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**(2012) 05 AHC CK 0253**

**In the Allahabad High Court**

**Case No : Central Excise Appeal No. 492 of 2012**

M/s. Nanumal Glass Works

APPELLANT

Vs

Commissioner of Central Excise Kanpur

RESPONDENT

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**Date of Decision : 07-05-2012**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11AC, 35G, 37C, 37C(a)

**Citation :** (2012) 5 ADJ 712 : (2012) 194 ECR 168 : (2012) 284 ELT 15

**Hon'ble Judges :** Prakash Krishna, J; Ashok Bhushan, J

**Bench :** Division Bench

**Advocate :** A.P. Mathur, for the Appellant; S.P. Kesarwani, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Hon'ble Ashok Bhushan, J.—Heard Sri A.P. Mathur, learned counsel for the appellant and Sri S.P. Kesarwani, learned counsel for the respondent. This appeal u/s 35G of the Central Excise Act, 1944 has been filed against the order dated 21st October, 2011 passed by the Custom Excise and Service Tax Appellate Tribunal rejecting the miscellaneous application filed by the appellant.

2. Following are the questions framed in the memo of appeal for consideration in this appeal :

(i) Whether the Hon'ble Tribunal was justified in rejecting the Misc. Application filed by the Appellants when admittedly 25% of the penalty amount stands deposited within 30 days from the communication of the Final Order dated 22.7.2010?

(ii) Whether the Hon'ble Tribunal was justified in not accepting the deposit of 25% of the penalty amount in lieu of compliance of its Final Order dated 22.7.2010 when admittedly entire duty demanded stands deposited much prior to the issuance of the Show Cause Notice?

(iii) Whether the Hon'ble Tribunal was justified in insisting on deposit of 25% of

the penalty within 30 days from the date of the order when Section 11AC itself speaks of deposit of duty and penalty within 30 days from the date of communication of the order?

3. Before we proceed to consider the aforesaid questions, it is necessary to note the facts giving rise to this appeal. The Assistant Commissioner of Central Excise passed an order confirming central excise duty amounting to Rs. 2,04,816/- and imposing penalty of the same amount. An appeal was filed by the appellant before the Commissioner (Appeals). The Commissioner (Appeals) vide its order dated 26th June, 2008 although confirmed the demand of duty but set-aside the order of penalty. The Department filed an appeal before the Customs Excise and Service Tax Appellate Tribunal. The Tribunal vide its order dated 22nd July, 2010 disposed of the appeal in following manner :

9. In the light of the above, the appeals and cross-objections are disposed of as follows :

(a) The order of the Commissioner (Appeals) in so far as the same relates to setting aside the penalty on the respondent firm is concerned, is set-aside and the order of the original authority imposing penalty of Rs. 2,04,816/- is restored.

(b) However, the respondent firm is given an option to pay 25% of the penalty imposed amount to Rs. 51204/- within 30 days from today. If they do not pay the amount within the stipulated period, the penalty shall be Rs. 2,04,816/-.

(c) The order of the Commissioner (Appeals) setting aside the penalty on the authorised signatory is not interfered with.

(d) Cross-objections are also disposed of.

4. The appellant could not deposit the 25% of the penalty within 30 days from the date of order. An application dated 30th August, 2010 was filed by the appellant before the Tribunal stating that the counsel who appeared and argued the case before the Tribunal informed the local counsel of the appellant but the local counsel could not inform the appellant about the direction of the Tribunal giving an option of paying 25% of the penalty within 30 days due to which 9 days" delay had occasioned. The appellant claimed that 25% of the penalty was immediately deposited on 30th August, 2010. It was prayed that delay be condoned. The said application was considered by the Tribunal and by order dated 21st October, 2011, the application has been rejected. The Tribunal held in its order that the order was passed on 22nd July, 2010 after hearing Sri Bipin Garg, Advocate for the appellant and the amount having not been deposited within 30 days, the order has not been complied with and no ground has been made out to modify the order. This appeal has been filed against the order dated 21st October, 2011.

5. Sri A.P. Mathur, learned counsel for the appellant, challenging the order, contends that amount of 25% of penalty is required to be deposited within 30 days from the date of communication of the order. He submits that the deposit of

25% of the penalty was made within 30 days from the date of communication of the order, hence there was no delay in deposit of 25% of the penalty. Sri Mathur has referred to Section 11AC proviso of the Central Excise Act, 1944. He submits that although the order was passed on 22nd of July, 2010 but 30 days' time shall run from the date of communication.

