(2007) 07 BOM CK 0057

In the Bombay High Court

Case No : First Appeal No. 240 of 2007

Commissioner of Central Excise and Customs APPELLANT

Vs

Padmashri V.V. Patil Sahakari Sakhar Karkhana Ltd. RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q

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

Citation : (2007) 109 BOMLR 1604 : (2007) 121 ECC 27 : (2007) ECR 27 : (2007) 215 ELT 23

Hon'ble Judges : N.V. Dabholkar, J;M.G. Gaikwad, J

Bench : Division Bench

Advocate : Alok Sharma, Assistant Solicitor General, for the Appellant; A.P. Kolte, for the Respondent

Judgement

N.V. Dabholkar, J.—We have admitted the appeal on following substantial questions of law:

(1) Whether there is any discretion with the authorities to exempt penalty u/s 11AC and interest u/s 11AB of Central Excise Act, 1944, while confirming the demand for evaded excise duty?

(2) Whether such exemption can be justified merely because the evaded excise duty is paid before issuance of show cause notice by the department ?

2. Respondent -assessee is engaged in the manufacture of excisable goods i.e. denatured spirit. According to department, respondent had undervalued the excisable goods to the extent of Rs.55,28,417/ and evaded the excise duty to the tune of Rs.8,84,547/-for the period from June 2000 to June 2001. Respondent -assessee admittedly paid the said duty in two instalments, amount of Rs.8,37,728/-on 28.5.2004 itself upon deficit being pointed out by the audit party. They had assured to pay the balance and accordingly paid the balance Rs.46,819/- on 5.8.2004. Show cause notice was issued on 29.7.2004 and

served on 11.8.2004. Thus, factually it is evident that major portion of the short duty was paid before issuance of show cause notice and a small chunk was paid, although after issuance of notice, before service of notice upon the assessee.

3. Show cause notice was confirmed by Joint Commissioner, Central Excise & Customs, Aurangabad, vide order in original dated 18.2.2005. The Commissioner was pleased to confirm demand of Rs.8,84,547/-and ordered appropriation of amount already paid. He also ordered imposition of equal amount of penalty u/s 11AC of the Central Excise Act, 1944 read with Rule 173Q of the Central Excise Rules, 1944. In addition, he also ordered recovery of interest at appropriate rate as u/s 11AB of the Act.

The assessee approached Commissioner (Appeals), who decided the appeal by judgment and order dated 29.7.2005. The learned Commissioner concluded the appeal thus:

In view of above, I hold the appellants were not liable for imposing any penalty. The penalty imposed in the impugned order is, therefore, not justified and hence I set aside the penalty imposed in the impugned order. Since the appellants are not contesting the demand, I uphold the impugned order in original, so far as the confirmation of duty and recovery of interest u/s 11AB is concerned.

Thus, Commissioner (Appeals) allowed the appeal of the assessee partly thereby quashing the order of imposition of penalty u/s 11AC, but confirming the demand and interest u/s 11AB.

4. The assessee, feeling aggrieved by the order of Commissioner, approached the Customs, Excise and Service Tax Appellate Tribunal (CESTAT for short) and the Tribunal was pleased to allow the appeal thereby setting aside the order of original authority imposing the interest u/s 11AB. Since the demand was not contested, there was no question of finding on that aspect, by any of the authorities.

It appears from reasons discussed in para 3 that interest amount is set aside on the sole ground that the short duty was paid much before issuance of show cause notice.

5. Heard respective counsel.

We intend to deal the appeal in two parts and hence for the purpose, both the issues shall be considered to be split in two parts. Each issue shall be considered for penalty imposable u/s 11AC and each issue shall be separately considered so far as charging of interest u/s 11AB.

6. So far as imposition of penalty u/s 11AC is concerned, learned Assistant Solicitor General has placed reliance upon Section 11AC as also Explanation (1) to Sub-section (2B) of Section 11A together with judgment of Punjab & Haryana High Court in the matter of Commissioner of Central Excise Vs. Machino Montell (I) Ltd., wherein the High Court has observed thus, in paras 7 and 9, after

considering the provisions of Section 11A(2B) and 11AC together.

