

**(2014) 03 AHC CK 0272**

**In the Allahabad High Court**

**Case No :** Central Excise Appeal Defective No. 32 of 2014

|                                                             |            |
|-------------------------------------------------------------|------------|
| The Commissioner of Central Excise, Customs and Service Tax | APPELLANT  |
| Vs                                                          |            |
| Steel Engineering Co.                                       | RESPONDENT |

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**Date of Decision :** 07-03-2014

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11AC, 6

**Citation :** (2014) 3 ALJ 138 : (2014) 305 ELT 25

**Hon'ble Judges :** Rajesh Kumar Agrawal, J; Ashwani Kumar Mishra, J

**Bench :** Division Bench

**Advocate :** Amit Mahajan, Sr. S.C, Advocate for the Appellant

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## **Judgement**

1. Heard Sri. Amit Mahajan, learned counsel for the appellant and Sri. M.B. Mathur appearing on behalf of the respondent. This is an appeal filed by the Commissioner of Central Excise against the order of the Tribunal dated 26.7.2013, by which the Tribunal has allowed the appeal of the respondent and reduced the penalty to Rs. 5000/-.

2. In the appeal the following question has been raised claiming to be substantial question of law.

Whether on the facts and in the circumstances of the case the CESTAT, New Delhi has committed an error of law in reducing the penalty levied upon the Respondent from Rs. 11,97,798/- imposed under the provisions of Rule 25 read with Section 11AC to Rs. 5,000/- under Rule 27 of the Central Excise Rules, 2002?

3. The brief facts of the case are that the respondent is engaged in the manufacturing of "Portable Gen Sets & Parts thereof". For the period of July, 2010 to February, 2011, the respondent admittedly has furnished the returns as required under Rule 8 but has not deposited the amount of duty amounting to Rs. 11,97,798/-. The said amount of duty has been deposited along with interest at Rs. 39058/- vide challans dated 11.3.2011.

4. The Assistant Commissioner initiated the penalty proceedings and has levied the penalty at Rs. 11,97,798/- u/s 11AC read with Rule 25 and further levied penalty at Rs. 5,000/- under Rule 27.

5. Being aggrieved by the order of the Assistant Commissioner, the respondent filed the appeal before the Commissioner (Appeals), who has allowed the appeal in part vide order dated 28th February, 2013. The Commissioner (Appeals) has deleted the penalty under Rule 27 and has reduced the amount of penalty levied u/s 11AC read with Section 25 to the extent of 25% of the penalty imposed.

6. Being aggrieved the respondent filed the appeal before the Tribunal. The Tribunal observed that the respondent has deposited the duty along with interest. The delay was caused on account of inability of the Bank to give correct password. The Tribunal further observed that on the similar facts the issue has been considered by the Tribunal in the case of Saurashtra Cement Ltd. v. CEE wherein it has been held that provision which is to be invoked is Rule 27 of the Central Excise Rules. The said decision is reported in ( 2008 (126) ECC 146 ). The said rule provided maximum penalty of Rs. 5,000/-. The Tribunal further observed that the order of the tribunal in the case of Saurashtra Cement Ltd. v. CEE has been affirmed by the Gujrat High Court in the case of Commissioner of C. Ex. and Customs Vs. Saurashtra Cement Ltd., . Against the said order the SLP has been dismissed. Tribunal accordingly on the facts of the case has upheld the penalty at Rs. 5,000/- under Rule 27.

7. Learned counsel for the appellant submitted that the respondent in return has stated that duty has been deposited while the duty has not been deposited and this amount to misrepresentation or concealment of fact and therefore, the provision of Section 11AC has rightly been invoked and the penalty levied u/s 27 was justified.

8. Learned counsel for the respondent submitted that Section 11AC can be invoked only in a circumstance where there is a misstatement or concealment of fact with intent to evade the duty. No such case has been made out.

9. The respondent has furnished the return disclosing the production for the relevant period and the duty payable thereon. The only contravention was that the amount of duty payable was not deposited within the specified period along with the return for which the reason was submitted and for such contravention the penalty could be imposed under Rule 27, maximum to the extent of Rs. 5,000/-.

10. He submitted that the Tribunal rightly relied upon the decision in the case of Saurashtra Cement Ltd. v. CEE decided by the tribunal and confirmed by the Gujrat High Court and has reduced the penalty to Rs. 5,000/- under Rule 27.

11. He submitted on the facts and circumstances, no substantial question of law arises from the order of the tribunal. Rule 25 of the Central Excise Rules reads as follows:

RULE 25. Confiscation and penalty.--(1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer,

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required u/s 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousand], whichever is greater.

(2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.

12. The said rule came up for consideration before the tribunal in the case of Saurashtra Cement Ltd. v. CEE (supra). The tribunal has observed in paragraph 5 as follows:--

We find that Rule 25 of Central Excise Rules, 2002 provides for imposition of penalties which shall not exceed the duty on the excisable goods, when there is contravention of the nature referred to in clause (a), clause (b), clause (c) or clause (d). We find that clause (a) of Rule 25 refers to removal of excisable goods in contravention of any of the provisions of the rules. Admittedly when the goods were removed, no excise duty was required to be paid at that point of time. As such, it cannot be said that the contravention of the nature mentioned in the said clause has been committed by the appellant. Clause (b) is to the effect that the manufacturer does not account for any excisable goods manufactured by him. Admittedly, the said clause does not stand contravened inasmuch as the goods were duly reflected in the statutory records. Similarly, clause (c) is not contravened inasmuch as the appellant has not manufactured goods without applying for registration. Clause (d) refers to contravention of any of the provisions of the rules with intent to evade payment of duty (emphasis provided). Admittedly, the excisable goods were entered in records, cleared on Central Excise invoices and duty was also paid subsequently, though belatedly along with interest. As such, the said clause (d) is also not attracted. In such a scenario, the invocation of Rule 25 for imposition of penalty for delayed deposit of duty is not in accordance with the law.

