(2013) 06 BOM CK 0070

In the Bombay High Court

Case No : Central Excise Appeal No. 5 of 2012

Gammon India Ltd. APPELLANT

Vs

The Commissioner, Customs and Central Excise RESPONDENT

Date of Decision : 14-06-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11A(2B), 11B, 35(G)

Citation : (2013) 298 ELT 171

Hon'ble Judges : S.B. Shukre, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : S.N. Kapoor, for the Appellant; S.K. Mishra, ASGI, for the Respondent

Judgement

B.P. Dharmadhikari, J.—Heard parties finally to find out whether question of liability of present appellant to pay interest on differential amount of sale price can be said to be a substantial question of law involved in the matter. The assessee before us questions the order dated 22.9.2011 passed by CESTAT, West Zonal Branch, Mumbai, whereby the said Tribunal has dismissed its Appeal and upheld the liability of present assessee to pay interest u/s 11AB by following the judgment of the Hon''ble Apex Court reported in Commissioner of Central Excise Vs. International Auto Limited,

2. In the present case, clearance of goods at a price prevailing on the said date and payment of duty accordingly is not in dispute. Existence of price variation clause is also not in dispute. The fact that price was later on hiked and the assessee then raised demand and also paid the differential duty is also not in dispute. Mr. Kapoor points out that during audit of department it was discovered that interest on differential amount of duty was not paid and hence that amount was first credited and then an application for its refund was made. That application has been rejected and the rejection has been maintained by CESTAT by the impugned order. Placing reliance upon the judgment delivered by the Division Bench of Karnataka High Court in The Commissioner of Central Excise Vs. Bharat Heavy Electricals Ltd. Electronics Division, to show how the judgment

of the Hon''ble Apex Court in Commissioner of Central Excise, Pune Vs. SKF India Ltd., has been distinguished, he contends that facts in the present case and said matter are identical. The Department questioned the said judgment of Karnataka High Court in SLP and that SLP was dismissed on 3.12.2010. The Department thereafter sought review of that order and the Hon''ble Apex Court has found no substance in the Review as per its order dated 17.8.2011. In this situation, according to the learned counsel, reliance by CESTAT on the judgment in the matter of SKF India Ltd. by the Hon''ble Apex Court is misconceived. He submits that the reasons recorded by the Karnataka High Court and accepted by the Hon''ble Apex Court are squarely applicable and ought to have been accepted. He, therefore, submits that the question about the liability of present assessee to pay interest on differential amount of prices is a substantial question of law which arises in the present matter.

3. The learned counsel appearing for the Department states that the judgment delivered by Karnataka High Court is not a final word and the Hon''ble Apex Court has only dismissed the SLP and therefore there is no judgment by the Hon''ble Apex Court in the matter. He submits that the judgment in the matter of S.K.F. India Ltd. (supra) as applied by the Hon''ble Apex Court later on in the matter of International Auto Ltd. (supra) is the final judgment and the same therefore needs to be applied. He submits that this later judgment of the Hon''ble Apex Court is looked into by the CESTAT in the impugned order and hence there is no scope for interference. According to him, in the present situation, the assessee ought to have sought provisional clearance and then only he might have attempted to evade the interest liability u/s 11AB. Absence of intention to deceive is not determinative at all. He, therefore, argues that no substantial question of law is involved.

4. Learned counsel for the respondent has invited our attention to the judgment delivered by the Division Bench of this Court on 31.8.2010 in Central Excise Appeal No. 29 of 2004 and the order dated 29.6.2011 in Central Excise Appeal No. 7 of 2011.

5. Shri Kapoor, in reply to the arguments, has invited our attention to the order dated 17.8.2007 in W.P. No. 3389/07 to urge that in somewhat similar situation, this Court has stayed the demand for interest.

6. After the dictation commenced and we completed the narration of arguments of learned counsel for the department, Shri Kapoor has produced before us copy of the order 9.10.2007 passed in above W.P. No. 3389/07 which shows that the said writ petition has been admitted for final hearing.

7. We find that in the judgment dated 31.8.2010 delivered in Central Excise Appeal No. 29 of 2004, the goods were cleared under the self removal procedure. In Central Excise Appeal No. 7 of 2011 the Court has dismissed the Appeal in motion hearing and the facts involved therein are also not very clear. The orders impugned in W.P. No. 3389/07 are not challenged in appeal u/s 35(G)

of the Central Excise Act. Scope of consideration of challenge in writ petition in such appeal is bound to be different. In the absence of narration of exact challenge in W.P. No. 3389/07, mere order admitting it is of no use.

