
(2010) 01 KAR CK 0084
In the Karnataka High Court
Case No : C.E.A. No. 131 of 2009

Commr. of C. Ex.

APPELLANT

Vs

Mac Charles (India) Ltd.

RESPONDENT

Date of Decision : 29-01-2010

Acts Referred:

Central Excise Act, 1944 — Section 11, 11 A, 11 AC, 35 G

Citation : (2010) 254 ELT 59

Hon'ble Judges : N. Ananda, J;D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : Jeevan J. Neeralgi, C.G.S.C, for the Appellant;

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—The appeal by the Commissioner of Central Excise, Bangalore-III, Commissionerate, Bangalore, u/s 35G of the Central Excise Act, 1944 [for short "the Act"] directed against the order of the Central Excise & Service Tax Appellate Tribunal [for short "CESTAT"], South Zonal Bench, Bangalore, dated 22-5-2009 [2004 (248) E.L.T. 632 (Tri. - Bang.)], setting aside the levy of penalty on the respondent-assessee u/s 11 of the Central Excise Act, 1944 [for short "the Act"] on the premise that the assessee had suppressed dutiable turnover of its confectionery products which is liable to excise duty under chapters 18 and 19 of the Central Excise Tariff Act, 1985, relevant for the period from 1-4-2002 to 31-3-2006.

2. While the respondent-assessee a franchisee of Le Meridian chain of Hotels had been carrying on activity of preparing confectionery products and supplying it to Hotel Le Meridian and were charging the price for it, the respondent who it appears had doubts about the liability or otherwise under the provisions of the Act had communicated to the excise authorities way back in the year 1997 by seeking advice etc., and with that correspondence not having culminated in any positive response by the authorities to indicate that the activity on the part of the respondent-assessee was one liable to payment of excise duty, the respondent

had continued with its preparation and supply of confectionery items to the Hotel, without worrying about payment of any excise duty.

3. It appears that the central excise authorities had on a perusal of the books of accounts of Le Meridian Hotel, who it appears had shown payment of certain sums to the appellant-assessee towards purchase of confectionery products from them, had thought it fit to issue show cause notice dated 14-5-2007 calling upon the respondent-assessee to show cause as to why the duty should not be demanded from the respondent for clearances made during the period from 1-4-2002 to 31-3-2006 and also as to why penalty should not be levied for not having paid the duty before making such clearances amounting to suppression of the dutiable turnover etc.

4. It appears the assessee had even before the issue of the show cause notice, on being apprised orally, had met the duty liability as had been quantified by the original authority and it appears the show cause notice is a subsequent follow up action after the assessee had made good the duty liability.

5. The assessee having already paid duty, contested the show cause notice only in so far as it related to the proposition of levying penalty claiming that there is no deliberate suppression of dutiable turnover and it is only because they were not properly advised or guided it had happened; that they had paid the duty on being told to pay such dues, nevertheless, the adjudicating authority adjudicated the show cause notice and chose to levy penalty of Rs. 3,89,276/- u/s 11AC of the Act on the premise that a total duty liability upto this extent having not been paid earlier. The adjudicating authority was of the view that the assessee though had paid duty even before the receipt of the show cause notice, nevertheless, duty liability being one computed by invoking the extended period of limitation as available u/s 11A of the Act assessee was to be inevitably mulcted with penalty u/s 11AC of the Act and under such circumstances thought it fit to levy penalty.

6. The assessee being aggrieved, appealed to the appellate commissioner in Appeal No. 156/2007-B.III [Copy at Annexure-D].

7. The appellate commissioner also was of the view that when once the provisions of Section 11A is attracted, it is inevitable to levy penalty u/s 11AC of the Act and accordingly dismissed the appeal in terms of the order dated 27-3-2008 [copy at Annexure-D].

8. As against these orders, the assessee appealed to the Tribunal u/s 35B of the Act.

9. The Tribunal examined the appeal in a pragmatic manner and appears to have taken a balanced view in holding that the circumstances did not reveal any suppression or deliberate attempt to evade payment of duty on the part of the respondent-assessee; that the bona fides of the assessee was indicated in terms of the assessee's letter dated 11-8-1997 addressed to the Superintendent of Central Excise seeking for guidance/advice as to duty liability and was also

pursuing the matter with the Federation of Hotel and Restaurants Association of India as to whether they have to register and pay any excise duty if they were covered under the Act and the Superintendent of Central Excise had only sought for further information from the assessee in terms of his letter dated 27-3-1998 which had also been responded by the assessee in terms of their further letter dated 15-4-1998 and the Tribunal on perusing the entire material, held, which in our opinion a right view, that the assessee had discharged the duty liability even before the issue of show cause notice and not having resorted to dispute its duty liability, the facts and circumstances of the case clearly indicated the non attraction of Section 11[AC] of the Act for imposing any penalty on the assessee : that there was absolutely no intention to evade any payment of duty on the part of the assessee nor to suppress any facts and accordingly allowed the appeal and set aside the penalty.

10. It is aggrieved by this order of the Tribunal dated 22-5-2009, the present appeal by the Excise Department u/s 35G of the Act.

11. Appearing on behalf of the appellant, Sri Jeevan J. Neeralgi, learned standing counsel for the revenue submits that the law on this aspect of the matter is well settled; that when once extended period of limitation in terms of Section 11A of the Act is invoked and certain duty liability is quantified, it inevitably attracts penalty in terms of Section 11AC of the Act and such is the law declared by the Supreme Court in the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, .

12. While it may be true that in that case the Supreme Court on examining the facts and circumstances opined that the provisions of Section 11AC of the Act was inevitably attracted, levy of penalty in each case is dependent on the facts and circumstances of the particular set of facts as they prevail.

13. We do not find that the present set of facts as noticed by the Tribunal which is a finding of fact, which we should accept u/s 35G of the Act which definitely indicates that neither the provisions of Section 11AC is attracted nor the Judgment of the Supreme Court is applicable in the peculiar facts and circumstances of the present case.

14. We find the Judgment of the Supreme Court is clearly distinguishable in the present set of facts and in this appeal and accordingly we do not admit this appeal for disturbing the order passed by the Tribunal which in our opinion is a correct order both on facts and law.

15. The appeal is dismissed.