(2012) 02 GUJ CK 0018

In the Gujarat High Court

Case No : Tax Appeal No. 1341 of 2011

Commissioner of C. Ex. and Cus., Daman APPELLANT

Vs

Nirmala Dyechem RESPONDENT

Date of Decision : 15-02-2012

Acts Referred:

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

Citation : (2012) 281 ELT 677 : (2013) 18 GSTR 525 : (2012) 28 STR 666

Hon'ble Judges : Bhaskar Bhattacharya, Acting C.J.;J.B. Pardiwala, J

Bench : Division Bench

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

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, ACJ

1. This Appeal u/s 35G of the Central Excise Act, 1944 ["the Act"] is at the instance of the Revenue and is directed against an order dated March 30, 2011 2011 (269) ELT 379 , passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad ["the Tribunal"] in Appeal Nos. E/932/04 and E/CO/437/04, thereby partly allowing the Appeal preferred by the Revenue. Being dissatisfied with the other part of the judgment of the Tribunal below, by which it refused to pass any order of payment of interest or penalty upon the assessee, the Revenue has come up before us.

2. The facts leading to filing of this Appeal may be summed up thus :

2.1 The initial question out of which the present Appeal arises was whether the respondent''s product i.e. "Ala Fabric Bleach" should be classified under the Heading 2828.90 as contended by the assessee, or under the Heading 3402.90 as claimed by the Revenue.

2.2 In the appeal preferred before the Commissioner [Appeals] by the assessee, its claim was accepted and it was held by the Commissioner [Appeals] that the product of the assessee should be classified under the Heading 2828.90.

2.3 Being dissatisfied, the Revenue preferred an appeal before the Tribunal below. At the time of hearing of the appeal before the Tribunal below, learned counsel appearing on behalf of the assessee conceded that the item in question should be classified under the Heading 3402.90 and therefore, the Tribunal below, by accepting the aforesaid concession of the assessee set aside that part of the order which was the subject-matter of appeal. The question, however, was whether in such circumstances, the assessee should be liable to pay interest and penalty as provided u/s 11AB of the Act and Rule 173Q[1] of the Central Excise Rules, 1944 ["the Rules"].

2.4 The learned Tribunal below, after hearing both the parties, came to the conclusion that it was not a case of mala fide on the part of the assessee so as to invoke penal action against it. The Tribunal below further came to the conclusion that in such circumstances, in the absence of any mala fide intention of the assessee in evading the amount of duty, no order of interest should also be passed in view of the then provision of Section 11AB of the Act.

3. Therefore, the only question that arises for determination in this Appeal is whether the Tribunal below was justified in rejecting the claim of the Revenue of interest and penalty as indicated above.

4. Mr. R.J. Oza, learned counsel appearing on behalf of the Revenue strenuously contended before us that it is apparent from the conduct of the as- sessee that there was deliberate mis-statement made by it as regards classification of its product, as a result, the Revenue has suffered and thus, it is a fit case of imposition of not only interest but also penalty upon the assessee. In support of such contention, Mr. Oza has placed strong reliance upon the decision of the Bombay High Court in the case of Commissioner of Central Excise and Customs Vs. Padmashri V.V. Patil Sahakari Sakhar Karkhana Ltd.,

5. In order to appreciate the aforesaid question, it will be appropriate to refer to the provision contained in Section 11AB of the Central Excise Act, 1944 as it stood at the relevant point of time. The same is quoted under :

SECTION 11AB. Interest on delayed payment of duty. - (1) 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 wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, the person liable to pay duty as determined under sub-section [2] of section 11A shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent and not exceeding thirty per cent per annum, as is for the time being fixed by the Board, from the first day of the month succeeding the month in which the duty ought to have been paid under this Act or the rules made thereunder or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section [2] of section 11A, till the date of payment of such duty.

[2] For the removal of doubts, it is hereby declared that the provisions of sub-section [1] shall not apply to cases where the duty became payable before the date on which the Finance [No. 2] Bill, 1996 receives the assent of the President.

Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner [Appeals], the Appellate Tribunal or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner [Appeals], the Appellate Tribunal or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.

[emphasis given]

6. On plain reading of the aforesaid section, it is clear that interest can be levied where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded. In case before us, there is no dispute that there is short-payment of duty. The aforesaid section further provides in no unambiguous term that such interest can be levied if such short-payment had occasioned by reason of fraud, collusion or any wilful misstatement or suppression of fact or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of duty.

7. In case before us, the notice to show-cause is annexed at page-18 of the memorandum of Appeal preferred before us. It appears from para-6 of the said show-cause notice that the Revenue has alleged that the act on the part of the assessee amounted to contravention so as to constitute an offence of the nature described in clauses [a] and [d] of sub-rule[l] of Rule 173Q of the Rules and also made it liable to pay interest at appropriate rate on delayed payment u/s 11AB of the Act.

8. In the show-cause notice, no allegation of any fraud, collusion, wilful mis-statement, or suppression of fact or contravention with intent to evade payment of duty has been made.

9. Therefore, we find substance in the reason assigned by the Tribunal below that in the absence of such allegation in accordance with law as it stood, there was no scope of invoking the provisions of interest within the meaning of Section 11AB of the Act.

10. Similarly, the penalty can be applied only by taking aid of Section 11AC of the Central Excise Act, 1944 where there is collusion, wilful misstatement or suppression of fact or contravention of any of the provisions of the Act with intent to evade payment of duty. We have also pointed out that in the show-cause notice, all that has been alleged is mis-statement or wrong classification, but no allegation of fraud, collusion, suppression or intention to evade lawful duty has been made, Therefore, for the selfsame reason, penalty also cannot be imposed.

11. With regard to the decision of the Bombay High Court in the case of CCE & E, Aurangabad [supra] referred to by Mr. Oza, with great respect to the Hon''ble Judges of the said Court, we are unable to subscribe to the view taken by Their Lordships on the plain and simple reading of the provision of Sections 11AB and 11AC of the Act as those stood at the relevant point of time.

12. We are quite conscious of the subsequent amendment by which those allegations of fraud, mis-statement, collusion etc. have been deleted by the Legislature w.e.f. May 11, 2001 and not earlier than the said date. Therefore, from the above amendment also, it is clear that the benefit of the latest amendment cannot be availed of by the Revenue in the case of the incident which occurred prior to the said amendment. On consideration of the entire materials on record, we thus find that no substantial question of law is involved in this Appeal and consequently, the same is dismissed.

