
(2006) 07 MP CK 0049
In the Madhya Pradesh High Court
Case No : M.A. No. 2578 of 2004

Sai Machine Tools Pvt. Ltd.

APPELLANT

Vs

Commr. of C. Ex. and Customs

RESPONDENT

Date of Decision : 06-07-2006

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 209A

Central Excises and Salt Act, 1944 — Section 11, 11AB, 11AC, 11C, 35G

Citation : (2006) 07 MP CK 0049

Hon'ble Judges : N.K. Mody, J;A.M. Sapre, J

Bench : Division Bench

Advocate : Ramesh Nair, for the Appellant; V.K. Zelawat, ASGI, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Sapre, J.—This is an appeal, filed by assessee u/s 35G of Central Excise Act, 1944, against an order, dated 16-4-2004, bearing No. A/700/04/NB/SM (Exhibit - 8), passed by Customs, Excise and Service Tax Appellate Tribunal (for short, called Tribunal) in Appeal No. E/416/04/NB/SM which in turn arises out of an order-in-appeal No. IND/1/563/2003, dated 8-10-2003, passed by Commissioner (Appeals). Facts of the case lie in a narrow compass. They however need mention in brief to appreciate the contentions urged.

2. The appellant is an assessee. They are engaged in the business of manufacture and sale of Plastic Processing Plants and machinery and parts. These goods are excisable and fall under Chapter 84 of First Schedule to the Central Excise Tariff Act, 1985.

3. The appellants were availing SSI exemption up to the aggregate value of clearance of Rs. 30 lac. However, during the financial year 1997-98, the turnover of assessee exceeded the exemption limit by Rs. 53,31,568/- thereby involving payment of excise duty amounting to Rs. 2,26,578/- on the goods manufactured and cleared from the factory.

4. A show cause notice was issued to assessee on 19-11-1999, proposing thereunder demand for duty amounting to Rs. 2,26,578/- and also to impose penalty on Director of Company under Rule 209A of Central Excise Rules. It was also proposed to impose penalty u/s 11C and interest u/s 11AB. The assessee filed reply and while contesting the show cause in substance contended that since they had deposited the duty amount prior to issuance of show cause and hence, no case for either imposing the penalty is made out, or interest can be demanded under any of the Sections/Rules mentioned in the show cause. The adjudicating authority by order, dated 31-05-2000 imposed a mandatory penalty of Rs. 2,26,578/- u/s 11AC read with Rule 173Q and also imposed a penalty of Rs. 20,000/- on Director of assessee (Company) under Rule 209A followed by payment of interest as per Section 11AB of the Act for delayed payment of duty. The assessee felt aggrieved filed appeal to Commissioner of Appeals. By order, dated 8-10-2003, the Commissioner of Appeals allowed the appeal filed by assessee and set aside the penalty imposed on assessee and also on their Director as mentioned supra. It is against this order, the Commissioner, Central Excise felt aggrieved and filed appeal to Tribunal. By impugned order, the Tribunal allowed the appeal filed by Commissioner of Central Excise and while setting aside of the order passed by Commissioner of Appeals restored that of Adjudicating Authority. However, the Tribunal while upholding the imposition of penalty on the assessee u/s 11AC interfered in its quantum and reduced the same to Rs. 50,000/- in place of Rs. 2,26,578/- which was imposed by A.O. In other words, the Tribunal proceeded to impose a penalty of Rs. 50,000/- on assessee thereby granted them substantial relief in the quantum of penalty as against what was imposed by A.O. i.e. Rs. 2,26,578/-. It is against this order of Tribunal which has resulted in upholding of imposition of penalty though to the extent of Rs. 50,000/-, the assessee has felt aggrieved and filed this appeal.

5. Heard Shri Ramesh Nair, learned Counsel for the appellant and Shri V.K. Zelawat, learned Assistant Solicitor General of India for the respondents.

6. Submission of learned Counsel for the appellant (assessee) was that no case for imposition of penalty u/s 11AC of the Act is made out because the assessee had deposited the duty prior to issuance of impugned show cause. Learned Counsel placed heavy reliance on decisions reported in Commissioner of C. Ex. Vs. Shree Krishna Pipe Industries, and 2005 (70) R.L.T. 699 (Bombay) (CCE v. Gaurav Mercantile Ltd.). In reply, learned Counsel for the Revenue supported the impugned order.

