
(2015) 02 MAD CK 0369
In the Madras High Court
Case No : C.M.A. No. 874 of 2009

Commissioner of Central Excise

APPELLANT

Vs

Peter and Miller Packers

RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:

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

Citation : (2015) 319 ELT 631

Hon'ble Judges : R. Sudhakar, J;R. Karuppiiah, J

Bench : Division Bench

Advocate : Rajnish Pathyil, for the Appellant

Judgement

R. Sudhakar, J.—Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Revenue is before this Court by filing the present appeal. This Court, vide order dated 2-4-2009 admitted the appeal on the following substantial questions of law:-

"(i) Whether on the facts and circumstances of the case, the Appellate Tribunal is right in setting aside the Commissioner's order by way of remand to re-quantify the duty within the normal period accepting the assessee's plea of "ignorance of law" for non-payment of duty?

(ii) Whether on the facts and circumstances of the case, the Appellate Tribunal is right in deleting the levy of penalty under Section 11AC of the Act and order to pay the interest as applicable under Section 11AB of the Act?

(iii) Whether on the facts and circumstances of the case, the Appellate Tribunal is right in vacating the penalty and the demand of interest observing that the ingredients to invoke larger period are absent whereas the respondent/assessee had taken registration and started paying duty only after the investigation conducted by the Department?"

The facts, in a nutshell, are as hereunder:-

The respondent/assessee is engaged in repacking of goods falling under sub-heading 3819.00 and 3820.00 of the Central Excise Tariff Act, which were received from Indian Oil Corporation (for short "IOC"), which is a public sector undertaking. IOC supplied Hydraulic Brake Fluid and Servo Kool (Servo Brake Fluid) to the appellant. After repacking, the respondent/assessee is despatching the repacked goods to various depots of IOC as per instructions from IOC. Those raw materials were received in bulk under invoice issued under Rule 52A of the Central Excise Rules, 1944. Along with those raw materials, the assessee received packing materials such as plastic containers of various dimension along with printed cartons for packing those goods. Those packing materials contain logo/emblem of IOC, viz., "SERVO". On receipt of the bulk materials, the same is stored in their tanks and, subsequently, refilled in smaller packs as per instructions of IOC. Thereafter, as per the despatch orders issued, the respondent/assessee despatches goods packed in the containers, which are thereafter packed in cartons containing the name of IOC, viz., "SERVO".

2. As per Note 5 of the Tariff 38 inserted by Finance Act, 1997, repacking amounts to manufacture and as a result, the respondent is not eligible for SSI exemption as they are repacking products of IOC with the brand name "SERVO" belonging to IOC.

3. Statements were recorded from various officers of the respondent, who clearly admitted that they had no knowledge of the same and, therefore, they did not pay duty. One Mr. K.S. Uma Shankar, Asst. Manager (Finance), Indian Oil Corporation, in his statement has stated as follows:-

"For the specific question on excisability of repacked goods from bulk into small packing he admitted that they were under the impression that the repacking of bulk into smaller packs does not attract any Excise duty and so he has not intimated the same to the Department. He further added that now only he came to know about insertion of Chapter note 5 in Chapter 38 of the Schedule to the Tariff, on being pointed out by the officers. As regards the duty liability, he states that the same has to be decided by their Regional Office and will convey the same to their Regional Office and will intimate the result."

4. A show cause notice, dated 11-1-1999, was issued, which, for better appreciation of the case, is extracted hereunder:-

"10. From the foregoing facts, it appears that PMP have been engaged in the repacking of coolants and brake fluids falling under Chapter 38 of the Tariff. The goods have been supplied by IOC (from their Lube Blending Plant, Chennai and plants at Trombay and Vashi) in bulk and the repacked unit containers cleared to the depots of IOC as per the instructions of IOC. The unit containers have been supplied by IOC itself along with the packing materials, viz., cartons. Both the unit containers and the packing materials bear the LOGO/EMBLEM of IOC. M/s. PMP deliberately did not declare to the Central Excise Department the fact that they were manufacturing "servo kool" and hydraulic brake fluid. They suppressed

this information from the Department with the intention to evade payment of duty. M/s. PMP are, therefore, liable to pay Central Excise duty on the repacked coolants and brake fluids in unit containers in terms of the proviso to Section 11A(1) of the Act. They are not eligible for SSI exemption since they are using the brand name SERVO belonging to IOC, on their products."

