

(2012) 03 BOM CK 0091

In the Bombay High Court

Case No : Central Excise Appeal No. 73 of 2004

M/s. DGP Hinoday Industries Ltd.

APPELLANT

Vs

Commissioner of Central Excise, Pune - 1 ICE House, 41A,
Sassoon Road, Opp. Wadia College, Pune - 411 001

RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

Central Excise (No. 2) Rules, 2001 — Rule 7, 7(4)
Central Excise Rules, 1944 — Rule 173(2A), 173(I), 173CC, 9B
Central Excises and Salt Act, 1944 — Section 11A, 11A(2), 11AA, 37(2)

Citation : (2012) 190 ECR 295

Hon'ble Judges : J.P. Devadhar, J;A.R. Joshi, J

Bench : Division Bench

Advocate : V. Sridharan, with Mr. Prakash Shah instructed by PDS Legal, for the Appellant; R. Ashokan with Ms. Suchitra Kamble, for the Respondent

Judgement

J.P. Devadhar, J.—This appeal was admitted on 8/12/2005 on the following questions of law:

(a) Whether the Appellate Tribunal was right, under the facts and circumstances, in holding that interest is payable u/s 11AA " ?

(b) Whether the Appellate Tribunal is right in confirming the interest demand on the ground that the appellants have not raised the issue of provisional assessment before the lower authorities ?

The appellant - assessee (originally known as Morris Electronics Ltd.) was engaged in the manufacture of soft ferrite components which according to the assessee were classifiable under chapter heading 8548.00 of the Central Excise Tariff ("CET" for short) attracting basic excise duty ("BED" for short) at 15% and special excise duty ("SED" for short) at 5% of BED. Accordingly, the assessee had filed classification list No. 15/90 - 91 on 20/3/1990 seeking classification of the above goods under Chapter Heading 8548.00 of the CET. Pending finalisation of the classification list, the assessee cleared the goods on payment of BED at

15% and SED at 5% of BED.

2. Even before the classification list filed on 20/3/1990 was approved, the Superintendent of Central Excise by his letter dated 1/11/1990 called upon the assessee to classify the goods in question under tariff heading 8505.00 of the CET as per trade notice No. 283/90 issued by the Additional Collector of Central Excise and Customs, Pune and pay duty accordingly. By a show cause notice dated 1/11/1990, the Supdt. of Central Excise and Customs called upon the assessee to show cause as to why the goods in question cleared during the period from May, 1990 to October, 1990 should not be held classifiable under C. H. No. 8505.00 attracting 20% BED and SED at 5% of BED and why the differential duty should not be recovered u/s 11A of the Central Excise Act, 1944 Act ("1944 Act" for short). The assessee objected to the show cause notice by filing a detailed reply. In the meantime, on 5/11/1990 the assessee filed a revised classification list under protest, seeking classification of the goods in question under chapter heading 8505.00 of the CET. Thus, from 5/11/1990 the assessee cleared the goods in question on payment of BED at 20% and SED at 5% of BED under protest.

3. By another show cause notice dated 20/3/1991, the assessee was called upon to show cause as to why the goods cleared during the period from 1/11/1990 to 4/11/1990 should not be classified under C.H. No. 8505.00 instead of classifying it under C.H. No. 8458.00 and the differential duty should not be recovered. The assessee opposed the claim by filing a detailed reply.

4. Thereafter, on 22/1/1993 the classification list filed by the assessee on 20/3/1990 was approved by classifying the goods in question under C.H. No. 8505.00 instead of classifying it under C.H. No. 8548.00 as claimed by the assessee. The classification list filed on 5/11/1990 seeking classification under C.H. No. 8505.00 under protest was also approved.

5. On approval of the classification lists filed by the assessee, both the show cause notices dated 1/11/1990 and 20/3/1991 were heard and by a common order in original dated 8/10/1993 the duty demand was confirmed u/s 11A of the 1944 Act. Challenging the aforesaid order, the assessee filed an appeal, which was dismissed by the Commissioner (Appeals) on 31/3/1994. On further appeal filed by the assessee, the Tribunal declined to grant stay. Thereupon, the assessee paid the differential duty on 22/7/1998. Ultimately, the appeal filed by the assessee was dismissed on 14/1/1999. Thus, the duty demand confirmed on 8/10/1993 attained finality.

6. Thereafter, by a show cause notice dated 21/1/2000, the Superintendent of Central Excise called upon the assessee to show cause as to why interest of Rs. 8,81,934/- on duty demand confirmed by the order in original dated 8/10/1993 for the period from 26/8/1995 (three months after Section 11AA was introduced with effect from 26/5/1995) till the date of payment on 22/7/1998 should not be recovered u/s 11AA of the Act. The assessee objected to the claim for interest.

