(2014) 01 AHC CK 0314

In the Allahabad High Court

Case No : Central Excise Appeal No. 8 of 2014

Commissioner of Central Excise, Customs and Service Tax APPELLANT

Vs

Precision Pipes and Profiles Co. Ltd. RESPONDENT

Date of Decision : 07-01-2014

Acts Referred:

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

Citation : (2014) 302 ELT 184 : (2014) 25 GSTR 36

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J;Dilip Gupta, J

Bench : Division Bench

Advocate : Amit Mahajan, Advocate for the Appellant

Judgement

1. The appeal by the Revenue arises from a decision of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, dated March 22, 2013. The Revenue has formulated the following substantial questions of law:

(i) Whether on the facts and in the circumstances of the case the CESTAT was justified in holding that although on merits the respondent shall not succeed following the apex court''s decision in the case of CCE Vs. Sunwin Technosolution P. Ltd., , the appeal filed by the respondent only succeeds only on the point of time bar and not on merit?

(ii) Whether on the facts and in the circumstances of the case the CESTAT was justified in holding that the respondent ought not have been denied the benefit of credit of additional customs duty paid through DEPB scheme on the ground that the respondent was in dark for the confusing or the divergent views expressed by the Tribunal in the plethora of cases?

2. The assessee is registered with the Central Excise Department for manufacture of automobile parts (articles of plastic) falling under Chapter subheading 3916 90 of the Schedule to the Central Excise Tariff Act, 1985. For the period December, 2003 to July, 2004, the assessee availed of Cenvat credit of Rs. 42,10,670 on the strength of eleven bills of entry in which the additional

customs duty had not been paid in cash but had been adjusted against duty entitlement passbook (DEPB).

3. A notice to show cause was issued to the assessee on December 9, 2005 invoking the extended period of limitation under the proviso to section 11A(1) of the Central Excise Act, 1944. The Additional Commissioner, Central Excise, Noida confirmed the duty demand and held, on the basis of the following findings, that the extended period of limitation had been validly invoked:

I find that Cenvat credit was taken on the strength of the bills of entry under discussion in the months of March 12 to April 7. The ER-1 returns and Cenvat credit returns submitted by the party for these months do not reflect that the additional customs duty (CVD) was paid through DEPB adjustments nor these returns show that bills of entry were submitted to the Department. The self-assessment memorandum Sl. No. 7(a) of the aforesaid ER-1 returns submitted by the party declares that the information given in the return is true, correct and complete in every respect whereas material information relating to taking of Cenvat credit on the strength of bills of entry on which additional duty of customs (CVD) has been paid through DEPB adjustment has not been incorporated in either of the aforesaid returns. The party had also not submitted the aforementioned bills of entries to the Department so that the Department could have knowledge to material information contained therein. Thus the material information relevant for scrutiny of above returns were suppressed and concealed from the Department. The party had deliberately concealed the facts with the Department with intent to evade the Central excise duty by debiting the duty through DEPB Scheme. Accordingly, the party suppressed the fact by not following the procedure as prescribed and availed/utilised the Cenvat Credit wrongly. Hence extended period u/s 11(A) of the Central Excise Act, 1944 is invokable in the instant case for recovery of inadmissible credit availed of by them.

4. A penalty in the like amount of Rs. 42,10,670 was imposed u/s 11AC.

5. In appeal, the Commissioner (Appeals) also held that under paragraph 4.3.5 of the Exim Policy of 2002-07 it had been made clear that additional customs duty paid in cash on inputs under the DEPB Scheme shall be adjusted against the Cenvat credit or duty drawback. Moreover, where additional customs duty was adjusted from DEPB, no benefit of Cenvat credit/drawback shall be admissible. In the present case since the assessee has not paid the duty in cash, it was held that the demand was valid and proper. In regard to the applicability of the extended period of limitation, the Commissioner (Appeals) has held as follows:

But the fact is that on being pointed out by audit, the fact of payment of countervailing duty through adjustment in DEPB, recovery proceedings were initiated against the appellants. Had the duty paying documents been submitted along with ER-1 returns/Cenvat credit returns, non-payment of duty in cash would have been detected at that very stage and the credit in question would have been disallowed. In this way it is evident that the fact of payment of countervailing duty through DEPB was not in the knowledge of the Department ever before, until it was pointed out by the audit. In view of this it can safely be inferred that the appellant suppressed the fact of not paying duty in cash and availing of credit thereof wrongly. As such I do not find that the extended period has wrongly been invoked in this case.

6. The view of the Commissioner (Appeals) has been reversed by the Tribunal, following its decision in 2012 (193) ECR 1 02 . The Tribunal has held that no mala fides could be attributed to the assessee since it was in the decision of the Punjab and Haryana High Court in Commissioner of C. Ex. Vs. Neel Kanth Rubber Mills, that the controversy was eventually resolved.

7. Hence, the Tribunal was of the view that although on merits the assessee is not entitled to succeed, the appeal would have to be allowed only on the bar of limitation since the extended period of limitation was not applicable.

