(2011) 02 BOM CK 0117

In the Bombay High Court

Case No : First Appeal No. 1349 of 2008

Commissioner of Central Excise and Customs — APPELLANT

Vs

Ahmednagar Forging Ltd. — RESPONDENT

Date of Decision : 10-02-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1A), 11A(2B), 11AA, 11AB

Citation : (2011) 02 BOM CK 0117

Hon'ble Judges : R.M. Borde, J;D.B. Bhosale, J

Bench : Division Bench

Advocate : Alok Sharma, Assistant Solicitor General, for the Appellant; Absent, for the Respondent

Final Decision : Allowed

Judgement

R.M. Borde, J.—This is an appeal by the Revenue raising challenge to the order passed by the Member (Judicial), Customs, Excise & Service Tax Appellate Tribunal, Mumbai, confirming the order passed by the Commissioner (Appeals), Central Excise & Customs, Aurangabad. The initial order passed by Deputy Commissioner, Customs & Central Excise Division, Ahmednagar, directing recovery of interest u/s 11AB of the Central Excise Act, 1944 and imposition of penalty u/s 11AC of the Central Excise Act, 1944, has been set aside by the Commissioner (Appeals), Central Excise & Customs, Aurangabad, which order has been confirmed by the appellate Tribunal.

2. Appeal is admitted and taken up forthwith for final disposal. The only substantial question of law, that arises for consideration in the appeal, is:

Whether in the facts of the matter, the adjudicating authorities have acted in conformity with the provisions of law in waiving the interest imposed u/s 11AB of the Central Excise Act, 1944?

3. Heard arguments advanced by Shri Alok Sharma, Assistant Solicitor General of India, for the Appellant. None appears for the Respondent, though served.

4. Respondent Company is engaged in manufacture of motor vehicle parts falling under Entry No. 73 of the Ist Schedule of Central Excise Tariff Act, 1985. The RespondentAssessee has been supplying finished goods to their customers after securing purchase orders. The valuation of the goods is done as per the rates prescribed in the purchase orders. During the period between July 2004 to March 2005, the Assessee had cleared the excisable goods manufactured by them to their different customers on payment of duty on the prices quoted in the purchase orders placed by the customers. Subsequently, the RespondentAssessee had claimed enhanced price from their customers on the ground of increase in the cost of input raw material. The Respondent Assessee, accordingly, paid the differential duty of Rs. 7,25,387.36 on the increased amount of prices of the goods as per the supplementary invoices.

5. The Deputy Commissioner, Central Excise & Customs, Ahmednagar, issued notice on 05.10.2005, calling upon the Assessee to show cause as to why (i) interest of Rs. 24,857/ should not be recovered from the Assessee under the provisions of Section 11AB of the Central Excise Act, 1944; and (ii) as to why penalty under the provisions of Section 11AC of the Central Excise Act, 1944, should not be imposed and recovered from them. The Assessee replied the show cause notice and after considering the rival contentions, the Deputy Commissioner, Central Excise and Customs, Ahmednagar, confirmed the notice and directed recovery of interest as well as imposition of equal amount of penalty, in view of the order passed on 30.12.2005.

6. RespondentAssessee raised challenge to the order passed by the Deputy Commissioner, Central Excise & Customs, Ahmednagar, by presenting an appeal to the Commissioner (Appeals), Central Excise & Customs, Aurangabad, who was pleased to allow the appeal and quash and set aside the order passed by the Deputy Commissioner, Central Excise & Customs, Ahmednagar.

7. An appeal was carried by the Revenue, against the order passed by the Commissioner (Appeals), Central Excise & Customs, Aurangabad, to the appellate Tribunal, which came to be dismissed on 19.11.2007.

8. The facts stated above are not disputed so far as it relates to revision of prices and recovery of differential price as well as payment of differential duty by the Assessee. The only question that arises in the matter is, whether the Deputy Commissioner, Central Excise & Customs, Ahmednagar, was justified in directing recovery of interest, as contemplated by Section 11AB of the Central Excise Act, 1944. The appellate Tribunal, placing reliance on the judgment of this Court in the matter of Commissioner of Central Excise, Aurangabad v. Rucha Engineering Pvt. Ltd. (First Appeal No. 42 of 2007), recorded a finding that there is nothing to indicate that there was any time gap between the time when the revised rates applicable with retrospective effect were learnt by the Assessee and the date on which differential duty was paid. The Appellate Tribunal found that there was no delay in paying the revised duty and as such, the provisions of Section 11AB are not attracted. The judgment in the matter of Commissioner of Central Excise,

Aurangabad v. Rucha Engineering Pvt. Ltd. (First Appeal No. 42 of 2007), has been reversed by the Apex Court, in the matter of Commissioner of Central Excise, Pune Vs. SKF India Ltd., . The relevant observations made in the case of SKF India Ltd., read thus:

9. Section 11A puts the cases of no levy or short levy, nonpayment or short payment or erroneous refund of duty in two categories.

