise Rules, 1944 and penalty under Rule 173Q and Rule 210 of Central Excise Rules, 1944, now Rules 25 and 27 of Central Excise (No.2) Rules, 2001, be not imposed and why interest be not charged under Section 11AC of Central Excise Act, 1944. The respondent assessee submitted its explanation. However, the Commissioner, Central Excise, Allahabad, vide order dated 9.9.2002 rejected the remission application and confirmed the demand of Rs. 2,41,337/ and ordered for its recovery and imposed a sum of Rs. 2,41,337/ as penalty. So far as levy of interest is concerned, the Commissioner, Central Excise, Allahabad neither gave any finding nor gave any direction in the operative portion of the order. Against the order dated 9.9.2002 passed by the Commissioner, Central Excise, Allahabad the Revenue preferred an appeal before the Tribunal. The respondent assessee also feeling aggrieved preferred an appeal. It appears that the appeal preferred by the Revenue was heard and decided independently without hearing the appeal preferred by the respondent assessee. The Tribunal vide order dated 11th February, 2004 had dismissed the appeal preferred by the Revenue on the ground that the provisions of Section 11AB was not invoked in the show cause notice and, therefore the prayer for levy of interest on the duty confirmed against the assessee cannot be allowed.

4. We have heard Sri S.P.Kesarwani, learned Senior Standing Counsel for the appellant, and Sri Krishna Agarwal, learned counsel appearing for the respondent assessee.

5. Sri S.P.Kesarwani submitted that in the show cause notice, if by mistake a wrong provision has been quoted for charging of interest that would not make any difference. According to him the Assistant Commissioner, Central Excise, Faizabad, while issuing show cause notice wrongly mentioned provisions of Section 11AC whereas it should have been Section 11AB. He further submitted that levy of interest under Section 11AB of the Central Excise Act, 1944 is automatic and does not depend upon mention in the notice.

6. Sri Krishna Agarwal, learned counsel for the respondent assessee submitted that it is not a case of mere wrong quoting of section but there is no question of charging of any interest as the respondent assessee had filed an application in the prescribed form for condonation of Central Excise duty on storage loss of molasses. He further submitted that in the assessee's appeal the Tribunal has remanded the matter to the Commissioner for a fresh adjudication and, therefore, the entire matter is at large and this Court should dismiss the Revenue's appeal as having become infructuous.

7. We have given out thoughtful consideration to the various pleas raised by the learned counsel for the parties and find that in the show cause notice the Assistant Commissioner, Central Excise, Faizabad had specifically mentioned as to why interest should not be charged under Section 11AC of the Central Excise,

Act, 1944. Thus, factum of charging of interest was already there in the show cause notice. Instead of mentioning Section 11AB he has mentioned Section 11AC to which the respondent assessee was asked to submit its reply. In our considered opinion it did not affect the contents of notice as it is well established that mere quoting of a wrong provision would not invalidate the notice, if the proposed action can be justified under any statutory provision. Reference can be made to the following decisions of the Hon"ble Supreme Court.

8. P. Balakotiah vs. Union of India & Another (AIR 1958 SC 232), H.L. Mehra vs. Union of India & Another [(1974) 4 SCC 396], State of Karnataka vs. Krishnaji Srinivas Kulkarni [(1994) 2 SCC 558] and M.T.Khan and others vs. Government of A.P. & others [(2004) 2 SCC 267].

9. So far as the contention by Sri Agarwal that the matter has been remanded by the Tribunal in the appeal preferred by the respondent assessee and the entire controversy is at large before the Commissioner is concerned, we may mention here that as long as the order dated 11th February, 2004 passed by the Tribunal stands, the Commissioner cannot adjudicate upon charging and levy of interest.

10. In this view of the matter we have no other option but to set aside the order dated 11th February, 2002 passed by the Tribunal and direct the Tribunal to decide the appeal of the Revenue afresh in accordance with law in the light of the observation made above. We may mention here that we have not expressed any opinion on the question as to whether charging of interest under Section 11AB is automatic or not as we find that the issue is yet to be gone into by the Commissioner of Central Excise.

11. The appeal succeeds and is allowed.