7. A perusal of the above provision, shows that the said provision incorporates liability to pay penalty in the situations mentioned therein. Once a case is covered by the situation mentioned in the Section, mere deposit prior to issuance of show cause notice u/s 11A of the Act will not necessarily negate the situation mentioned in the said Section.

9. In view of the above, applicability of Section 11AC is not excluded at the threshold merely on deposit of the amount after having been caught and before the issue of show cause notice."

With the assistance of the learned Counsel representing both the parties, we have gone through Sections 11A, 11AA, 11AB and 11AC of the Central Excise Act, 1944. It is evident that Section 11AA enables the department to charge interest if, even after determination u/s 11A(2) of duty short paid, the assessee does not pay the duty so determined within a period of three months from the date of determination. Interest chargeable u/s 11AB stands on different footing. From the clause

... the person who is liable to pay duty as determined under Sub-section (2) or has paid the duty under Sub-section (2B) of Section 11A, shall in addition to the duty, be liable to pay interest at such rate not below 10% and not exceeding 36% p.a., as is for the time being fixed by the Central Government by notification in the official gazette,....

On comparison of the language of Sections 11AB and 11AC, it can be seen that the opening part is identical. The interest chargeable u/s 11AB is determinable by the Central Government and imposable in accordance with the rates published in the official gazette, but not below 10%, as against which Section 11AC imposes penalty equal to the amount of duty evaded. The clause pertaining to imposition of penalty, which is part of Section 11AC reads thus:

...the person who is liable to pay duty as determined under Sub-section (2) of Section 11A shall also be liable to pay a penalty equal to the duty so determined.

There does not appear any discretion with the authorities to impose penalty at any lower rate than cent percent of the duty evaded. Under the proviso added by amendment in the year 2000, the penalty can be 25% if the duty as determined by Excise Officer is paid within 30 days from the date of determination. But even in that region, there does not appear to be any discretion to impose penalty less than 25% of the duty so determined.

7. Considering the scheme together, it is evident that interest chargeable u/s 11AB is a sort of civil liability of the assessee, who has failed to pay the duty or who has short paid the duty. This is irrespective of the fact whether such non payment / short payment is innocent or mala fide. So far as penalty u/s 11AC is concerned, it is certainly a provision, penal in nature. This is because, it comes into play only when non payment / short payment is result of fraud, collusion or

any wilful mis-statement / suppression of facts or contravention of any of the provisions of the Act / Rules on the part of the assessee, with intent to evade payment of duty. There is a sense of deliberate evasion and scheming for the purpose on the part of the assessee and that is why in that case, there is no discretion to impose penalty lesser than 100% or 25% in case duty determined is paid within 30 days from the date of determination. The distinction of civil liability and criminal liability stands further demonstrated by Explanation (1) to Sub-section (2B) of Section 11A, which reads thus:

Explanation (1) : Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short levied or was short paid or was erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty.