One in which the nonpayment or short payment, etc. of duty is for a reason other than deceit; the default is due to oversight or some mistake and it is not intentional. The second in which the nonpayment or short payment etc. of duty is "by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty"; that is to say, it is intentional, deliberate and/or by deceitful means. Naturally, the cases falling in the two groups lead to different consequences and are dealt with differently. Section 11A, however, allow the Assessees in default in both kinds of cases to make amends, subject of course to certain terms and conditions. The cases where the nonpayment or short payment etc. of duty is by reason of fraud collusion etc. are dealt with under subsection (1A) of Section 11A and the cases where the nonpayment or short payment of duty is not intentional under sub section (2B).

10. Subsection (2B) of Section 11A provides that the Assessee in default may, before the notice issued under subsection (1) is served on him, make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and inform the Central Excise Officer in writing about the payment made by him and in that event he would not be given the demand notice under subsection (1). But explanation 2 to the subsection makes it expressly clear that such payment would not be exempt from interest chargeable u/s 11AB, that is, for the period from the first date of the month succeeding the month in which the duty ought to have been paid till the date of payment of the duty. What is stated in Explanation 2 to sub section (2B) is reiterated in Section 11AB that states where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who has paid the duty under subsection (2B) of Section 11A, shall, in addition to the duty, be liable to pay interest. ... It is thus to be seen that unlike penalty that is attracted to the category of cases in which the nonpayment or short payment etc. of duty is "by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty", under the scheme of the four sections (11A, 11AA, 11AB & 11AC) interest is leviable on delayed or deferred payment of duty for whatever reasons.

11. The payment of differential duty by the Assessee at the time of issuance of supplementary invoices to the customers demanding the balance of the revised prices clearly falls under the provision of subsection (2B) of Section 11A of the Act.

12. The Bombay High Court, Aurangabad Bench, in its decision in The Commissioner of Central Excise, Aurangabad v. Rucha Engineering Pvt. Ltd., (First Appeal No. 42 of 2007) that was relied upon by the Tribunal for dismissing the Revenue''s appeal took the view that there would be no application of Section 11A(2B) or Section 11AB where differential duty was paid the Assessee as soon as it came to learn about the upward revision of prices of goods sold earlier. In Rucha Engineering the High Court observed as follows:

It is evident that the Section (11AB) comes into play if the duty paid/levied is short. Both, the Commissioner (Appeals) and the CESTAT have observed that the Assessee paid the duty on its own accord immediately when the revised rates became known to them from their customers. The differential duty was due at that time i.e. When the revised rates applicable with retrospective effect were learnt by the Assessee, which was much after the clearance of the goods and therefore, question of payment of interest does not arise as the duty was paid as soon as it was learnt that it was payable. Finding that provisions of Section 11A(2) and 11A(2B) were not applicable as the situation occurred in the instant case was quite different, Section 11AB(1) was not at all applicable, and therefore, the Assessee was not required to pay interest.

13. It further held that a case of this nature would not fall in the category where duty of excise was not paid or short paid .

14. We are unable to subscribe to the view taken by the High Court. It is to be noted that: the Assessee was able to demand from its customers the balance of the higher prices by virtue of retrospective revision of the prices. It, therefore, follows that at the time of sale the goods carried a higher value and those were cleared on short payment of duty. The differential duty was paid only later when the Assessee issued supplementary invoices to its customers demanding the balance amounts. Seen thus it was clearly a case of short payment of duty though indeed completely unintended and without any element of deceit etc. The payment of differential duty thus clearly came under subsection (2B) of Section 11A and attracted levy of interest u/s 11AB of the Act.

9. The view taken by the Apex Court in the matter of Commissioner of Central Excise, Pune v. SKF India Ltd., has been reiterated in the recent judgment in the matter of Commissioner of Central Excise Vs. International Auto Limited, . While approving the view adopted in Commissioner of Central Excise, Pune v. SKF India Ltd., the Apex Court has observed in para 8 of the judgment, thus:

...What does differential prince signify? It signifies that value, which is the function of the price, on the date of removal / clearance of the goods was not correct. That, it was understated. Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance, hence enhanced duty. This enhanced duty is on the corrected value of the goods on the date of removal. When the differential duty is paid after the date of clearance, it indicates shortpayment/short levy on the date of removal, hence, interest which is for loss of revenue, becomes leviable u/s 11AB of the Act.

10. Thus, the instant appeal is squarely covered by the judgments of the Apex Court in the matter of Commissioner of Central Excise, Pune v. SKF India Ltd., as well as in the matter of Commissioner of Central Excise v. International Auto Ltd. The judgment rendered by the Tribunal, placing reliance on the judgment of this Court in the matter of Commissioner of Central Excise, Aurangabad v. Rucha Engineering Pvt. Ltd. (First Appeal No. 42 of 2007), which has been disapproved by the Apex Court, is, therefore, unsustainable and shall have to be quashed and set aside.

11. In the result, appeal presented by the Revenue, therefore, stands allowed. The order passed by the Tribunal on 19.11.2007, confirming the order passed by the Commissioner (Appeal), Central Excise & Customs, Aurangabad, on 07.09.2006, is quashed and set aside and the order passed by Deputy Commissioner, Central Excise & Customs, Ahmednagar, on 30.12.2005, is confirmed only to the extent of recovery of interest u/s 11AB of the Central Excise Act, 1944. In the facts and circumstances of this case, there shall be no order as to costs.