(2007) 04 AP CK 0057

In the Andhra Pradesh High Court

Case No : Central Excise Appeal No. 27 of 2007

Commissioner of Central Excise		APPELLANT
	Vs	
Andhra Cements Limited, Durga Cement Works		RESPONDENT

Date of Decision : 17-04-2007

Acts Referred:

Central Excise Rules, 1944 — Rule 96ZP(3)
Central Excise Rules, 2002 — Rule 25, 8(3)
Central Excises and Salt Act, 1944 — Section 11, 11A(2), 11AB, 11AC

Citation : (2007) 216 ELT 362

Hon'ble Judges : Nooty, J;Bilal Nazki, J

Bench : Division Bench

Advocate : A. Rajashekar Reddy, for the Appellant;

Final Decision : Dismissed

Judgement

1. This appeal is filed against the Final Order No. 1351 of 2006, dated 10-08-2006, passed in Appeal No. E/295/2006, on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore, reversing the order in CEX-11/2005, dated 22-12-2005.

2. The respondent-company-Andhra Cements Limited is manufacturing cement and clinker, which attract duty, which was required to be discharged on a monthly basis. There was default in paying the duty on account of the unit being registered with BIFR. However, the duty along with interest was subsequently paid before a show-cause notice dated 04-01-2005 proposing to impose penalty under Rule 25 of the Central Excise Rules, 2002 (for short ''the Rules'') was issued for default in paying the duty.

3. The respondent-company had in its reply to the show-cause notice submitted that since the matter is pending before BIFR, the circumstances existed were beyond it''s control and therefore, the duty could not be paid in time. However, the penalty, which was imposed, was upheld by the appellant-Commissioner of Central Excise. Appeal was taken by the respondent-company before the

Customs, Excise and Service Tax Appellate Tribunal. The Tribunal reversed the orders and held that penalty could not be imposed in the present case. Therefore, this appeal has been filed by the Commissioner of Central Excise, Guntur.

4. In terms of Rule 8(3) of Rules, if the duty is not paid within time, it gives a mechanism for payment of interest on the outstanding amount of duty from the date it became due till the date on which the amount was actually paid. There is no dispute that this Rule has been followed and the interest as calculated under Rule 8(3) of the Rules has been paid.

5. However, the learned Counsel for the appellant has drawn our attention to Section 11 of the Central Excise Act, 1944 (for short ''the Act''). Section 11AC of the Act reads as under:

Penalty for short-levy or non-levy of duty in certain cases : Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of duty, 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.

Provided that where such duty as determined under Sub-section (2) of Section 11A, and the interest payable thereon u/s 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section be twenty-five per cent of the duty so determined;

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, for the purposes of this Section, the duty, as reduced or increased, as the case may be, shall be taken into account.

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

6. As per Rule 25(d) of the Rules subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, contravenes any of the provisions of these rules or the

notifications issued under these rules with intent to evade payment of duty, he is liable to pay the penalty in terms of Rule 25 of the Rules. A bare perusal of this Rule would suggest that evasion of payment of duty is not sufficient to impose penalty on a producer or manufacturer. There should be an element of intention to evade payment of duty. Unless the authorities come to a definite conclusion that there was an intention to evade the payment of duty, penalty cannot be imposed.

7. In the present case, there is a finding of the Tribunal that the circumstances were beyond the control of the respondent-company as the matter was pending before BIFR, and as such, the amounts could not be deposited by the respondent-company within time and as soon as it was in a position to make the payment, the respondent-company made the payment not only of the duty, but also of the interest calculated under Rule 8(3) of the Rules. Therefore, we have no doubt in our mind that the Tribunal has correctly interpreted Rule 25 of the Rules and the penalty could not be imposed on the respondent-company.

8. However, the learned Counsel for the petitioner has relied on a judgment of the Punjab and Haryana High Court in 2004 (96) ECC 180 . This judgment, as a matter of fact, is in conformity with what we have held herein above. In this judgment, it has been held that an element of evasion of duty must be present. Therefore, the Punjab and Haryana High Court remanded the matter back to the Commissioner (Appeals) for fresh decision on the question of penalty after determining the question whether the non-payment of penalty in that case at the relevant time was on account of fraud, collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of the Act or the Rules made there under with intent to evade payment of duty as laid down u/s 11AC of the Act and as held by the adjudicating authority. The learned Counsel also relies on a judgment of the Allahabad High Court reported in Pee Aar Steels (P) Ltd. Vs. Commissioner of Central Excise, . In this case, Rule 96ZP(3) of the Central Excise Rules, 1944, was being interpreted by the Court and it is altogether different.

9. For the above reasons, the Appeal is dismissed. No costs.