Rejecting the contention of the assessee, an order in original was passed on 28/8/2000 whereby the demand for interest was confirmed u/s 11AA of the 1944 Act. The appeal filed by the assessee against the said order dated 28/8/2000 was dismissed by the Commissioner of Central Excise (Appeals), Pune on 18/6/2003. Further appeal filed by the assessee before the CESTAT was also dismissed by the Tribunal on 10/2/2004. Challenging the aforesaid appeal, the present appeal is filed by the assessee.

7. Mr. Sridharan, learned senior Advocate appearing on behalf of the appellant - assessee submitted that the liability to pay interest u/s 11AA of the 1944 Act arises when a person chargeable with duty determined u/s 11A(2) of the Act fails to pay such duty within three months from the date of such determination. In the present case, he submits that during the period from May, 1990 to 4/11/1990 the goods in question were cleared under provisional assessment under Rule 9B of the 1944 Rules and, therefore, final assessments were required to be made under Rule 9B of the 1944 Rules and not u/s 11A of the 1944 Act. Even though the assessment order passed on 8/10/1993 erroneously records that the assessment has been finalised u/s 11A of the 1944 Act, in fact the assessment was finalised under Rule 9B and to such a duty demand determined under Rule 9B(5), the interest provision contained in Section 11AA would not apply.

8. Mr. Sridharan further submitted that the legislature by Finance Act, 1999 inserted clause (ibb) to Section 37(2) of the 1944 Act, thereby empowering the Central Government to make rules for charging interest on the differential duty which becomes payable on finalisation of the provisional assessment. Accordingly, the Central Government has framed the Central Excise (No. 2) Rules 2001 ("2001 Rules" for short). As per Rule 7(4) of the 2001 Rules, a person is liable to pay interest on any amount payable to the Central Government consequent to the finalisation of the provisional assessment from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof. In the present case, since the duty demand was in fact determined on finalisation of the provisional assessment and the liability relates to the period prior to 2001, the question of demanding interest from the assessee on the said amount does not arise at all. Relying on the CBEC circular dated 21/6/2001, Mr. Sridharan submitted that the interest liability under Rule 7 of the 2001 Rules applies to the provisional assessments made after 1/7/2001. In the present case, the provisional assessments were made prior to 1/7/2001 and hence the interest liability could not be demanded on the amounts determined payable on finalisation of such provisional assessments.

9. Lastly, Mr. Sridharan submitted that the fact that the assessee at the threshold had not objected to the assessment u/s 11A of the the 1944 Act would not preclude the assessee from contending at this stage that the assessment could not be made u/s 11A, because, at the time when the assessment was

erroneously made u/s 11A, Section 11AA was not on the statute book and the duty liability whether u/s 11A or under Rule 9B being same, there was no need for the assessee to object to the assessment being made u/s 11A of the 1944 Act. Since the revenue, after the insertion of Section 11AA has chosen to demand interest, the assessee is entitled to raise the contention that the assessment finalised on 8/10/1993 was in fact finalised under Rule 9B of the 1944 Rules and not u/s 11A and, therefore, the interest provisions contained u/s 11AA are not applicable to the facts of the present case. Accordingly, Mr. Sridharan submitted that the impugned orders passed by the authorities below being contrary to law are liable to be set aside.

10. Mr. Asokan, learned counsel appearing on behalf of the Revenue submitted that in the present case admittedly the show cause notices dated 1/11/1990 and 20/3/1991 were issued u/s 11A of the Act and even the assessment order was passed on 8/10/1993 u/s 11A of the Act and, therefore, the authorities below were justified in demanding interest u/s 11AA of the Act. Mr. Asokan conceded that where the goods are cleared on provisional assessments, the final assessment would have to be made under Rule 9B and not u/s 11AA of the 1944 Act. However, since the assessment in the present case, has been made u/s 11A, the assessee would be liable to pay interest u/s 11AA of the Act.

11. After hearing both the parties, we were inclined to allow the appeal as there was no dispute regarding clearance of goods in question under provisional assessment. Accordingly, on conclusion of the arguments on 13/3/2012, we had informed the parties that we are allowing the appeal for the reasons to be recorded later on .However, while recording the reasons, it was noticed that the specific case of the assessee before the adjudicating authority was that there was no provisional assessment under Rule 9B of the 1944 Rules. Therefore, we have placed the matter on board for "directions" today with a view to recall our earlier order and pass fresh order on merits. Accordingly, we recall our earlier order dated 13/3/2012 and pass the present order.

12. The dispute in the present case is, whether the assessee is liable to pay interest u/s 11AA of the 1944 Act in respect of duty determined as payable for the clearances effected during the period from May 1990 to 4/11/1990.

13. The interest liability contained in Section 11AA which was inserted to the 1944 Act with effect from 26/5/1995 applies to a person who has failed to pay the duty determined u/s 11A(2) of the 1944 Act. Obviously, Section 11AA would not apply where the duty liability is determined under provisions other than Section 11A(2) of the Act.

