(2012) 07 AHC CK 0341

In the Allahabad High Court

Case No : Central Excise Appeal Defective No. 9 of 2005

Commissioner of Central Excise APPELLANT

Vs

Polar Industries Ltd. RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A

Citation : (2013) 292 ELT 503 : (2013) 21 GSTR 395

Hon'ble Judges : Sunil Ambwani, J;Aditya Nath Mittal, J

Bench : Division Bench

Advocate : B.K. Singh Raghuvanshi, for the Appellant;

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the appellant. The appeal was admitted on 30-8-2010. Office has reported on 17-2-2012 that notices were issued to the respondents but neither acknowledgment nor undelivered cover has been received back.

2. The petitioner was required to affect service on the respondents. An affidavit of service of Ms. Pallabika Dutta has been filed. On the report of the office and the affidavit of service, the service shall be deemed to be sufficient.

3. We have considered the grounds of delay in filing the appeal and find them to be good and sufficient. The delay in filing the appeal is condoned. The delay condonation application is allowed.

4. This appeal has been preferred by the Central Excise Department primarily on the ground that the respondent-assessee did not disclose the marketing pattern of the company. The company was clearing the goods (Polar fans), which was manufactured by the other company. A show cause notice beyond the period of limitation was issued on the ground of clandestine removal of goods.

5. The Customs, Excise & Service Tax Appellate Tribunal in its order dated

10-12-2003 has recorded findings of fact that the department was aware of the marketing pattern of the company as in the case of 2003 (87) ECC 620 , rendered in the case of company belonging to Polar Group as early as in 1994 the department was aware of the marketing pattern of the company. The relevant portion of the order quoted by the Tribunal is recorded as below:-

We have perused the records and have heard the Ld. SDR also. It is clear that Revenue Authorities were aware of the marketing pattern of the appellant-companies. A show cause notice taking almost the same ground as raised in the present proceedings was issued by the Meerut Collectorate as early as 1994. The thrust of the allegations in that show-cause-notice was also that the manufacturing companies and the marketing company were related persons and that the sale price to the related marketing company cannot constitute the correct assessable value. These proceedings culminated in the passing of this Tribunal''s Order No. 725/99-A, dated 26-5-1999. Therefore, the allegation of suppression of facts with intend to evade payment of duty is not maintainable for a subsequent period. This position was known to the Ld. Commissioner who passed the impugned order also. However, he has proceeded to pass the impugned order on the ground that in the earlier proceedings this point was examined in isolation and that it resulted in the "proverbial vision of an elephant". Such a finding cannot constitute the basis for re-opening the proceedings in terms of Proviso to Section 11A. Despite knowledge of facts, if revenue took a blinkered view, the assessee cannot be blamed for it. Admittedly, bulk of the demand is beyond the permissible time-limit. In these facts and circumstances, the demand made for the extended period has to fail at the threshold on the ground of limitation. We are not going into the merits of the case, as the assessee do not consider this an appropriate case to press their submissions on merits. They are right in their submission that even the demand within the normal time-limit is required to be re-computed after making due allowance for freight taxes, cash discount and transit insurance from the sale price of M/s. Polar International Ltd.

6. The Tribunal consequently found that the same ratio has to be applied in the present case as well. It did not find the contentions raised on the ground of limitation to be sufficient and held that the demand beyond the normal period u/s 11A of the Central Excise Act is barred by limitation. The penalty on the appellant as well as its directors and officials was not found sustainable.

7. Learned counsel for the department states that it was incumbent upon the company to disclose its marketing pattern. The company was clearing fans without disclosing marketing pattern and thus the sale price could not constitute the correct assessable value clandestinely evading the excise duty and thus show cause notice was even beyond the period of limitation was valid.

8. The Tribunal has recorded the findings that the department (the Commissioner himself) was aware of the marketing pattern of the company as the earlier decision was rendered in the case of company belonging to the same group. The

show cause notice in that case was also issued on the same ground namely that manufacturing company and marketing company were related persons and that sale price to the related marketing company could not have constituted correct assessable value. The department is dealing with the same group of companies and thus the finding that it was aware of the marketing pattern is a finding of fact, which does not call for interference.

9. We do not find any illegality in the findings recorded by the Tribunal, that in the circumstances the demand beyond the normal period u/s 11A, was barred by limitation. The Central Excise appeal is dismissed.

