(2014) 09 BOM CK 0014

In the Bombay High Court

Case No : Central Excise Appeal No. 215 of 2013

Commissioner of Central Excise APPELLANT

Vs

Jyoti Structure Ltd. RESPONDENT

Date of Decision : 01-09-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, 11A, 11AA

Citation : (2014) 309 ELT 209

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : Vijay Kantharia and Suchitra Kamble, Advocate for the Appellant

Judgement

1. We have heard Mr. Kantharia, learned Counsel appearing in support of this appeal. He submits that though there are concurrent findings rendered by the Commissioner of Central Excise on 12-11-2007 and by the Tribunal in the impugned order dated 16-6-2009 [2009 (247) E.L.T. 555 (Tribunal)], yet the appeal raises a substantial question of law. In his submission, when the Revenue has invoked the extended period within the meaning of sub-section (4) of Section 11A of the Central Excise Act, 1944, then, a separate proof for satisfying the ingredients thereof is not necessary for imposition of the penalty. In any event such proof was there on record and therefore, the penalty of Rs. 4,83,490/- imposed on the respondent/assessee under Section 11 of the Central Excise Act, 1944 could not have been set aside. The appeal, therefore, raises a substantial question of law. We are unable to agree with Mr. Kantharia for more than one reason. Sub-section (4) of Section 11A enables the issuance of notice upon requisite satisfaction being reached, namely, where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by the reason of either fraud or collusion or any wilful misstatement or suppression of fact or contravention of any of the provisions of the Central Excise Act, 1944 or Rules made thereunder with an intent to evade payment of duty. That contravention should be by any person chargeable with the duty. The

Central Excise Officer then can and within five years from the relevant date serve a notice on such person requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 11AA and the penalty equivalent to the duty specified in the notice.

2. In the present case the respondent is engaged in manufacture of Galvanized Transmission Towers and parts thereof falling under Chapter 7308 of the Central Excise Tariff Act, 1985. The Officers of the Preventive Unit pointed out that the Respondents cleared these goods and parts thereof with remarks on the invoices and which demonstrate that they are exempted from payment of excise duty. The notification in that behalf has been referred by the Commissioner (Appeals) in Paragraph 2 of his order. He has also adverted to the cause shown by the Assessee. Eventually after analyzing the entire material the Commissioner (Appeals) concluded that the Assessee acted bona fide on the advice/purchase order of the customer and availed the exemption. When it was pointed out later on that the Condition No. 64 of the Notification is not fulfilled and the exemption is not available to the Assessee, the Assessee paid the amount of duty leviable together with interest thereon. There was nothing on record about any ingredients, namely, fraud, collusion or any wilful misstatement or suppression of facts, etc. so as to enable the Revenue to impose the penalty and therefore, the Commissioner (Appeals) has set aside the penalty. That is in the facts and circumstances peculiar to this case. We do not find that the understanding of the Commissioner (Appeals) and the Tribunal on applicability of the provision enabling imposition of penalty is in any way perverse or vitiated to such an extent as would call our interference in further appellate jurisdiction. The concurrent findings are that (sic) a notice could be issued if the duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by the reason of fraud, collusion, etc., but for the purpose of imposition of penalty, in the final analysis, these elements have to be proved. They could be said to be satisfied only on the basis of the material produced. If the material produced is not pointing towards any fraud or collusion or any wilful misstatement or suppression of facts or contravention of the provisions of the Act or Rules with an intent to evade payment of duty, then, imposition of penalty is not called for. If the penalty cannot be imposed, then, the Revenue''s exercise in doing so has been rightly interfered with. We do not find that any substantial question of law arises for consideration from such concurrent findings. The Appeal is devoid of any merits. It is dismissed. No costs.