14. In the present case, the order in original dated 8/10/1993 was no doubt passed u/s 11A of the 1944 Act determining duty liability for the period from May 1990 to 4/11/1990. The question is, whether the assessee is justified in contending that since the goods in question were cleared under provisional assessment, the final assessment order was liable to be made under Rule 9B of

the 1944 Rules and not u/s 11A of the 1944 Act and merely because the assessment order erroneously records that the assessment has been made u/s 11A of the 1944 Act, the assessee cannot be saddled with the interest liability u/s 11AA of the Act.

15. It may be noted that at the material time, the manufacturers of excisable goods were entitled to clear the goods on payment of duty under the self removal procedure. Any demand for differential central excise duty on the goods cleared under self removal procedure, could be made by passing an order u/s 11A of the 1944 Act or under Rule 9B / 173I of the 1944 Rules, as the case maybe.

16. Where there was delay in approving the classification list or the price list filed by the assessee, the proper officer under Rule 173(2A) of the 1944 Rules, could, subject to the provisions of Rule 173CC, permit the assessee to avail the procedure prescribed under Rule 9B for provisional assessment of the goods. In other words, pending approval of the classification list, clearances could be made either under Rule 173CC or under Rule 9B of 1944 Rules.

17. In the present case, on perusal of the assessment order dated 8/10/1993, it is seen that the specific case of the assessee before the adjudicating authority was that there was no provisional assessment under Rule 9B and that Rule 9B was not applicable to the present case. Even before the Commissioner (Appeals), no plea was raised regarding clearance of the goods under provisional assessment. In the memo of appeal before the CESTAT, it was for the first time contended that the clearances of the goods pending approval of classification list should be deemed to have been assessed provisionally under Rule 9B and hence duty determined as payable on finalisation of such provisional assessment would not be covered u/s 11AA of the Act.

18. The Tribunal by the impugned order dated 10/2/2004 declined to entertain the plea of provisional assessment as that plea was raised for the first time before the Tribunal. The Tribunal further held that even if the goods were cleared under provisional assessment, there was no bar for passing an order u/s 11A of the 1944 Act and consequently, interest on duty determined as payable u/s 11A would be covered u/s 11AA of the 1944 Act.

19. In the memo of appeal filed before this Court the assessee has stated (see ground 31R) that at the relevant time, the goods were cleared under the provisional assessment. In support of the above contention the assessee has annexed a typed copy of the RT12 return for the month of July, 1990 wherein it is recorded that the goods covered therein have been assessed provisionally under Rule 9B. Neither the name of the Superintendent, Central Excise, Bhosari Range 1, who is supposed to have signed the said document nor the date on which it was signed is to be seen on that document (RT 12 return).

20. From the aforesaid facts, it is crystal clear that the case put forth by the assessee at different stages of the proceeding is mutually contradictory. Before

the adjudicating authority the assessee claimed that there is no provisional assessment order passed under Rule 9B. Before the CESTAT the assessee claimed that the clearances should be deemed to have been made by way of provisional assessment under Rule 9B and before this Court it is for the first time contended that the clearances were in fact effected on provisional assessment under Rule 9B of the 1944 Rules.

21. In the ordinary course, on account of the inconsistent stand taken by the assessee at every stage, we would not have entertained the appeal. However, with a view to ascertain the truth regarding the plea of provisional assessment, we set aside the order of the Tribunal and restore the matter back to the file of the Tribunal subject to payment of costs of `25,000/- . We further direct the Tribunal to decide the matter afresh after recording a finding as to whether the clearances during the relevant period were in fact made under Rule 9B especially when the specific case of the assessee before the adjudicating authority was that goods in question were not and could not be cleared under Rule 9B and even the letter addressed by the Superintendent of Central Excise dated 1/11/1990 demanding duty does not refer to the provisional assessment.

22. If on investigation, the Tribunal arrives at a conclusion that the clearances during the relevant period were under Rule 9B, then the demand claiming interest u/s 11AA cannot be sustained, because, the assessment made on 8/10/1993 would in fact be finalisation of provisional assessment under Rule 9B and not u/s 11A (as erroneously recorded in the order) and in such a case, the interest liability u/s 11AA would not be applicable. As noted earlier, interest liability under rule 7(4) of the 2001 Rules would arise only if the provisional assessments were made after 1/7/2001 and in the present case, the provisional assessment, if any, being prior to 1/7/2001, the interest liability would not apply. If it is found that the clearances were not made under Rule 9B and the averments as well as the documents to that effect produced by the assessee are found to be false or fabricated, then, the Tribunal shall initiate appropriate proceedings against the assessee.

23. In the result, the appeal is allowed by setting aside the impugned order of the Tribunal dated 10/2/2004 subject to payment of costs quantified at `25,000/- to be paid by the appellant to the respondent within 4 weeks from today. If the assessee fails to pay the said amount within the stipulated period, the appeal to stand dismissed. If the amount is paid, the Tribunal to reconsider the matter on merits after recording findings on issues set out hereinabove. The appeal is disposed off accordingly.