**(2011) 02 AHC CK 0034**

**In the Allahabad High Court**

**Case No :** Central Excise Reference No. 1 of 2004

Super Polyplast (Pvt.) Limited — APPELLANT

Vs

Commissioner of Central Excise — RESPONDENT

**Date of Decision :** 22-02-2011

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11A, 11A(1)

**Citation :** (2011) 4 ADJ 861 : (2012) 278 ELT 308 : (2013) 20 GSTR 492

**Hon'ble Judges :** Yatindra Singh, J;Rajes Kumar, J

**Bench :** Division Bench

## Judgement

Rajes Kumar, J.—This is a Central Excise Reference arising out -from the order of the Tribunal dated 22.8.2011.

At the instance of the Assessee, this Court has directed the Tribunal to draw the statement of case for the consideration on the following two questions:

(1) Whether there could be any intention to evade payment of duty on the part of the applicants when the applicants always had the credit balance in their RG 23A Part II Register even after discharging duty liability and at no point of time they paid duty from their PLA?

(2) Whether extended period of limitation under proviso to Section 11-A(1) of the Act could be invoked when the applicants always had surplus modvat credit in their statutory records and which fact has not been disputed by the Department?

2. The brief facts of the case are that M/s. Super Polyplast (Pvt.) Limited are engaged in the manufacturing of rigid PVC pipes. They were taking modvat credit on inputs, like, PVC Resin, Calcium Carbonate and other Chemicals. Rigid PVC Pipe is an excisable commodity. Central Excise Officers made a search at the factory of the Assessee on 2nd January, 1996. The records were not made available in the factory as they were reported to be lying in the registered office of the Company. On physical verification of the stock of the finished goods as

well as the raw materials, excess quantities were found. Thus, they were seized. Some PVC Pipes were also found short. In the absence of any proper explanation, it has been inferred that the PVC pipes involving Central Excise Duty of Rs. 1,92,478/- were removed clandestinely. Some private records were found for the period 30th March, 1995 to 31st December, 1995, excluding August, 1995. On verification, it was found that in RG-I Register, only 15,250 pipes were recorded, as manufactured goods, whereas the actual production, as per private records, was 93815 pipes. On the basis of the aforesaid discrepancy, it was found that the Assessee had suppressed the production of 43565 pipes, valuing at Rs. 1,22,45,416/- evading Central Excise Duty amounting to Rs. 24,49,083/- by the aforesaid suppression of production for the period 10th March, 1995 to 31st December, 1995. The adjudicating authority has also estimated the suppressed production of PVC pipes valuing at Rs. 1,54,55,123/- involving Central Excise Duty of Rs. 30,91,025/- for the period April, 1994 to March, 1995 and August, 1995. It was also found that the modvat credit of Rs. 6,83,096/- was also not admissible. A show cause notice was issued u/s 11-A of the Central Excise Act on 1st July, 1996 to show cause why the demand of Rs. 24,49,083/- for the period 30th March, 1995 to 31st December, 1995, except August, 1995, and the demand of Rs. 30,91,025/- for the period of April, 1994 to March, 1995 and August, 1995 may not be confirmed. It has also been alleged that the modvat credit of Rs. 6,83,096/- has been wrongly availed, therefore, why the said amount may not be demanded and for the alleged suppression penalty may not be levied and why the PVC pipes for Rs. 11,72,011/- and the raw material valued at Rs. 11,99,720/- may not be confiscated.

3. The Assessee filed the detailed reply before the adjudicating authority.

4. The adjudicating authority confirmed the demand of Rs. 55,45,108/- for the period 1st April, 1994 to 31st December, 1995 on the ground that the goods have been clandestinely removed from the factory. The demand of Rs. 6,83,096/- has also been confirmed on the ground that the modvat credit has been wrongly allowed.. The confiscation of PVC pipes valued at Rs. 11,72,011/- and the raw material valued at Rs. 11,99,720/- have also been confirmed. A sum of Rs. 10Lakhshas been imposed towards the penalty on the Company and Rs. 1,00,000/- each has been imposed on Sri J.K. Agrawal, Managing Director, Sri T.R. Jain, Authorised Signatory and Sri K.K. Gupta, Clerk of the Company.

5. Being aggrieved by the order, the Assessee filed the appeal before the Custom, Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as the Tribunal).

6. The Tribunal by the impugned order allowed the appeal in part The Tribunal has confirmed the demand of Rs. 24,49,083/-, which relates to the period 10th March, 11995 to 31st December, 1995, except for the period August, 1995 and has set aside the demand of Rs. 30,91,025/- relating to the period April, 1994 to March, 1995 and August, 1995 on the ground that for the period April, 1994 to March, 1995 and August, 1995, the private record was not found and the

 

demand has been raised merely on presumption. The Tribunal has also confirmed the disallowance of modvat credit for Rs. 6,83,096/-. The Tribunal reduced the quantum of penalty from 10,00,000/- to Rs. 5,00,000/- in the case of the Company and in the case of Managing Director Sri J.K. Agrawal from Rs. 1 Lakh to Rs. 50000/-. However, the penalty imposed on Sri T.R. Jain and Sri K.K. Gupta has been deleted by the Tribunal.

7. Head Sri Pankaj Bhatia, learned Counsel for the Assessee and Sri B.K. Raghuvanshi on behalf of the Respondents.

8. Learned Counsel for the Assessee submitted that the notice was issued on 1.7.1996 beyond the period of six months. He submitted that no case has been made out invoking the proviso to Section 11-A(1) of the Act and, therefore, the demand is barred by limitation.