8. The ratio laid down in the matter of 2003 (161) ELT 285 , relied upon by learned Counsel for assessee, which view was confirmed by the Hon''ble the Apex Court while dismissing the appeal of the department, that in case the duty is paid before issuance of show cause notice, no penalty u/s 11AC is imposable, was a decision of the Tribunal at Bengalore dated 13.11.2002. Taking into consideration the hierarchy of authorities under the Central Excise Act, 1944 i.e. Assessment Officer conducting enquiry and determining the duty evaded or short paid, Commissioner (Appeals) and thereafter CESTAT, it can safely be said that this was a decision regarding the non payment of duty of the period prior to insertions by Amendment Act No.14/2001 with effect from 11.5.2001 by which Sub-sections (2A), (2B) and (2C) are inserted in the main Act. Naturally, the Explanation (1) to Sub-section (2B), reproduced hereinabove, was neither on the statute book nor was under consideration before the Tribunal or before the Hon''ble the Supreme Court. If the effect of Explanation is taken into consideration, the liberty to pay evaded excise duty as may be ascertained by Central Excise Officer u/s 11A(2) or on the basis of duty ascertained by himself, was not available to the assessee prior to 11.5.2001. We must say that by insertion of Sub-sections (2A) to (2C) and more particularly Explanation (1) to Sub-section (2B), the position stands drastically changed. Since there is no liberty to the assessee, who has evaded the duty intentionally, by exercising fraud, collusion etc. for the purpose, the liberty to pay the evaded duty under Sub-section (2B) is not available and the terminal portion of Sub-section (2B) "...and inform the Central Excise Officer of such payment in writing, who on receipt of such information shall not serve any notice under Sub-section (1) in respect of the duty so paid;" can not render any assistance to such an assessee. In other words, the proceedings of ascertainment of evaded duty, imposition of interest and penalty can not be dropped by virtue of above terminal clause of Sub-section (2B) in the cases of assessees, who had intentionally evaded payment of duty by use of fraud, collusion etc. as contemplated by Section 11AC.

In the cases where the finding of fact regarding existence of fraud, collusion, wilful mis-statement / suppression of facts or contravention of any provisions of the Act or Rules with intent to evade the payment of duty is confirmed, it may not be open to the assessee to claim that no penalty is imposable upon him u/s 11AC, because of payment of evaded duty before issuance of show cause notice, after amendment as inserted by Act No.14/2001 with effect from 11.5.2001.

As already discussed hereinabove, there is no discretion with the authorities to impose any lesser penalty than 100% and 25% in case duty after being determined u/s 11A(2), the assessee pays it within 30 days. This answers both the substantial questions of law on which appeal is admitted, so far as penalty imposable u/s 11AC is concerned.

9. For the purposes of present appeal and the assessee, Advocate Shri Kolte has advanced further submissions. He has pointed out that not merely because of payment of alleged evaded duty before show cause notice, but because of absence of circumstances enumerated in Section 11AC being absent, the penalty was not imposable upon the respondent. For the purpose, he has taken us to contents in para 7 of the judgment of Commissioner (Appeals). Those contents read as follows:

find that the clearances of subject goods were well within the knowledge of the department. There is no allegation in the show cause notice that the appellants had suppressed the fact that they had cleared the SDS (Special Denatured Spirit) for captive consumption. Further I do not find any evidence on record as to what the appellants had mis-stated or suppressed, to prove that they had intention to do so. The mere fact that the value and quantity of captive consumption and domestic sale of ethyl alcohol (SDS) were not shown separately in the RT-12 returns submitted by the appellants from time to time will not prove that they had mala fide intention to do so and make them liable for imposition of equal amount of penalty as provided under the Act / Rules.

Learned Counsel Shri Kolte did not fail to point out that this judgment by Commissioner (Appeals) was suffered by the department, in the sense department did not challenge it before CESTAT and more particularly this finding of fact. The appeal before CESTAT was by the assessee thereby challenging imposition of interest u/s 11AB, which was not set aside by Commissioner (Appeals). Having acquiesced to finding of fact that there were no mala fide intentions on the part of the assessee, now it is not open for the department to say that penalty is imposable. This is because of absence of basic requirement of Section 11AC. The decision of CESTAT confirming the decision of Commissioner (Appeals) setting aside the penalty u/s 11AC, therefore, will have to be confirmed, although we are not confirming it because short paid duty was paid before issuance of show cause notice, but we are holding the penalty not imposable since basic requirement of Section 11AC is non-existent.

10. So far as interest u/s 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest.

Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the official gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied / short paid / non levied / unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of Sub-section (1) of Section 11, which runs thus:

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 is liable to pay duty as determined under Sub-section (2) or has paid the duty under Sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate....

The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional.

