

(2007) 04 KAR CK 0049

In the Karnataka High Court

Case No : Central Excise Appeal No. 43 of 2006

Commissioner of Central Excise

APPELLANT

Vs

Chelpark Co. (P) Ltd.

RESPONDENT

Date of Decision : 04-04-2007

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 11 AB, 11 AC
Central Excise Rules, 1944 — Rule 172

Citation : (2007) 119 ECC 390 : (2007) ECR 390 : (2007) 216 ELT 364

Hon'ble Judges : R. Gururajan, J; Anand Byrareddy, J

Bench : Division Bench

Advocate : Arvind Kumar, for the Appellant;

Judgement

R. Gururajan and Anand Byrareddy , J.J

1. State is before us aggrieved by the order of the tribunal in the case on hand. Respondent is covered by the Central Excise Laws. It claimed duty exemption on Synthetic Adhesives under the self removal procedure. It failed to discharge the duty on the synthetic adhesives cleared during the period from 1-3-1998 to 30-7-1998 without payment of duty. The assessee also did not pay 8% of the price of the exempted goods. No reasons were assigned with regard to non-payment of duty. In these circumstances, notice was issued demanding a sum of Rs. 1,80,341/- by the department. The State Government also claimed a demand of Rs. 44,788/- being 8% of the value of clearance of exempted products in the case on hand. Thereafter, duty was made over. The Joint Commissioner confirmed the payment in terms of the order. However, he levied penalty u/s 11-C of the Act read with Rule 172 of the Central Excise Rules. Assessee aggrieved by the imposition of penalty and levy of interest filed an appeal before the Commissioner-Appeals unsuccessfully. Thereafter assessee moved the tribunal. The tribunal accepted case of the case. State is therefore before us.

2. The following questions of law referred for our consideration;

1. Whether the tribunal has erred in law while granting immunity from penalty when the assessee had paid the duty prior to issue of show cause notice, that too, when the duty was paid after the department and point out the evasion by invoking the suppression clause.

2. Whether the tribunal had erred in law while not considering the provisions Section 11A, 11AB and 11AC where the assessee opts for payment of duty subsequent to the detection by the Department that too, when the proviso to Section 11A has been invoked.

3. Whether it was correct and proper for the tribunal to have allowed the appeal and set aside the penalty and interest levied u/s 11AC and 11AB of Central Excise Act, without any justifiable reason and particularly when the same is imposed/levied as contemplated under the Act?

3. Heard Sri. Arvind Kumar, learned standing counsel appearing for the state and the learned Counsel appearing for the respondent.

4. The strong argument of Sri. Arvind Kumar, learned standing counsel is that payment of duty before show cause notice could not be a ground for denial of penalty and interest to the State. Learned Counsel would say that but for the proceedings initiated by the department, the assessee would not have made over the duty payment. On fact and in the given circumstances, the State is justified in seeking for interest and penalty. He would say that the judgment on which reliance is placed by the tribunal has not considered this aspect of the matter and that therefore matter requires reconsideration. Per contra, learned Counsel for the assessee would support the order. They would say that in identical circumstances, this Court has accepted similar order and it is also brought to our notice that the tribunal has passed several orders adverse to the State in such circumstances all over the country.

5. After hearing, we have carefully perused the material on record.

6. It is unnecessary for us to refer to all the facts for the purpose of this order.

7. Admitted facts would reveal that duty has been made over before issue of show cause notice. The tribunal after noticing this aspect of the matter and after noticing a judgment of a Division Bench of this Court in Commissioner of C. Ex. Vs. Shree Krishna Pipe Industries, , and also the judgment of the Supreme Court in 2004 (163) ELT 53, has chosen to hold in favour of the assessee.

8. Rule 173Q would provide for confiscation and penalty. It provides for levy of penalty apart from confiscation if a producer, manufacturer, registered person of a warehouse or a registered dealer-removes any excisable goods in contravention of any of the provisions of these rules; or does not account for any excisable goods manufactured, produced or stored by him.

9. Rule 173Q has been noticed by the tribunal in the case of Rashtriya Ispat Nigam Ltd., case reported in 2003 (161) ELT 285 The tribunal noticed that the

duty was deposited even before issue of show cause notice and hence there is no justification on the part of the department in imposing penalty u/s 11AC as well as under Rule 173Q of the Central Excise Rules, 1944 and consequently no interest is also payable. This order was challenged before the Apex Court. The Apex Court in 2004 (163) ELT 53 has chosen to dismiss the appeal. The order of the tribunal has become final.