9. Learned Standing Counsel relied upon the order of the Tribunal.

10. We have perused the impugned order and the order of the authority below.

The Tribunal in its order held as follows:

15. We have heard the rival submissions. On careful consideration of the submissions made, we find that the total demand confirmed of Rs. 55,40,108/- comprised of two demands. The first demand is of Rs. 24,49,083/-for the period 10.3.95 to 31.12.95 except August, 1995. This demand has been computed based on the private records diary and note-books maintained shift wise, the department went to the extent of calculating the size wise and date wise production base don these diaries/records. The department has at no stage held that they are not relying on the diaries maintained shift wise only. In passing they have said that this also supports the contention that the diaries show that 60 parts of calcium carbonate was being used. Since this demand is based on the private records maintained by the Assessee, we uphold this demand of Rs. 24,49,083/-for the period 10.3.195 to 31.12.1995 except August, 1995. We also note that private records were not given a go-bye.

16. Insofar as the demand of Rs. 30,91,025/-for the period April, 1994 to March, 1995 and August, 1995 is concerned, we find that the Appellants produced the evidence in the form of inspection report by CIPET itself an apex agency in the particular field. We also note that the department is contending that the applicants produced more pipes. However, we note that it is indicated nowhere that 60 parts of calcium carbonate will increase the length of pipes on prorate basis. On the contrary, we find that there is evidence on record that the contention is that more calcium carbonate will lead to increase in density/specific gravity. We find that the pipes are sold in length. There is no evidence on record to show that the use of 60 parts calcium carbonate will increase the length of the pipes. In the absence of any definite indication on this issue, we give the benefit of doubt to the Appellants and hold that the demand of Rs. 30,91,025/- is not sustainable in law.

 

17. In regard to limitation, we note that there is a presumption that in case the Assessee has sufficient credit balance in the modvat account, there will be no intention to evade payment of duty. In the instant case, we find that for the period 10.3.1995 to 31.12.1995 except for August, 1995, the demand has been calculated on the basis of private records maintained shift wise for the period hence the above presumption will not be applicable to this demand in the present case.

18. Insofar as the disallowance of modvat credit of Rs. 6,83,096/- is concerned, we note that it was taken on certain inputs at the time of physical verification of the inputs, the inputs were not found there, therefore disallowance of the credit of Rs. 6,83,096/- is sustainable in law.

19.Insofar as confiscation of the raw materials is concerned, we note that not only the raw materials have been confiscated but also PVC pipes which are the finished products. We further note that the Commissioner has given an option to the Assessee to redeem the confiscated goods on payment of fine of Rs. 1 lakh. Looking to the value of the goods including the finished goods, we find that the redemption fine is not out of all proportion. On the question that the penalty on the Appellant''s firm is very much higher. We find that the penalty of Rs. 10 lakh has been imposed on the company Since we have held that only demand of Rs. 24,49,083/- is sustainable in law. We, therefore reduce the penalty to Rs. 5 lakhs on the company." Section 11-A of the Act alongwith the proviso reads as follows:

Section 11A - Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show-cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this Sub-section shall have effect as if, for the words "Excise Officer", the words "Collector of Central Excise" and "six months", the words "five years" were substituted.

11. u/s 11A(1) of the Act, excise duty can be levied in case of short levy or short payment or erroneously refund for the period of one year from the relevant date after the service of notice. Under the proviso of Section 11A(1) of the Act, the excise duty can be levied for short levy or short payment or erroneously refund

 

where there is a case of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty for the period of five years from the relevant date.

12. In the present case, on the facts and circumstances, proviso has been invoked on the allegation that there was wilful mis-statement or suppression of facts with intent to evade the payment of duty.

13. The question for consideration is whether on the facts and circumstances, the revenue is able to make out a case under the proviso of Section 11A(1) of the Act.

14. In the present case, at the time of the search, private records were found. The Assessee is not able to make out a case that the private records, which were found from the business premises, did not relate to the production of PVC pipes. On verification, it was found that in RG-I Register, the production of 50250 PVC pipes were shown, while as per private record, the actual production was 93815 and as such the production of 43565 PVC pipes were suppressed, the value of which has been determined at Rs. 1,22,45,416/-. Therefore, it is a clear case of wilful mis-statement and suppression of facts with the intention to evade the duty. In the circumstances, we are of the view that the proviso to Section 11-A has rightly been invoked. Finding of the Tribunal in this regard is finding of fact, which does not require any interference.

15. So far as the disallowance of modvat credit is concerned, the Tribunal held that the modvat credit for Rs. 6,83,096/- has been wrongly claimed. It has been held that on physical verification of the inputs, such inputs were not found there. Learned Counsel for the Assessee is not able to dispute this finding recorded by the Tribunal in this regard.

16. RG 23A Part II Register is maintained for the purposes of modvat credit. It is open to the Assessee to make the payment of duty from PLA or from RG 23A Part II Register. Credit balance in RG-23A Part II Register has no relevance to the suppression of production and evasion of duty found in the present case. Therefore, the Assessee is not entitled for any benefit of the credit balance available in RG 23A Part II Register inasmuch as in the present case, on the basis of the seized private records, the suppression of production was detected.

17. For the reasons stated above, we do not find any error in the order of the Tribunal. Both the Question Nos. land 2 are answered in affirmative against the Assessee and in favour of the revenue.

18. There shall be no order as to cost.

 