(2009) 09 SHI CK 0027

In the High Court Of Himachal Pradesh

Commissioner of Central Excise — APPELLANT

Vs

Him Chemicals and Fertilizers Ltd. — RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:

Himachal Pradesh General Sales Tax Act, 1968 — Section 11AC

Citation : (2010) 256 ELT 363 : (2010) 1 ShimLC 149

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Deepak Gupta, J.—This appeal has been admitted on the following substantial questions of law:

Whether interest and penalty is imposable even it C.E. duty has been deposited by the assessee before Show-Cause Notice in case where the said duties deposited not voluntarily but on detection by the department.

2. The facts of the case are that the assessee-M/s. Him Chemicals & Fertilizers Limited, Village Maganpura, Nalagarh is engaged in the manufacture of fence fittings and scaffolding for which zinc metal and aluminum alloys are the raw material. The Central Excise staff visited the industrial premises of the assessee. On physical verification, it was found that though the finished goods tallied with the records, there was a shortage in the inputs, i.e., zinc metal and aluminum alloys which were subject to central excise and VAT duties. The Department, therefore, came to the conclusion that raw material which was liable to central excise and VAT had been removed from the factory premises clandestinely. Before issuing notice to the assessee, the assessee himself deposited the requisite amount payable as central excise and VAT. Thereafter, Show-Cause Notice was issued. The Assistant Commissioner confirmed the demand of Rs. 46745/- alongwith interest and also imposed penalty of Rs. 46745/-. This order was challenged in the appeal by the assessee. The main ground raised was that

since the Department had deposited the amount before the issuance of the notice, the assessee was not liable to pay any penalty. The Commissioner (Appeals) allowed the appeal and set aside the order of the Assessing Officer in relation to penalty. The Central Excise and Service Tax Appellate Tribunal, Delhi rejected the appeal filed by the revenue only on the ground that a Larger Bench of the Tribunal had taken a view that penalty cannot be imposed in case the assessee has deposited the amount before issuance of Show-Cause Notice.

3. Learned Counsel for the revenue submitted that view taken in the impugned order and the decisions relied upon therein, is not legally sustainable. Once there was requisite mens rea, which conferred jurisdiction to levy penalty, mere deposit of the amount of duty and interest by itself did not deprive the authority of jurisdiction to levy penalty, as the said deposit could not be conclusive of their being no intention to evade payment of duty or duty being short levied or for having not paid by reasons of fraud, collusion or any willful mis-statement or suppression of fact, or contravention of any of the provisions of this Act.

4. We have considered rival contentions and perused the record and statutory provisions.

5. Provisions of Section 11AC of the Act providing for penalty reads as under:

11AC. 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 hortlevied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful misstatement 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, the person who is liable to pay duty as determined under Sub-section (2) of Section 11-A, 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. 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.

7. It would be apposite to refer to a judgment of the Apex Court delivered in Sony India Ltd. Vs. Commissioner of Central Excise, Delhi, wherein the Apex Court held that where the assessee is guilty of taking an action which s not bona fide then penalty can be imposed. This would also be in consonance with the settled principle of law that a person who is guilty of trying to evade duty by mala fide methods should not be given the benefit of not having to pay penalty when his clandestine and mala fide acts are discovered by the revenue.

8. In view of the above, applicability of Section 11-AC is not excluded merely on deposit of the amount after having been caught but before the issuance of show-cause notice.

9. In view of the above discussion, the question is answered in favour of the revenue and against the asssessee. The appeal is accordingly allowed. No costs.