5. The above show cause notice was issued invoking the proviso to Section 11(A) (1) of the Act extending it for demand to the larger period. The quantification of the differential demand for duty and liabilities made in the show cause notice, for better clarity, are extracted hereunder:-

"12. Therefore, M/s. Peter and Miller Packers at 130, Rama Naicken Street, Royapuram, Chennai-13 are required to show cause to the Commissioner of Central Excise, Chennai-I Commissionerate, 121, Mahatma Gandhi Road, Nungambakkam, Chennai-34, within 30 days from the date of receipt of this notice, as to why

(i) the Central Excise Duty of Rs. 30,91,400/- (Rupees thirty lakhs ninety one thousand and four hundred only) being the duty on the clearances and the stock as on 24-7-98, of Servo Kool and Hydraulic Brake Fluids manufactured by them and cleared to the depots of IOC during the period from January, 1998 to 24th July, 1998, as detailed in the Annexure "B" enclosed with this notice should not be demanded from them under Rule 9(2) of the Rules read with the proviso to Section 11A(1) of the Act;

(ii) the amount of Rs. 1,51,000/- paid by M/s. PMP on 22-9-98 towards payment of duty on the stock of repacked goods available with them on the date of detection of the case, should not be adjusted towards the abovesaid demand of duty; and

(iii) a penalty should not be imposed on them under Section 11AC of the Act and Rule 173Q of the Rules for the abovementioned contravention."

Similar show cause notice was also issued on IOC.

6. The said show cause notice was adjudicated by the Commissioner, who held that ignorance of law is no ground to avoid payment of duty and, therefore, he held that the assessee is guilty of suppression of material facts with intent to evade payment of duty and, therefore, invoked the extended period under proviso to Section 11A. The relevant portion, as is evident from para 11, reads as follows:-

"11. I have carefully gone through the records of the case. There is no dispute that repacking of Servo Kool and Hydraulic Brake Fluid from bulk packs amounted to manufacture as per Chapter Note 5 of Chapter 38 of the Tariff. This Chapter Note was inserted by the Finance Act, 1997. M/s. IOC and M/s. PMP entered into contract to repack the above mentioned products in January, 1998. Since M/s. IOC are one of the large public sector undertaking in India, they cannot plead ignorance of the insertion of this chapter note. They could have

advised M/s. PMP about the duty liability involved in the activity of repacking. Moreover, M/s. PMP have another unit at Bombay. Hence they also cannot plead ignorance of law. Therefore, I hold that M/s. PMP are guilty of suppression of material facts with intent to evade payment of duty and, hence, invoking the extended period under proviso to Section 11A of the Act is justifiable."

7. Consequent upon the same, demand together with penalty under Section 11AC and Section 209A came to be passed. The relevant portion of the order is quoted hereinbelow:-

"15. In view of the discussion made in the preceding paragraphs, I pass the following order:-

(a) I demand an amount of Rs. 32,17,984/- towards duty payable on the repacked goods manufactured and cleared/held in stock by M/s. PMP during the period from January, 1998 to 24-7-98 under Rule 9(2) of the rules read with proviso to Section 11A(1) of the Act subject to my observation in para 12 of this order. I also order adjustment of an amount of Rs. 1,51,000/- being the duty paid on the stock of repacked goods available with them on the date of detection of the case against the demand confirmed though they have claimed that Rs. 3,47,369/- had been paid towards duty liability on the stocks held as on 24-7-98. The Assistant Commissioner had confirmed that only an amount of Rs. 1,51,000/- alone had been paid by M/s. PMP towards the duty liability.

(b) I impose a penalty of Rs. 32,17,984/- on M/s. PMP under Section 11AC of the Act.