11. The question then arises whether payment of duty before issuance of show cause notice exempts the assessee from liability to pay interest u/s 11AB. Learned Counsel Shri Kolte had placed reliance upon concluding para in the judgment of CESTAT Bengalore in the matter of Rashtriya Ispat Nigam Ltd. v. Commissioner of Central Excise, Visakhapatnam, which reads thus:

In these circumstances, there is no justification on the part of the department to impose penalty u/s 11AC as well as under Rule 173Q of the Central excise Rules, 1944. Consequentially, no interest also is payable.

In the matter, penalty u/s 11AC is held non-imposable because the amount of duty was paid before issuance of show cause notice. The observation "consequentially no interest is also payable", according to Advocate Shri Kolte, was confirmed by the Hon''ble the Supreme Court while dismissing the appeal of the department. First of all, with due respect, it must be said that on going through the entire judgment of the Tribunal at Bengalore, there does not appear any submissions advanced regarding the issue of interest. The stray reference to interest has come in the judgment of the Tribunal unsupported by any reasons except that it has treated the interest chargeable u/s 11AB at par with the penalty imposable u/s 11AC. We have sufficiently distinguished the nature of liability of interest u/s 11AB and penalty u/s 11AC in the discussion hereinabove. The first one is civil liability whereas second is penal, if not criminal, liability. This is because u/s 11AC, existence of mens rea is a must, whereas u/s 11AB, it may be innocent evasion or omission to pay the duty. The judgment of the Supreme Court is brief and it is not possible to judge whether issue regarding interest was also agitated by the department before the Hon''ble Apex Court. Otherwise also, we have already pointed out that this is a judgment, which can safely be presumed to be regarding the duty payable for a period prior to insertion of amendments by Act No.14/2001 with effect from 11.5.2001, which have clarified the distinction between Sections 11AB and 11AC by virtue of Sub-section 2B and Explanations below the same. Second explanation below Sub-section 2B reads thus:

Explanation (2) : For the removal of doubts, it is hereby declared that the interest u/s 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of duty if any as may be determined by the Central Excise Officer, but for this sub-section.

It is evident that explanation has taken care to charge the interest on the difference amount if the amount of duty payable as ascertained by the assessee and the amount of duty payable as ascertained by the Central Excise Officer, is different. Thus, even if the assessee pays the short duty by virtue of liberty granted by Sub-section 2B of Section 11A, he is liable to pay interest, on the same even if the amount is paid, and he is liable to further interest also on the amount of short duty as ascertained by the department if that exceeds the self assessment and to that extent. By this explanation, we are convinced that even if no notice is issued by the department because it agrees with the amount of short duty paid by the assessee as ascertained by the assessee himself under Sub-section 2B, still the assessee shall be liable to pay interest over the same even without going through the process of determination as contemplated by Section 11A(1) and (2) commencing with a show cause notice and culminating with an order of the Central Excise Officer. The show cause notice and determination can go on if the short duty is not paid, but even if short duty is paid by taking liberty under Sub-section (2B), we are afraid, that does not absolve the assessee from the liability to pay interest thereon. In case by proceeding with the show cause notice, if the Central Excise Officer determines short duty payable higher than as ascertained and paid by the assessee himself, the assessee would be liable to pay interest u/s 11AB upon the same.

Emphasis by Advocate Shri Kolte was on the tail piece of Sub-section 2B. According to him, once the short duty is paid before issuance of show cause notice, the department is prohibited from issuing show cause notice and, therefore, there can not be any adjudication u/s 11A(1) and (2) and, therefore, there can not be any imposition of either interest u/s 11AB or penalty u/s 11AC. We quote the tail piece, relied upon by Advocate Shri Kolte:

...On receipt of such information (regarding payment under Sub-section 2B) shall not serve any notice under Sub-section (1) in respect of duty so paid.