7. Having heard learned Counsel for the parties and having perused record of the case, we find no merit in this appeal.

8. This is how the learned Member of the Tribunal dealt with the issue against the appellant while upholding the imposition of penalty and then reduced it to Rs. 50,000/- from Rs. 2,26,578/- which was initially imposed by the AO:

The learned Counsel has contended that since duty was paid before the issuance

of the show cause notice, and that the respondents were ignorant of the law and had no intention to evade payment of duty, therefore, the penalty and interest have been rightly set aside against them by the Commissioner (Appeals). But in my view this contention of the counsel is wholly misconceived and cannot be accepted. It is difficult to accept that the respondents did not know as to whether they had crossed the exemption limit or not. The fact that they paid the duty before the issuance of the show cause notice could be used as a mitigating circumstance for imposing a lesser penalty than the penalty equal to the amount of duty. But could not be made basis for setting aside the penalty in toto, u/s 11AC by the Commissioner (Appeals). The payment of duty by the respondents cannot be said to be voluntary in the eyes of law as they did not of their own pay the duty but paid only when they were caught by the Department. The provisions of Section 11AC are mandatory and as such in a case of evasion/non-payment of duty, penalty has to be imposed under the said section. On the delayed payment of duty, the respondents are liable to pay interest also u/s 11AB. Therefore, the impugned order of the Commissioner (Appeals) in respect of penalty and interest cannot be sustained and is set aside. However, keeping in view the facts and circumstances of the case, the penalty u/s 11AC as imposed by the adjudicating authority, is reduced to Rs. 50,000/- from Rs. 2,26,578/- The respondents are also liable to pay interest from the due date. The appeal of the Revenue accordingly stands disposed of.

9. In our considered view, no fault can be found in the approach of the Tribunal when it proceeded to uphold the penalty imposable u/s 11AC as also interest on delayed payment of duty u/s 11AB. When the appellant (assessee) was aware of the limit for non-payment of excise duty on the goods manufactured by them, then they are presumed to even know the limit for payment of excise duty. The appellant can not claim ignorance of law i.e. limit for payment of excise duty on their goods. The moment, the appellant exceeded a limit of 30 lac; they ceased to be SSI and became liable to pay excise duty on the goods so manufactured under the Act. As an honest tax payer, if they enjoyed the benefit of non-payment of excise duty up to a particular limit (Rs. 30 lac) on their goods, then in the same way and with the same dignity, it was expected of from them to have started paying the excise duty in accordance with law of their own no sooner they crossed the bar of Rs. 30 lac. Though these facts were very much within the knowledge of assessee they did not pay and instead continued to enjoy the exemption facility though not eligible. In such situation, a clear case of breach of Section 11 of the Act was made out and in consequence a case for taking penal action for imposition of penalty for non-levy of duty within the meaning of Section 11AC was made out against the appellant. In other words, if the assessee fails to pay duty or short-paid then the provisions of Section 11AC gets attracted. In this case, since appellant failed to pay any duty on the goods at the time of clearance after the date when they crossed the limit of Rs. 30 lac, a case for invocation of penalty as contemplated u/s 11AC stood made out entitling the authorities to impose the penalty as also interest for delayed deposit

u/s 11AB of the Act. The language employed in Section 11AC is clear and unambiguous. It does not leave for any room for any other construction.

10. We do not agree to the submission of learned Counsel for the appellant when he urged that since the duty amount was deposited prior to show cause and hence, no action u/s 11AC was called for against them. In order to attract the rigour of Section 11AC what has to be seen is; whether duty which is required to be paid as per the provisions of Act was infact paid by the assessee and if so, at what point of time? In other words, what is important is payment of correct duty at a correct point of time as per the provision of the Act and not payment according to the whims and fancy of the assessee and at any point of time. Once, it is noticed that duty as required was not paid at the time of clearing of the goods, but paid much later in point of time, then in such event, default occurs thereby attracting the rigour of Section 11AC *ibid*. It may be that authority concerned may chose to exercise discretion in favour of assessee by deciding to impose less penalty because of deposit of duty prior to issuance of notice, but it can not be urged that no action can be taken u/s 11AC because the duty was deposited though late but prior to issuance of show cause.

11. In our view, the decisions relied on by learned Counsel for the appellant are distinguishable. In those cases, their Lordships did not examine the scope of Section 11AC but only held that case does not involve any substantial question of law for entertaining the appeal which was dismissed in *limine*. In these circumstances, their Lordship did not answer the question urged by learned Counsel for the appellant in this case.

12. In our view, the appellant has been given substantial relief because the Tribunal has reduced the penalty and confined it to Rs. 50,000/-. In this way, the appellant has partly succeeded so far as the quantum issue is concerned. This was done because the appellant had deposited the duty prior to issuance of show cause. Had they not done so, then they would have been saddled with full amount of penalty as provided in Section 11AC. We in our appellate jurisdiction can not interfere in the discretion exercised by the Tribunal while reducing the amount of penalty.

13. In view of foregoing discussion, we concur with the view taken by the Tribunal quoted *supra* and dismiss the appeal.

No costs.