10. Thereafter a similar question was raised before this Court in 2004 (165) ELT 509 Commissioner of Central Excise v. Sri Krishna Pipes. This court after noticing the judgment of the Supreme Court in 2004 (163) ELT 53 Rashtriya Ispat Nigam Ltd's case has chosen to hold that where the assessee has deposited the duty even prior to the issue of show-cause notice, imposition of penalty is not justified, so also interest.

11. The tribunal has only chosen to follow the Apex Court judgment and judgment of this Court. However, Sri Arvind Kumar, learned Counsel would point out that Sri Krishna Pipe Industry's case would not be available on the facts of this case. It was under different circumstances. It was not after efforts of the department. In the light of the submission, we have seen the facts of Sri Krishna Pipe's case.

12. From the facts in Krishna Pipes case, we see that assessee was a registered SSU manufacturing rigid PVC pipes. The SSU whose turnover is less than Rs. 50 lakhs is not required to register themselves under the Central Excise Act and is not liable to pay the Central Excise Duty. The Central Excise officers visited the unit of the assessee on 5-2-1999 and found that as on that day, the assessee had cleared goods of the value of Rs. 65,09,461/-. It was thereafter a show cause notice was issued. With regard to payment of penalty and interest, from the facts it is seen that it is not as though Sri Krishna Pipe's case stands on a different footing. It is only after the efforts either by way of visit or search, duty was made over before issue of show cause notice. It was in those circumstances, and after noticing the Apex Court judgment, a Division Bench of this Court has categorically ruled that where the assessee has deposited the duty even prior to issue of show cause notice, penalty should not be imposed and interest should not be levied. Therefore we are unable to accept the argument of Sri Arvind Kumar that penalty has to be imposed despite payment of duty in the light of the efforts by way search etc., by the department. In fact we have accepted similar orders in the light of Sri Krishna Pipe's case. We do not want to deviate in the case on hand particularly in the light of our rejection of argument of Sri Arvind Kumar with regard to a right being available on account of their best efforts in the matter despite deposit before showcause notice.

13. Sri Arvind Kumar places before us, the judgment of the Allahabad High Court in Pee Aar Steels (P) Ltd. Vs. Commissioner of Central Excise, . In the said case court came to a conclusion that penalty is payable despite payment of duty. A further reading of the facts would show that judgment was rendered in different circumstances. In that case, the court was considering the fourth proviso to Rule

96ZP(3) of the Central Excise Rules wherein it is specifically provided for penalty in the event of non-payment of duty by 10th of every month. It was in those circumstances the court has chosen to impose penalty. Moreover, the Allahabad High Court has not chosen to refer to the judgment of the Apex Court in Rashtriya Ispat Nigam Ltd. In these circumstances, we find ourselves unable to accept the submission of Sri Arvind Kumar on the basis of the Allahabad High court judgment.

14. Similarly, we find ourselves unable to accept the submission of Sri Arvind Kumar with regard to the applicability of a judgment in Zunjarrao Bhikaji Nagarkar Vs. U.O.I. and Others, . That was a judgment rendered in totally different circumstance. At any rate, in the light of subsequent judgment of the Supreme Court and the subsequent judgment of this Court, it is not proper for this Court to consider the issue at the instance of the State. In these circumstances, we reject the contention of Sri Arvind Kumar that penalty has to be levied despite payment of duty before issue of show cause notice. Further we are told that penalty matter in terms of Sri Krishna Pipe's case is pending consideration before the Supreme Court. We make it clear that in the event of the Central Government succeeding with regard to penalty in the pending matter, liberty is reserved to the Central Government to claim penalty notwithstanding this order in the light of the judgment of the Supreme Court in the pending case.

15. The next question is with regard to the interest in the case on hand. Admittedly, the duty has been made over after a demand but before the issue of show cause notice. There is a delay in payment of duty. Prima facie interest seems to be available to the department. However, in Rashtriya Ispat Nigam Ltd., or in Sri Krishna Pipes case, there is no discussion with regard to interest. It also involves factual aspect of the matter. In these circumstances, we deem it proper to remand the matter in so far as interest is concerned to the tribunal.

16. In the result, this appeal is partly accepted. Question of law in so far as penalty is concerned is answered against the revenue and in so far as interest is concerned, the same is not answered. Matter is remitted back to the tribunal only for consideration of interest only for the delayed period. Parties are directed to appear before the tribunal on or before 30.4.2007. The tribunal is directed to complete the proceedings within six months from the date of receipt of a copy of this order.