(2013) 06 MAD CK 0014

In the Madras High Court

Case No : C.M.A. No. 651 of 2006

Commr. of C. Ex., Tiruchirapalli APPELLANT

Vs

Shree Ambika Sugars Ltd. RESPONDENT

Date of Decision : 27-06-2013

Acts Referred:

Citation : (2014) 299 ELT 452

Hon'ble Judges : K.B.K. Vasuki, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : S. Muthu Venkataraman for R. Karthikeyan, for the Respondent

Judgement

Chitra Venkataraman, J.—The Revenue is on appeal as against the order of the Customs, Excise and Service Tax Appellate Tribunal

cancelling the penalty levied u/s 11AC of the Central Excise Act, 1944 on the sole ground that the assessee has reversed the Modvat credit,

availed prior to the issuance of the show cause. The Revenue raised the following substantial question of law in preferring the above appeal:-

1. Whether the Tribunal is correct in holding that demand of interest u/s 11AB of Central Excise Act, 1944, as it stands after 11-5-2001 read with

Rule 57AH of the erstwhile Central Excise Rules, 1944/Rule 12 of the erstwhile Cenvat Credit Rules, 2001/Rule 12 of the Cenvat Credit Rules,

2002 is not payable if duty is paid before issue of show cause notice notwithstanding delay in payment of Central Excise Duty?

It is the admitted case of the assessee that the assessee transferred certain Cenvat availed inputs to its sister concerns and had not paid the

appropriate duty at the time of clearance to the said sister units. The assessee had mentioned in the despatch advices that the goods were sent on loan basis and the said removals were not made under the cover of the invoices prescribed under the Central Excise Rules prevailed during the

relevant period. When the assessee was confronted with the show cause notice for the period 1-5-2001 to 30-4-2003, on enquiry, the assessee

admitted that the non-payment was due to inadvertence and immediately, thereafter on 23-5-2003, they furnished the details of removal on inputs

and capital goods during the period 1-5-2001 to 30-4-2003 and paid the duty thereon. Thus, on the removal of goods without payment of duty,

proceedings were issued as detailed in the show cause notice demanding duty by invoking Section 11A(1) proviso of the Central Excise Act, 1944

read with Rule 57AH/Rule 12 of Cenvat Credit Rules, 2001/Rule 12 of Cenvat Credit Rules, 2002, applicable during the relevant period as well

as proposing to levy penalty u/s 11AC and interest u/s 11AB, penalty under Rule 173Q of the Central Excise Rules, 1944/Rule 26 of the Central

Excise Rules, 2001/Rule 26 of the Central Excise Rules, 2002. The assessee contested the proposal that there was no mens rea or willful

misconduct and the omission was only unintentional. However, the Assistant Commissioner of Central Excise held that penalty could not be

dropped and thereby, confirmed the imposition of penalty. Aggrieved by the same, the assessee filed appeal before the Adjudicating Authority.

2. The Adjudicating Authority, however, held that the assessee did not plead their bona fide and that as the omission was not an unintentional

mistake, their contention could not be accepted; the issue was a recurring one and hence there was mala fide intention on non-payment of duty. In

the circumstances, Rules 57AB, 52A and 173G, not being followed, the defence that the duty had been paid even before the adjudication was

made, would not be a good defence to the assessee. On the facts found, penalty u/s 11AC read with Rule 57AH and Rule 173Q of the Central

Excise Rules was held to be justified. As against the same, the assessee went on appeal before the Commissioner of Customs and Central Excise,

who upheld the order. As against the same, the assessee went on further appeal before the Customs, Excise and Service Tax Appellate Tribunal,

which, however, allowed the assessee''s appeal holding that Modvat credit irregularly availed was reversed prior to the issuance of show cause

notice and hence, penalty was not leviable. Aggrieved by the said order, the Revenue filed the present Civil Miscellaneous Appeal.

3. On going through the order passed by the Adjudicating Officer, we find that the periodicity of such a default appears to be more than once and

in more than one case, the assessee had not observed the procedure prescribed and prevailed during the relevant period. The period involved in

respect of clearance to various other sister concerns also were different. Leaving aside the fact that the assessee had paid the duty prior to the

issuance of show cause notice, the fact remains that the Adjudicating Authority found that the conduct of the assessee lacked bona fide and the

issue was a recurring one. Thus looking at the conduct of the assessee, the bona fides not thus established, the facts herein rightly called for levy of

penalty.

4. The fact that the Modvat credit irregularly availed was reversed prior to the show cause notice, does not afford a good defence of good faith

and could not be sustained in law. In the circumstances, we do not find any justification to uphold the order of the Customs, Excise and Service

Tax Appellate Tribunal allowing the assessee''s appeal to cancel the levy of penalty.

5. In the decision in the case of Commissioner of C. Ex., Chennai-II Vs. Hindustan Motors Ltd., which followed the decision in the case of

Collector v. Rashtriya Ispat Nigam Ltd., reported in 2004 (163) E.L.T. A53 (S.C.), this Court pointed out that there being no material to show

that there was escapement of duty and non-payment as intentional or on account of deception, the Revenue''s contention could not be upheld.

Thus, this Court upheld the order of the Tribunal. The case of the assessee herein stands on a different footing. The transaction of the assessee and

the periodicity as given in the order of the adjudicating authority reads as follows:-

The first appellate authority pointed out that the assessee paid the duty only during the course of the investigation and that in the past too, the

assessee had cleared the inputs and capital goods from the factory without payment of duty to other units during June, 2000 to April, 2001. The

clearance, particularly for the period under consideration, were not reflected in the monthly returns filed and the removal were made under the

despatch advices. The penalty levied for the earlier period was confirmed in appeal. Thus, considering the fact that the present case too was a recurrence, we find it difficult to accept the order of the Customs, Excise and Service Tax Appellate Tribunal on the aspect of mala fides.

Then, when as a matter of fact, the Commissioner of Customs and Central Excise had found that the assessee lacked bona fide, we find that there

are hardly any other material which the Customs, Excise and Service Tax Appellate Tribunal considered to come to a different conclusion. Thus,

the finding not being based on any material, we have no hesitation in setting aside the order of the Customs, Excise and Service Tax Appellate

Tribunal. In the circumstances, reversing the order of the Tribunal, the order of penalty is restored and thus, we allow this Civil Miscellaneous

Appeal. No costs.