We are afraid, the proceedings starting with the show cause notice u/s 11A(1) are prohibited so far as duty paid. It does not make any reference, much less prohibits issuance of show cause notice for the purpose of according an opportunity to the assessee to show cause as to why interest may not be charged or penalty may not be imposed. The department would be justified in issuing show cause notice pertaining to duty as well if the duty as ascertained by the assessee himself and paid is less than duty as prima facie ascertained by the officer of Central Excise. In any case, we are unable to agree with the submission by learned Counsel Shri Kolte that on payment of short duty as under Sub-section (2B), before issuance of show cause notice, no interest u/s 11AB can be charged, by virtue of portion of Section 11AB(2B) reproduced hereinabove.

12. Learned Counsel Shri Kolte has also placed reliance upon the tail piece of Explanation (2) to Sub-section (2B) reading "but for this sub-section". According to him, "but" is a conjunction used to indicate the intention of those who use it to limit or restrain the sense or effect of something, which had before been said. He has obtained this meaning from Law Lexicon by P.Ramnatha Aiyar. In order to examine the submission by learned Counsel as to whether this terminal part of Explanation (2) gives the explanation so much strength as to mean that the party, which has utilised the facility of Sub-section (2B) of payment of short duty as ascertained by the assessee himself, is not liable to pay the interest as u/s 11AB, we have tried to search for the meaning of phrase "but for". As per Concise Oxford Dictionary, 11th Edition, "but for" means "except for", "if it were not for". In view of these meanings obtained from the Law Lexicon and the Oxford Dictionary attached to the word "but" and to the phrase "but for", the Advocate pleaded that it should be interpreted that had Sub-section (2B) not been in existence or rather the facility to pay the short duty was not available, the party would have been required to pay interest u/s 11AB and if the facility is available, on compliance of the same, the party would not be liable to pay interest.

Taking into consideration that the tail piece relied upon by learned Counsel is included in the Explanation to particular Sub-section (2B), we are unable to accept the interpretation as tried to be attributed by the learned Counsel for one simple reason that an explanation ought to be there for the purpose of explaining the main provision, it can not nullify the effect of main provision. If Explanation (2) interprets as attempted by learned Counsel due to the phrase with which it ends "but for this sub-section", the explanation will have to be ignored being in conflict with Sub-section (2B), which it explains. However, the meaning of this clause "but for this sub-section" can be enlightened when we refer to Section 11AB(1), we have reproduced two portions of this provision (in parts) in the earlier part of this judgment and for the sake of convenience, now we are quoting entire Sub-section (1) of Section 11AB, which reads:

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, the person, who is liable to pay duty as determined under Sub-section (2), or has paid the duty under Sub-section (2B) of Section 11A, shall in addition to duty be liable to pay interest at such rate, not below 10%.... from the first date of the month succeeding the month in which the duty ought to have been paid under this Act or from the date of such erroneous refund as the case may be, but for the provisions contained in Sub-section (2) or Sub-section (2B) of Section 11A, till the date of payment of such duty.

Thus, why the clause "but for" is used, is evident from the tail piece of Section 11AB(1). Ordinarily, the interest is payable till payment of short duty as adjudicated, but in view of Sub-section (2B), which gives liberty to the party to pay the short duty even before determination or without determination by the officer of Central Excise, the interest would stop to run to the extent of amount deposited by self ascertainment and on the date such amount is so deposited.

If the tail piece of Explanation (2) was to be so strong as to nullify the effect of Sub-section (2B), Section 11AB would not have incorporated within it the clause "or has paid the duty under Sub-section (2B)". Reading Section 11AB together with Section 11A(2B) and Explanation (2), we are unable to accede to the interpretation tried to be attributed by Advocate Shri A.P. Kolte to Explanation in question.

13. For all these reasons discussed, we are unable to agree with the proposition that interest u/s 11AB is also not chargeable in case the short duty or unpaid duty is deposited with the Government before issuance of show cause notice.

This answers both the substantial questions of law as framed so far as interest chargeable u/s 11AB is concerned and consequently the appeal of the department will have to be partly allowed by restoring the order in original as passed by the Joint Commissioner on 18.2.2005 so far as it relates to charging of interest u/s 11AB.