
(2014) 01 OHC CK 0024
In the Orissa High Court
Case No : OTAPL No. 4 of 2005

Commissioner, Central Excise and Customs, Bhubaneswar	APPELLANT
Vs	
M/s. Aditya Alloys Limited	RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A 11AC 35G 3A

Citation : (2014) 117 CLT 1070 : (2015) 315 ELT 508 : (2014) 43 GST 593 :
(2015) 31 GSTR 205 : (2014) 1 ILR 401 : (2014) 1 OLR 652

Hon'ble Judges : A.K. Goel, C.J.;A.K. Rath, J

Bench : Division Bench

Advocate : Mrunalini Padhi, Standing Counsel Central Excise and Customs, for the Appellant; S.C. Lal, S. Lal and Sujit Lal, for the Respondent

Judgement

A.K. Goel, C.J.—This appeal has been preferred u/s 35G of the Central Excise Act, 1944 proposing following questions of law:

1. Whether on the facts and circumstances of the case, the Hon''ble Tribunal is right in law and facts in holding that "no notice was issued for recovery of duty, hence no interest is payable"?
2. Whether the Ld. CESTAT''s present order is valid and legally sustainable when the Show Cause Notice proposes recovery of fraudulently availed credit which was utilized for discharging duty liability?
3. Whether the utilized amount sought for recovery under Rule 9(2) read with Section 11A of Central Excise Act, 1944 is not considered as duty for the purpose of levy of interest?
4. Whether the Hon''ble Supreme Court''s decision and the decision of Madras High Court which have been relied upon by the Ld. CESTAT, Eastern Bench, Kolkata are appreciable to the instant case?
5. Whether the interest component as envisaged under 11AA or 11AB of the

Central Excise Act, 1944 imposed upon the accountable person is hit by law of estoppels?

6. Whether the settled principles of law that "there shall be no estoppel against statute" would be made applicable to the instance case?

The assessee is manufacturing Mild Steel Ingots and is covered by the Compounded Levy Scheme u/s 3A of the Central Excise Act, 1944 as applicable at the relevant time under which excise duty was calculated with reference to the Annual Capacity of Production (ACP) instead of actual production at the option of the assessee. The assessee failed to pay the due duty for the period from September, 1997 to March, 2000 and its stand is that it had applied for re-determination of the ACP, which was still pending.

2. The Deputy Commissioner, Central Excise & Customs, Cuttack, by his order dated 29.3.2002, after issuing show cause, confirmed the demand of the duty with interest and imposed penalty equal to the amount outstanding.

3. On appeal, the duty amount as well as the corresponding penalty were reduced, accepting the plea of the assessee that there was error in calculation to that extent. On further appeal, the Tribunal reduced the penalty amount while upholding the order of the appellate authority with regard to the duty and also reduced the interest by directing the same to be calculated from the date of the order of the Supreme Court in Union of India and Others Vs. Supreme Steels and General Mills and Others,

4. Heard learned counsel for the parties.

5. Learned counsel for the revenue submits that though six questions have been proposed, there are two questions for consideration-question of minimum penalty and leviability of interest for the period prior to the orders of Hon''ble Supreme Court in the above judgment.

6. With reference to the question of interest, it is submitted that interest liability could not be set aside and the same is to be calculated from the date the amount is due and not from the date of order of the Supreme Court.

7. The Tribunal has held as follows:

...In view of the Hon''ble Supreme Court's judgment and followed by the Bangalore's CEGAT order in the case of M/s. Agni Steels Ltd. & Anr. Vs. CCEx., Calicut reported in 2003(57) RLT 32 (CEGAT-Ban.), the interest will be paid from the date of order of the Hon''ble Supreme Court till the date of payment.

8. Learned counsel for Revenue submits that the Hon''ble Supreme Court has not expressed any opinion to the effect that the interest liability starts only after the judgment of the Supreme Court. In absence thereof, interest is to be calculated as per 3rd proviso to Rule 96 ZO(3) of the Central Excise Rules, 1944, from the relevant date till the date of actual payment.

9. Learned counsel for the assessee fairly accepts this legal position.
10. Accordingly, this question stands answered in favour of the Revenue. The interest may be calculated and recovered accordingly.
11. Coming to the issue of penalty, learned counsel for the Revenue submits that in view of decision of the Apex Court in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, , lesser penalty is not imposable and no discretion is available on the quantum of penalty u/s 11AC of Central Excise of the Central Excise Act, 1944.
12. Learned counsel for the assessee on the other hand submits that the judgment in Dharamendra Textiles Processors (supra) has been explained in the subsequent judgments of the Supreme Court in Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, The decision in the Dharamendra Textiles Processors (supra) cannot be held to have laid down that Section 11AC would apply to every case of non-payment or short payment of duty, regardless of the conditions expressly mentioned therein for its application.
13. In view of the above, the plea raised on behalf of the Revenue that there is no element of discretion even in absence of conditions mentioned u/s 11AC, cannot be accepted. In the present case, there is no finding or plea that the conditions mentioned in Section 11AC exist or that there is any mens rea on the part of the assessee. Thus, it is a case where there is delay in payment simplicitor for which penalty is leviable, in addition to the interest liability. In such circumstances, levy of minimum penalty cannot be held to be mandatory. Element of discretion is certainly available to be exercised on the principle of proportionality. The penalty has to be commensurate to the circumstances of default. Reduction of penalty to Rs. 1,00,000/- cannot be held to be arbitrary or perverse. The question raised by the Revenue on this aspect stands answered against it and in favour of the assessee. The appeal is partly allowed, accordingly.