8. The assessee is placing reliance upon the adjudication by the Division Bench of Karnataka High Court. The judgment of Hon''ble Apex Court in SKF India Ltd. has been looked into and distinguished by the Karnataka High Court in para 7. The High Court found that the increased price became payable and recoverable by virtue of later revision of prices and, therefore, on the date the goods were cleared, the differential duty became payable. In fact, before it, the High Court noticed that the goods were initially cleared on price then prevailing and appropriate duty was paid. Subsequently, there was price escalation due to increase in labour inputs and other costs which was determined by the All India Industrial Price Indices and by the Reserve Bank of India. It was communicated to All India Electrical Manufacturers Association. In terms of the said directions, supplementary invoices were issued to facilitate the recovery of expenditure of costs escalation and the enhanced duty thereon was paid. The High Court has, therefore, concluded that as on the date the goods were cleared initially, the price escalation had not taken place, the assessee could not have foreseen it. It, therefore, felt that law laid down by Hon''ble Apex Court in S.K.F. India Ltd. (supra) was not attracted.

9. The very same judgment of Hon''ble Apex Court is looked into by it later on in International Auto Ltd. In the said judgment in para 8 the Hon''ble Apex Court has observed as under:

Section 11A of the Act deals with recovery of duty not levied or not paid or short-levied or short-paid. The said section, which stood inserted by Act 25 of 1978, underwent a sea-change when Parliament inserted major changes in that section vide Act 14 of 2001 [with effect from 11th May, 2001] and Act 32 of 2003 [with effect from 14th May, 2003]. It needs to be mentioned that simultaneously Act 14 of 2001 also made changes to Section 11AB of the Act. In the case of S.K.F. India Ltd. [supra], it has been, inter alia, held, as can be seen from the above quoted paragraphs, that sub-section 2(B) of Section 11A provides that the assessee in default may make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and, in that event, such assessee in default would not be served with the Demand Notice u/s 11A(1) of the Act. However, Explanation (2) to the sub-section makes it clear that such payment would not be exempt from interest chargeable u/s 11AB of the Act. What is stated in Explanation (2) to sub-section 2(B) is reiterated in Section 11AB of the Act, which deals with interest on delayed payment of duty. From the scheme of Section 11A(2B) and Section 11AB of the Act, it becomes clear that interest is levied for loss of revenue on any count. In the present case, one fact remains undisputed, namely, accrual of price differential. What does differential price signify? It signifies that value, which is the function of the price, on the date of removal/clearance of the goods was not correct. That, it was understated. Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance, hence, enhanced duty. This enhanced duty is on the corrected value of the goods on the date of removal. When the differential duty is paid after the date of clearance, it indicates short-payment/short-levy on the date of removal, hence, interest which is for loss of revenue, becomes leviable u/s 11AB of the Act. In our view, with the entire change in the Scheme of recovery of duty under the Act, particularly after insertion of Act 14 of 2001 and Act 32 of 2003, the judgment of this Court in the case of M.R.F. Ltd. [supra] would not apply. That judgment was on interpretation of Section 11B of the Act, which concerns claim for refund of duty by the assessee. That judgment was in the context of price list approved on 14th May, 1983. In that case, assessee had made a claim for refund of excise duty on the differential between the price on the date of removal and the reduced price at which tyres were sold. The price was approved by the Government. In that case, the assessee submitted that its price list was approved by the Government on 14th May 1983, but subsequent thereto, on account of consumer resistance, the Government of India directed the assessee to roll back the prices to pre 14th May, 1983 level and on that account, price differential arose on the basis of which the assessee claimed refund of excise duty which stood rejected by this Court on the ground that once the assessee had cleared the goods on classification, the assessee became liable to payment of duty on the date of removal and subsequent reduction in the prices for whatever reason cannot be made a matter of concern to the Department insofar as the liability to pay excise duty was concerned. In the present case, we are concerned with the imposition of interest which, as stated above, is charged to compensate the Department for loss of revenue. Be that as it may, as stated above, the Scheme of Section 11A of the Act has since undergone substantial change and, in the circumstances, in our view, the judgment of this Court in the case of M.R.F. Ltd. [supra] has no application to the facts of this case. In our view, the judgment of this Court in the case of SKF India Ltd. [supra] is squarely applicable to the facts of this case.

[emphasis added]

10. Thus, liability to pay interest on short payment of duty appears to be absolute and reasons for such short payment are not germane. This finding in S.K.F. India Ltd. [supra] has been endorsed again by the Hon''ble Apex Court. Dismissal of SLP in motion hearing by Hon''ble Apex Court is not sufficient to ignore its binding judgment. It is, therefore, apparent that appreciation of law, as laid down in S.K.F. India Ltd. [supra] by the apex court needs to be acted upon and implemented by this Court. Thus, the question sought to be raised is already conclusively answered and cannot be treated as a substantial question of law at all. Moreover, the appellant made good the short duty only after it was brought to his notice by the respondents. The CESTAT in the impugned order has correctly appreciated the position. We, therefore, do not find any substantial question of law arising. Appeal is dismissed. No costs.