
(2010) 04 KAR CK 0048
In the Karnataka High Court
Case No : C.E.A. No. 54 of 2007

The Commissioner of Central Excise

APPELLANT

Vs

Bharat Heavy Electricals Ltd. Electronics Division

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 11 A (2), 11 AB

Citation : (2010) 257 ELT 369

Hon'ble Judges : K.L. Manjunath, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : K.N. Mohan, for the Appellant; Lakshmi Kumaran, for the Respondent

Final Decision : Dismissed

Judgement

1. The revenue has preferred this appeal by challenging the order dated 9.10.2006 passed in Final Order No. 1723/2006 by CESTAT at Bangalore, by raising the following substantial questions of law:

- i) Whether the provisions for interest on delayed payment contained in Section 11AB are applicable only for duty determined under Sub-section (2) of Section 11A or also for duty which has been paid u/s 11A of the Central Excise Act, 1944?
- ii) Whether an assessee is liable to pay interest when he pays the duty because of subsequent refixation of prices through supplementary invoices, from the date of clearance of the goods?
- iii) Whether the Hon"ble CESTAT Bangalore has right in law, granting immunity from penalty to the respondent?

2. The facts leading to the filing of this appeal are that, the respondent-assessee which is a manufacturer of heavy electrical goods had cleared the goods on payment of duty at 16 % as prescribed while discharging the duty liability. The respondent had been paying the duty in terms of the value arrived at on the date of payment of duty. However, the appellant, by contending that there was a

delay in payment of duty on account of variation in price, issued a show cause notice dated 19.10.2004 by demanding interest and penalty on the delayed payment of duty for the period from 1.4.2003 to 31.3.2004. The respondent had replied to the said show cause notice on 8.11.2004 and the said matter was adjudicated and an order in original was passed on 27.12.2004 by confirming the demand made in the show cause notice. Being aggrieved by the said order, the respondent had preferred an appeal before the Commissioner of Central Excise (Appeals II) which authority also confirmed the order in original by his order dated 29.3.2005. The respondents thereafter preferred an appeal before the tribunal which was allowed on 9.10.2006. It is against the said order the revenue has preferred this appeal.

3. We have heard the learned Counsel for the appellant and the learned Counsel for the respondent-assessee.

4. The main contention of the appellant is that when there was a variation in the price, duty had to be paid on the price variation (escalation) and the same had not been done, when the actual duty was paid and on account of the delayed payment, the Department was justified in issuing the show cause and also demanding interest and penalty for the said delayed payment of differential duty for the period from 1.4.2003 to 31.3.2004. He, therefore, submits that in terms of Section 11AB of the Central Excise Act, 1944, the demand made was justified and that the tribunal was not correct in setting aside the orders passed by the lower authorities. He, therefore, submits that the order passed by the tribunal be set aside and the demand made in terms of the show cause notice be upheld.

5. Per contra, learned Counsel for the respondent brought to our notice the copy of the show cause notice as well as the reply issued to the same and has contended that Section 11AB of the said Act is not applicable to the facts of the present case considering the fact that as on the date the duty was paid there was no price variation and therefore, the duty paid was in terms of the value of the said goods and subsequently, when there was a variation in price (escalation), the duty has also been paid on the differential price and hence, when there was no situation as envisaged u/s 11AB of the Act. The show cause notice issued was not in accordance with the said section and hence, the tribunal was justified in setting aside the order of the authorities and which order does not call for any interference-in this appeal.

6. Having heard the Counsel on both sides and on perusal of the material on record, we find that the show cause notice issued on 19.10.2004 was not in respect of any demand made regarding non-payment of duty on account of there being a price variation, but the demand made was only with regard to delayed payment of duty and for payment of interest and penalty. To the said show cause notice, reply has been given by the assessee by contending that in the first place, when there was actual removal of the goods and the appropriate duty has been paid based on the price of the goods. In the second place, when there was a transaction when there was escalation in the cost of goods with regard to the

said price variation also there had been a payment of duty and hence, there was no delay in payment of duty. Having regard to the contents of the show cause notice and the reply, we are of the view that in the first instance there has been no demand made for payment of duty. In fact, such a demand could not have been made considering the fact that the respondent-assessee had paid the duty on the difference in the price and therefore, the differential duty was paid for the relevant period. In the circumstances, the provisions envisaged u/s 11AB of the Act are not applicable to the facts of the present case as in the instant case there has been no determination of the duty nor there has been short payment of duty u/s (2B) of Section 11A. Section 11AB is applicable and interest on delayed payment of duty arises only when any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded. The aforesaid circumstances are not applicable in the instant case. Therefore, the issuance of the show cause notice dated 19.10.2004 by invoking the provision of Section 11AB in the instant case is improper and not in accordance with the said section.

7. Learned Counsel for the appellant has however relied upon the decision of the Apex Court in the case of Commissioner of Central Excise, Pune Vs. SKF India Ltd., to contend that the said provision is applicable on the facts of the present case also. We have perused the said decision and we find that we are unable to accept the contention of the learned Counsel for the appellant that the said case applies to the facts of the present case. It is to be noted that in the said decision, the facts were that the assessee had demanded from its customers, the balance of the higher price by virtue of the retrospective revision of the price and therefore, on the date the goods were cleared, the differential duty had to be paid and the same had not been done which was held to be a short payment of duty as the differential duty was paid only later when the assessee issued supplementary invoices to the customers demanding the balance amounts. Under the said circumstances, the Apex Court held that it was a case of short payment of duty though it was not intentional and without any allegation of deceit. The facts of the present case are that after the goods were initially cleared and the appropriate duty had been paid subsequently, the price escalation was due to the increase in input labour and other costs which was determined by the All India Industrial Price Indices and by the Reserve Bank of India communicated by All India Electrical Manufacturers Association. In terms of the said direction, the supplementary invoices were issued to facilitate the recovery of the expenditure of cost escalation and the enhanced duty thereon was paid. Therefore, as on the date the goods were cleared initially, if such a price escalation had not taken place, then the assessee could not foresee, the subsequent escalation in price. However, in the instant case the assessee paid duty on the differential price also. Therefore, we cannot apply the said decision to the present case.

8. For the aforesaid reasons and for the reasons assigned by the tribunal, we are of the view that the substantial questions of law raised in this appeal have to be answered against the revenue. Accordingly, the appeal is dismissed.