(c) I also impose a penalty of Rs. 50,000/- on M/s. IOC under Rule 209A of the Rules.

(d) I hold that an amount of Rs. 3,00,633/- paid by M/s. IOC cannot be adjusted against the demand confirmed against M/s. PMP."

8. Aggrieved against the said order, the assessee moved appeal before the Tribunal and the Tribunal, taking note of the plea that Modvat credit is available to the assessee during the relevant period, remanded the matter back to the Commissioner for de novo consideration.

9. On remand, the Commissioner adjudicated the case once over and held that the assessee does not dispute that as per Note 5 of Chapter 38 of the Central Excise Tariff, repacking of goods amounts to manufacture. The Commissioner, therefore, held that it is a clear case of suppression of fact with intendment to avoid payment of duty. However, the Commissioner, on adjudication, allowed credit of duty on goods received in bulk and taking note of the report of the Divisional Assistant Commissioner, while passed the following order, also imposed penalty under Section 11AC and interest under Section 11AB:-

"15. The Divisional Assistant Commissioner in his report dated 10-4-2001 has stated that the assessee was entitled to a credit of Rs. 29,23,969/-. I am not

encouraged to take a different view, in the absence of any distinguishing facts. In the light of the order of Hon"ble CEGAT, and on redetermination, the duty liability works out to Rs. 2,94,022/- after permitting the Modvat eligibility of Rs. 29,23,969/- to offset against the duty remanded.

16. In view of the above, I pass the following :

ORDER

(a) I confirm an amount of Rs. 2,94,022/- towards duty payable on the repacked goods manufactured and removed/held in stock by M/s. PMP during the period from Jan. 1998 to 24-7-98 under Rule 9(2) of the Rules read with proviso to Section 11A(1) of the Act against the duty demanded. I also order adjustment of Rs. 1,51,000/- being the duty paid on the stock of repacked goods available with them on the date of detection of case against the duty confirmed above.

(b) I impose a penalty of Rs. 2,94,022/- on M/s. PMP under Section 11AC of the Act.

(c) I order them to pay the interest as applicable under Section 11AB of the Act."

10. The said order was once again challenged by the assessee before the Tribunal and the Tribunal came to hold that the default in payment of duty was due to ignorance and, therefore, larger period cannot be invoked. The Tribunal held that there was no intention on the part of the assessee to avoid payment of duty. The Tribunal held that the Commissioner's finding of suppression of fact is without any basis and, therefore, invoking the larger period was wrong. There was no mens rea and as a result no penalty could be imposed under Section 11AC so also interest under Section 11AB and accordingly allowed the appeal filed by the assessee. The reasoning of the Tribunal, for better clarity, is extracted hereunder:-

"4. We have carefully considered the facts of the case and the submissions made by both sides. The appellant does not dispute their liability to duty on the subject clearance. The consistent case of the appellant had been that the failure to pay the duty due occurred owing to their coming to know of the requirement belatedly. Even the executive of the IOC which had been Excise control for generation was unaware of the legislative changes which fastened the subject liability to the appellants. In the impugned order, the Commissioner does not find mens rea on the part of the appellants in not paying the duty. He only found that the assessee which undertook repacking of the impugned goods in labeled containers could not plead ignorance of law. He found that the appellants were guilty of suppression of material facts and that intention of PMP was established. We find that this finding is without any basis. We are inclined to believe that PMP did not pay the duty on the impugned goods owing to ignorance of their new liability as per the Finance Act, 1997. In the circumstances, the demand could not have been raised invoking larger period. Penalty could not have been imposed under Section 11AC and demand of interest could not have been made

under Section 11AB in the absence of ingredients to invoke larger period."

Aggrieved against the said order of the Tribunal [2008 (232) E.L.T. 635 (Tri.-Chennai)], the appellant/Revenue is before this Court by filing the present appeal.