8. Paragraph 4.3.5 of the Exim Policy for 2002-07 under which the licenses for import were issued provided as follows:

Normally, the exports made under the DEPB Scheme shall not be entitled for drawback. However, the additional customs duty/excise duty paid in cash on inputs under the DEPB shall be adjusted as Cenvat credit or duty drawback as per rules framed by the Department of Revenue. In cases, where the additional customs duty is adjusted from DEPB, no benefit of Cenvat/drawback shall be admissible.

9. On January 28, 2004, Notification No. 28/(RE 2003)/2002-07, was issued by the Ministry of Commerce and Industry by which the last sentence of paragraph 4.3.5 noted above was deleted. After the deletion, paragraph 4.3.5 reads as follows:

Normally, the exports made under the DEPB Scheme shall not be entitled for drawback. However, the additional customs duty/excise duty paid in cash on inputs under the DEPB shall be adjusted as Cenvat credit or duty drawback as per rules framed by the Department of Revenue.

10. Consequently, it is clear that both before and after the amendment, paragraph 4.3.5 expressly stipulated that it was only when the additional customs duty was paid in cash on inputs under the DEPB that it would be adjusted against the Cenvat credit or duty drawback.

11. Subsequently Notification No. 96/2004-CE , dated September 17, 2004 was issued and Condition (vi) of this notification stipulates that importers shall be entitled to avail of the drawback/Cenvat credit against the amount debited in DEPB. This notification was followed by a circular dated October 21, 2004 which came into effect from September 1, 2004 which clarifies and explains the notification dated September 17, 2004. Paragraph 6 of this circular provides that the aforesaid facility would be available only in respect of the licenses issued

under the new Foreign Trade Policy and the licenses issued under the previous policies would be governed by the provisions of the earlier policies.

12. The Tribunal, in the present case, has held that the notification dated September 17, 2004 would have only prospective effect. This view is in accord with the judgment of the Supreme Court in CCE Vs. Sunwin Technosolution P. Ltd., . On this view the Tribunal was of the opinion that the assessee was not entitled to succeed on merits. However, what weighed with the Tribunal was that the invocation of the extended period of limitation under the proviso to section 11A(1) was not proper.

13. In this regard, we find merit in the contention of the learned counsel appearing on behalf of the Revenue that the Tribunal has given absolutely no consideration either to the reasons indicated in the order of the Additional Commissioner while confirming the duty demand or to those contained in the order of the Commissioner (Appeals). Both these orders take note of the fact that the ER-1 returns and Cenvat credit returns submitted by the assessee did not disclose or reflect that the additional customs duty had been paid through DEPB adjustments, nor did the returns show that the bills of entry were submitted to the Department. Moreover, it has been found that the payment of additional customs duty through DEPB adjustments was not incorporated in any of the returns and it was only in the course of audit that it was found that the additional customs duty had not been paid in cash. It was on this basis that the extended period of limitation was sought to be invoked. If the Tribunal had to reverse this view regarding invocation of the extended period of limitation, it was necessary for it to indicate some reasons why the factual findings contained in the order of the Additional Commissioner and the Commissioner (Appeals) were being overruled. There is absolutely no reasoning on that aspect. The Tribunal has relied upon its own decision in 2012 (193) ECR 1 02 . The decision in 2012 (193) ECR 1 02 refers to the confusion in law which prevailed until the judgment was delivered by the Punjab and Haryana High Court in Commissioner of C. Ex. Vs. Neel Kanth Rubber Mills, . In our view, the essential aspect which has to be considered by the Tribunal is as to whether, within the meaning of the proviso to section 11A(1), the short-levy was by reason of fraud, collusion, wilful misstatement or suppression of facts or contravention of the provisions of the Act or the Rules with intent to evade payment of duty. The Tribunal has not applied its mind to this aspect.

14. The assessee has been served with a notice that the appeal would be taken up on January 7, 2014 and an acknowledgment has been filed but no counsel has appeared.

15. For the reasons indicated above, we are of the view that the order passed by the Tribunal is unsustainable and that the proceedings should be restored back to the file of the Tribunal for a fresh consideration. We may clarify that since the assessee is not before the court, we are of the view that the interests of justice would demand an order of restoration of the proceedings so that the assessee, if

it is so advised, can have an opportunity to urge all submissions before the Tribunal.

16. On remand, the Tribunal shall have due regard to the judgments of the Supreme Court on the invocation of an extended period of limitation including those in T.N. State Transport Corpn. Ltd. Vs. Collector of C. Ex., Madurai, and Nicholas Piramal India Ltd. Vs. Commnr. of Central Excise, Mumbai, .

17. In order to facilitate this, we set aside the impugned judgment of the Tribunal dated March 22, 2013 and restore the Excise Appeal No. E/3014/ 2007 to the file of the Tribunal for disposal afresh. In the view which we have taken, it is not necessary to express any opinion on the questions of law as raised.

18. The appeal is, accordingly, disposed of.

19. There shall be no order as to costs.