6. Sri S.P. Kesarwani, learned counsel for the respondent, refuting the submissions of the appellant, contends that the option given by the Tribunal was to deposit 25% of the penalty from the date of order and the option having not been utilised by the appellant, the appellant is not entitled for the benefit of the order of the Tribunal. It is submitted that 25% of the penalty was to be deposited not from the date of communication of the order, rather from the date the order was passed. He submits that learned Advocate of the appellant being present at the time of passing of the order, the order shall be deemed to have been communicated to the appellant on the same date and 30 days time shall run from the date of order. He further submits that Section 11AC proviso of the Central Excise Act, 1944 is not applicable since the said provision relates to the order of Central Excise Officer determining such duty.

7. We have considered the submissions of learned counsel for the parties and perused the record.

8. A perusal of the order of the Tribunal dated 22nd July, 2010, specially paragraph 9 sub-clause (b) indicates that an option was given to the respondent (appellant in this appeal) to pay Rs. 25% of the penalty imposed amounting to Rs. 51205/- within 30 days from today. The Tribunal having specifically directed for payment of the amount from the date of passing of the order, the appellant could have taken benefit of the said order within 30 days from 22nd July, 2010. Admittedly, the appellant claimed deposit of 25% of the amount on 30th August, 2010 i.e. beyond 30 days.

9. Now comes the submission of the appellant's counsel that 30 days time shall be deemed to take place from the date of communication of the order. There are two reasons for not accepting the aforesaid submission. Firstly when the order of the Tribunal specifically directed for deposit within 30 days from (today) the date of order, the said period of 30 days shall begin from the date of the order and the express order of the Tribunal cannot be read in the manner the appellant's counsel contends. Secondly, the counsel for the appellant being present on the date of hearing when the order was passed, which is recorded in the impugned order itself by the Tribunal, the order shall be deemed to be communicated to the appellant on the same very date.

10. It is relevant to refer to the provisions of Section 37C of the Central Excise Act, 1944 which provides for service of decisions, orders, summons etc. Section 37C is quoted below :

37C. Service of decisions, orders, summons, etc.--(1) Any decision or order passed or any summons or notices issued under this Act or the rules made

thereunder, shall be served, -

(a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgement due, to the person for whom it is intended or his authorised agent, if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1).

11. A perusal of Section 37C(a) indicates that in case the decision is tendered to the person or his authorised agent, the same shall be deemed to be served in accordance with the Act. In the present case, the Advocate of the appellant who is authorised agent within the meaning of Section 37C, being present on the date of the order, the service of the order shall be deemed to be made to the authorised agent on the same date.

12. It is also relevant to refer to the Customs Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. Rule 13 of the said Rules provides for document authorising representative to be attached to the memorandum of appeal. Rule 13 of the said Rules is quoted below :

Rule 13. Document authorising representative to be attached to the memorandum of appeal--Where the parties to an appeal or application are being represented in such appeal or application by authorised representatives, the documents authorising such representatives to appear on their behalf shall be appended to the memorandum of appeal, application or memorandum of cross-objections if they are signed by the authorised representatives and the said documents shall indicate clearly the status of the authorised representatives as to whether they are relatives or regular employees of the parties and the details of the relationship or employment or, in cases where they are not relatives or regular employees, their qualifications to act as authorised representatives under the Acts or, in the case of a person referred to in rule 2(c)(ii), particulars of the notification by which he has been appointed:

Provided that where the authorised representative is a legal practitioner, such document of authorisation shall be a duly executed vakalatnama.

13. With regard to legal practitioner execution of vakalatnama is authorisation for the purposes of the Rules. Rule 35 of the 1982 Rules provides that an order passed in an appeal or on an application shall be communicated to the appellant or the applicant and to the respondents either in person or by registered post. Rule 35 is quoted below :

Rule 35. Communication of orders to parties.--Any order passed in an appeal or on an application shall be communicated to the appellant or the applicant and to the respondent either in person or by registered post.

14. Section 37C of the 1994 Act read with Rules 13 and 35 of the 1982 Rules clearly indicate that communication of the order to authorised agent of a person is sufficient communication. Thus when the order was passed by the Tribunal on 22nd July, 2010 in presence of counsel of the appellant, the order shall also be deemed to be communicated on the same date and the submission of the appellant that unless the order is received by the appellant in person, the order shall not be treated to be communicated to the appellant, cannot be accepted. In view of the foregoing discussions, we do not Find any substantial question of law for consideration. The Tribunal has rightly rejected the miscellaneous application of the appellant by the impugned order.

The appeal is dismissed.