11. The main plank of contention of the learned Standing Counsel for the appellant/Department is that ignorance of law is no excuse for defaulting in payment of tax. It is the further submission of the learned Standing Counsel appearing for the Revenue that IOC, being a public sector undertaking and having been under Excise Control Laws time immemorial, as has been rightly accepted by the Tribunal itself, should have been well aware of the legislative changes and should have, in turn, passed on the knowledge to the assessee, which it did not do. It is submitted by the learned Counsel for the Revenue that the assessee is having another unit at Bombay where they would be paying similar tax and, therefore, they cannot plead ignorance of law. On the question of invoking the larger period, it is the submission of the learned Counsel for the Revenue that the assessee was doing the activity of repacking for over seven months prior and took registration only after visit of the Divisional Preventive Team and, therefore, invocation of larger period by the adjudicating authority is in order. In view of the activity of the assessee, which dates back to seven months, the levy of penalty and interest under Section 11AC and 11AB cannot be found fault with, which is the proposition of law as laid down by the Supreme Court in the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, (2008) 219 CTR 617 : (2008) 133 ECC 247 : (2008) 159 ECR 247 : (2008) 231 ELT 3 : (2008) 306 ITR 277 : (2008) 11 JT 255 : (2008) 13 SCALE 233 : (2008) 13 SCC 369 : (2008) 174 TAXMAN 571 : (2009) 11 Vat Reporter 63 : (2008) 18 VST 180 . It is the further submission of the learned Counsel for the Revenue that the assessee having not disputed the non-declaration of packing activity to the Central Excise Department and the deemed manufacture clause introduced as Note 5 of Chapter 38 of Central Excise Act, is guilty of suppression of material facts with an intention to evade Excise duty. In the above backdrop, it is the vehement submission of the learned Counsel for the Revenue the assessee having resorted to subterfuge with an intention to evade duty, the Commissioner (Appeals) was right in demanding duty along with interest and penalty and the order of the Tribunal setting aside the same is liable to be interfered with.

12. Heard the learned Standing Counsel appearing for the appellant/Revenue and perused the materials available on record. In spite of notice, there is no representation on behalf of the respondent/assessee.

13. On a perusal of the order of the Tribunal, it is evident that the Tribunal has primarily acted upon the fact that even IOC, which was under Excise Control for generations, was unaware of the relative changes in law and, therefore, the stand of the respondent/assessee, a bulk repacking unit that it had no knowledge of the change of law has to be accepted. In fact, the Tribunal accepted the plea of the ignorance of law as a primary reason and, accordingly, held that demand

invoking the larger period provided under proviso to Section 11A could not be sustained. Accordingly, the Tribunal went on to hold that the penalty and interest levied thereon also are unsustainable.

14. In this case, we have already extracted both the adjudication orders, viz., on the first occasion and, thereafter, on remand. There is a specific finding by the Commissioner that only due to ignorance of law, the assessee has not paid the duty. It is trite law that ignorance of law cannot be a ground to avoid tax liability and to allow the appeal. There is yet another factor involved in the present case, viz., IOC being a public sector undertaking, as has been admitted by the Tribunal, is under Excise control for generations. IOC has supplied goods in bulk and, therefore, show cause notice has also been issued on them. Therefore, IOC should have been well aware of the change in circumstances. In such circumstances, it should be expected that the assessee was aware of the position through IOC. Further, the assessee having an unit at Bombay, would have been aware of the changes in the law and, therefore, it cannot come before this Court and seek indulgence on the ground of ignorance of law.

15. The element of mens rea is one of the components that will be relevant for the purpose of invoking proviso to Section 11A of the Central Excise Act. In the present case, merely pleading ignorance of law, the assessee cannot wriggle out of the duty liability for the larger period. The Tribunal has been kind enough to remand the matter for de novo adjudication on a claim of Modvat credit and that has been allowed. However, the fact remains that duty liability has to be worked out for the larger period if the ingredients of Section 11A has been made out.

