(2011) 09 MAD CK 0320

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 2625 of 2005 and C.M.P. No. 13685 of 2005

Commissioner of C. Ex., Chennai-II — APPELLANT

Vs

Hindustan Motors Ltd. — RESPONDENT

Date of Decision : 08-09-2011

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

Citation : (2012) 284 ELT 168

Hon'ble Judges : K.K. Sasidharan, J;D. Murugesan, J

Bench : Division Bench

Advocate : V. Balasubramanian, for the Respondent

Final Decision : Dismissed

Judgement

D. Murugesan, J.—This Civil Miscellaneous Appeal is at the instance of the Revenue. While admitting the appeal, this Court has framed the following substantial questions of law :

(i) Whether the second respondent-Tribunal was correct in relying on the decision of 2004 (96) ECC 180 wherein the Tribunal have set aside mandatory penalty u/s 11AC and interest u/s 11AB, where penalty under Rules 173Q and 209A of the Central, Excise Rules, 1944 was not the issue?

(ii) Whether the second respondent-Tribunal was correct in affirming the order of Commissioner (Appeals) wherein the penalty imposed by the adjudicating authority under Rules 173Q and 209A of the Central Excise Rules, 1944 was set aside when the assessee has claimed the refund through fabrication of documents.

The core issue in this appeal is as to whether penalty could be levied in case, the duty involved had been paid before the issuance of show cause notice. On the facts of this case, both the Commissioner (Appeals) as well as Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT") have held that the duty has already been paid even before the issuance of show cause notice and in that event, in view of the settled position of law, penalty cannot be levied. To arrive at such a conclusion the CESTAT had relied on a decision of the Larger Bench of the Tribunal in the case of 2004 (96) ECC 180 . In fact, the order of the Tribunal in the case of Machino Montell (I) Ltd., cited supra has been finally upheld by the Supreme Court in the case of Collector v. Rashtriya Ispat Nigam Ltd. - 2004 (163) E.L.T. A53 (S.C.).

2. It is also relevant to note the following observation of the Supreme Court in Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills,

Sub-section (2B) of Section 11A provides that in case the person in default makes payment of the escaped amount of duty before the service of notice then the Revenue will not give him the notice under sub-section (1). This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It however overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest u/s 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub-section (2B). will have no application.

3. From the above judgment, it is clear that if the duty is paid before the issuance of show cause notice, normally, penalty and interest will not be levied. However, in the event, the non-payment of duty is intentional and by reason of deception, the main provisions set out in sub-section (2B) of Section 11A will have no application. In the instant case it is not the case of the revenue that the escape of duty was intentional or there was a reason of deception. In view of the above, we find no question of law much less substantial question of law involved in this appeal. Accordingly, the appeal fails and the same is dismissed. Consequently, the connected CMP is closed. No costs.