(2015) 08 DEL CK 0319

In the Delhi High Court

Case No : CEAC No. 29 of 2015

Commissioner of C. Ex. — APPELLANT

Vs

Shakti Fragrances Pvt. Ltd. — RESPONDENT

Date of Decision : 05-08-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11AA, 35G

Citation : (2015) 324 ELT 390

Hon'ble Judges : S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Sonia Sharma, SSC, for the Appellant

Judgement

1. This appeal under Section 35G of the Central Excise Act, 1944 (''Act'') is directed against an order dated 21st November, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (''CESTAT'') allowing the respondent-assessee''s appeal to the extent of partly setting aside an order dated 13th September, 2014 passed by the Commissioner of Central Excise regarding duty payable for the month of August, 2012 in terms of the show cause notice (''SCN'') dated 23rd May, 2013. However, the CESTAT has upheld the said order of the Commissioner to the extent it required the assessee to pay the interest on the differential duty. The respondent-assessee is engaged in the manufacture of Gutka and is paying Central Excise duty under the compounded levy scheme as per the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (''PMPM Rules'').

2. Relevant to the appeal on hand, the respondent by its letter dated 9th August, 2012 requested the Department for sealing of all the 12 machines in its factory used for production of Gutka pouches with effect from 13th August, 2012. No manufacturing activity was carried out in the factory of the respondent from 14th to 31st August, 2012. By an abatement order dated 28th August, 2012, the respondent paid Central Excise duty of Rs. 95,61,290/- for 13 days from 1st to 13th August, 2012 on pro rata basis.

3. Stating that on the harmonious reading of Rules 7, 8 and 9 of PMPM Rules, the assessee was required to pay upfront the Central Excise duty on all the machines put to operation during the month and that it had paid duty only for 13 days, the Department issued a SCN to the assessee on 23rd May, 2013 asking it to show cause why it should not be asked to pay the duty of Rs. 1,32,38,710/- along with the interest as well as penalty under Rule 17 of the PMPM Rules.

4. By the order dated 13th January, 2014, the Commissioner confirmed the demand of Rs. 1,32,38,710/- and also ordered recovery of interest under Section 11AA of the Act. A penalty of Rs. 15 lakhs and cess amounts were also imposed.

5. Aggrieved by the above order, the assessee filed an appeal before the CESTAT in which the impugned order dated 21st November, 2014 was passed as noted hereinbefore.

6. At the outset it must be noticed that para 2 of the impugned order of the CESTAT (of which only a typed copy has been placed on record by the appellant) erroneously refers to the sealing of the packing machines of the assessee in the month of July, 2012 although admittedly the appeal pertains to the determination by the Commissioner of the SCN pertaining to closure of the packing machines in the month of August, 2012.

7. The CESTAT in the impugned order notes in para 4 that there was no dispute about the appellant''s entitlement to abatement and that Revenue''s only objection was as regards the non-compliance by the assessee with the procedural obligation under the PMPM Rules. The CESTAT then proceeded to rely upon its earlier decision in Shree Flavours Pvt. Ltd. v. CCE, Delhi-IV - , 2014 (304) E.L.T. 441 (Tri.-Delhi) wherein it took note of another earlier decision in Kaipan Pan Masala Pvt. Ltd. - , 2012 (285) E.L.T. 296 (Tri. - Delhi) in which it was held that non-deposit of the duty and any subsequent claiming of abatement in violation of the procedure under the PMPM Rules would not result in the substantive benefit being denied to the assessee. The only consequence would be the liability to pay interest.

8. The aforementioned decision in Shree Flavours Pvt. Ltd. v. CCE, Delhi-IV (supra) was challenged by the Revenue before the High Court of Punjab & Haryana by way of CEA No. 4 of 2015 (O&M) in the High Court of Punjab & Haryana. By an order dated 7th May, 2015 [2015 (321) E.L.T. A152 (P&H)] , the Division Bench of the Punjab & Haryana High Court dismissed the said appeal following its earlier decision dated 4th October, 2007 in Commissioner of Central Excise, Rohtak Vs. Kay Fragrance (P.) Ltd., .

9. The Court has been shown the judgment of the High Court of Punjab & Haryana in Kay Fragrance (P) Ltd. The question addressed there was whether the duty liable was to be determined under the PMPM Rules for each month separately. The case of the Revenue was that the closure of a factory for less than 15 days in a month would not entitle the assessee to claim abatement of duty pro rata. The High Court held that Rules 7 and 9 could not be pressed into

service by the Revenue to contend that the abatement cannot be made for a fraction of month. In other words, abatement of duty could not be denied to the party if in a particular month the closure was for less than 15 days.

10. In the present case, the appellant had pressed into service Rule 10 of the PMPM Rules requires the duty calculated on a proportional basis to be abated in case the factory does not produce the notified goods during any continuous period of 15 days in a month. Rule 10 further requires the intimation to that effect to be given to the authorities at least three working days prior to the commencement of the period of closure. Rule 9 requires the monthly duty payable to the authorities to be paid by the fifth day of the same month. There is nothing in Rule 9 to suggest that the failure to pay the duty payable on all the machines upfront by the 5th day of a month would disentitle the assessee to claim pro rata abatement of duty. The requirement under Rule 10 of giving intimation three days prior to the closure has been complied with by the assessee.

11. On a collective reading of Rules 9 and 10 of the PMPM Rules, the Court is of the view that the failure to make the payment of duty on fifth day of every month cannot result in depriving the assessee of the pro rata abatement of duty which he is in any way entitled to since admittedly in the present case there has been a closure of the factory from 14th to 31st August, 2012 and an abatement order has also been passed on 28th August, 2012. However, the assessee would be liable to pay the interest for the period of late deposit of duty.

12. Consequently, the impugned order of the CESTAT does not call for interference. No substantial question of law arises therefrom. The appeal is dismissed.