16. In Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, AIR 1989 SC 832 : (1989) 40 ELT 276 : (1990) 184 ITR 224 : (1989) 1 JT 417 : (1989) 1 SCALE 436 : (1989) 2 SCC 127 : (1989) 1 SCR 711 : (1989) 1 UJ 539 , the Supreme Court passed the following order:-

"8. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of Excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."

17. In the case of Pushpam Pharmaceuticals Company Vs. Collector of Central

Excise, Bombay, (2002) 80 ECC 6 : (1995) 78 ELT 401 : (1995) 3 SCC 462 Supp , the Supreme Court held as under:-

"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different than what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(Emphasis supplied)

18. In this case, IOC, which is a public sector undertaking and admittedly coming under the Excise Control for generations, as observed by the Tribunal, should have, at the time of supply of bulk goods, informed the assessee that on repacking, duty liability has to be discharged. In this case, correct information was not disclosed to escape payment of duty.

19. The main ground on which the Tribunal granted the relief being ignorance of law, this Court is of the considered opinion that the said proposition is not acceptable in law. The statement recorded from the persons and the finding of the Commissioner in the earlier and later orders clearly show that it is a case where proviso to Section 11A could be invoked. Therefore, we answer the first question of law against the assessee and in favour of the Revenue.

20. Insofar as the issue relating to penalty under Section 11AC is concerned, this Court had occasion to deal with similar issue in CMA No. 1099 of 2008, wherein the decisions in Dharmendra Textiles case and Rajasthan Spinning and Weaving Mills case (supra) were taken into consideration and this Court, in the said judgment held as under:-

"8. While considering the pari materia provision, namely, Section 11AC of the Central Excise Act, the Supreme Court in the decision reported in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, (2008) 219 CTR 617 : (2008) 133 ECC 247 : (2008) 159 ECR 247 : (2008) 231 ELT 3 : (2008) 306 ITR 277 : (2008) 11 JT 255 : (2008) 13 SCALE 233 : (2008) 13 SCC 369 : (2008) 174 TAXMAN 571 : (2009) 11 Vat Reporter 63 : (2008) 18 VST 180 , held as follows:

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroffs case (supra) was not correctly decided but Chairman, SEBI's case (Supra) has analysed the legal position in the correct perspectives. The reference is answered...."

9. The above-said decision was followed by the Supreme Court in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, (2009) 224 CTR 1 : (2009) 165 ECR 93 : (2009) 238 ELT 3 : (2009) 7 JT 314 : (2009) 8 SCALE 231 : (2009) 13 SCC 448 : (2009) 10 SCR 58 : (2009) 20 STT 481 : (2009) 180 TAXMAN 609 : (2009) 4 UJ 1637 : (2009) 11 Vat Reporter 210 , wherein, the Supreme Court held as follows:

"23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.

24. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision.

25. In the light of the discussion made above it is evident that in both the appeals, orders were passed by the Tribunal on a wrong premise. In both the appeals, therefore, the impugned orders passed by the Tribunal are set aside and the matters are remitted to the respective Tribunals for fresh consideration, in accordance with law, and in the light of this judgment...."

10. In view of the categorical statement of law and taking note of the specific provision of Section 11AC where there is a specific mandate that the assessee shall be liable to pay penalty, the mere payment of duty even after the show cause notice is not a ground to waive penalty. Hence, the Tribunal is not justified in deleting the penalty imposed under Section 11AC of the Central Excise Act. Such a mandate under the Statute cannot be given a go-by by the Tribunal. We therefore, answer the question of law in favour of the Revenue."

21. The above decision postulates that on confirmation of duty, there is a specific mandate for levy of penalty under Section 11AC. In view of the above, the

penalty imposed under Section 11AC is justified. Since this Court has held that the duty demand and the penalty are justified due to suppression of materials by the assessee, the consequential payment of interest on delayed payment of duty stands attracted automatically and the Revenue is justified in invoking Section 11AB directing payment of interest. For the all the reasons above stated and in view of the above decision, substantial questions of law Nos. 2 and 3 are answered in favour of the Revenue and against the assessee. In the result, this appeal is allowed setting aside the order passed by the Tribunal.