13. Against the order of the tribunal, the Commissioner of Central Excise has filed the appeal, which has been dismissed vide order dated 16.9.2010. The decision of the Division Bench of the Gujarat High Court is reported in Commissioner of C. Ex. and Customs Vs. Saurashtra Cement Ltd., . The Gujarat High Court in paragraph 17 held as follows:--

17. It is also to be borne in mind that Rule 25 starts with the word "Subject to the provisions of section 11AC.....". Section 11AC of the Central Excise Act deals with penalty for short levy or non levy of duty in certain cases. It says that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion or any willful misstatement 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, the person who is liable to pay duty as determined under sub-section (2) of Section 11AC, shall also be liable to pay a penalty equal to the duty so determined. For the purpose of invoking section 11AC of the Act, the condition precedent is that the duty has not been levied, or paid or short-evied or short-paid or the refund is erroneously granted by reasons of fraud, collusion or any willful misstatement or suppression of facts. If these ingredients are not present, penalty u/s 11AC cannot be levied. Since Rule 25 can be invoked subject to the provisions of section 11AC of the Act, as a natural corollary, the ingredients mentioned in section 11AC are also required to be considered while determining the question of levying of penalty under Rule 25 of the Central Excise Rules.

14. There is no dispute that against the order of the Gujarat High Court in the case of Commissioner of Central Excise v. Saurashtra Cement Ltd., referred herein above, the SLP filed by the Commissioner of Central Excise, has been dismissed.

15. This issue has come up before the Andhra Pradesh High Court in case of Commissioner of C. Ex. Guntur v. Andhra Cements Limited (supra) wherein the Court has taken the view that as per Rule 25(d) of the Rules subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty, he is liable to pay the penalty in terms of Rule 25 of the Rules. The Court further observed that a bare perusal of this Rule would suggest that evasion of payment of duty is not sufficient to impose penalty on a producer or manufacturer. There should be an element of intention to evade payment of duty. Unless the authorities come to the definite conclusion that there was an intention to evade the payment of duty, a penalty cannot be imposed. Considering the facts before the Andhra Pradesh High Court, the Court observed that there is a finding of the Tribunal that the circumstances were beyond the control of the respondent-company as the matter was pending before BIFR, and as such, the amounts could not be deposited by the respondent-company within time and as soon as it was in a position to make the payment, the respondent-company

made the payment not only of the duty, but also the interest calculated under Rule 8(3) of the Rules. The Court, therefore, comes to the conclusion that the Tribunal has correctly interpreted Rule 25 of the Rules and the penalty cannot be imposed on the assessee company.

16. A similar issue has come up before the Kerala High Court in the case of Superintendent of Central Excise v. Sance Pharmaceuticals (supra). The Court in that case was concerned with issuance of show-cause notice and levy of penalty under Rule 173GG of erstwhile Central Excise Rules, 1944. The Division Bench of the Kerala High Court while confirming the order and judgment of the learned single Judge, setting aside the penalty, has held that the learned single Judge has correctly applied the law laid down by the Apex Court that penalty should not be imposed in absence of willful intention to evade payment of tax or duty, as the case may be. The Court further held that it is trite law that even the statute provides for imposition of penalty when there is failure to pay duty within the statutorily prescribed period, such imposition of penalty should be preceded by a finding that there was a willful default as such and in the case before the Kerala High Court, the deficit duty had been paid along with interest even before the issuance of the show-cause notice. The appellate authority had also found absence of any intention to evade payment of duty. The Court, therefore, took the view that the orders of penalty were not sustainable and rightly interfered with by the learned single Judge.

17. Even in the case of Supreme Industries Limited v. C.E.S.T.A.T., New Delhi (supra), the Madhya Pradesh High Court took the view that enforcement of penal clause to be done subject to strict proof of intention to evade payment of duty. In the case before the Madhya Pradesh High Court, there was no material to show that there was intention to evade duty. The goods manufactured were not subject to quality control test and were kept on hold. The goods were to be cleared by quality control department and only thereafter were to be sent to packing department after quality control test was concluded. Merely because in statement, the Commercial Manager of petitioner in that case has stated that goods were manufactured, that by itself cannot be a ground for holding that goods were ready for dispatch to customer. The Court, therefore, took the view that confiscation and penalty is not sustainable under Rule 173Q of erstwhile Central Excise Rules, 1944.

18. The Apex Court judgment in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, also supports the case of the respondent assessee. The Apex Court after reproducing section 11AC in the judgment, took the view that the main body of section 11AC lays down the condition and circumstances that would attract penalty and the various proviso enumerate the condition, subject to which and the extent to which the penalty may be reduced. The Court further took the view that the penalty provision of section 11AC would come into play only after recording a finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

The penalty u/s 11AC is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in that section. The Court further held that section 11AC would not apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

19. It is also relevant to mention here that applicability of Rule 25 is subject to the provisions of section 11AC of the Act. The term "subject to" in the context assumes some importance. The Apex Court in the case of Commr. of Central Excise, Bhavnagar Vs. Saurashtra Chemicals Ltd., , after referring to its earlier decisions observed that the term "subject to" is an expression whereby limitation is expressed. It is further observed that the expression "subject to" must be given effect to.

20. We have perused the order of the Assistant Commissioner and the Commissioner Central Excise (Appeals). No case of clauses (a), (b), (c) or (d) of Rule 25 has been made out. No case of fraud, collusion or any willful statement or suppression of fact, or contravention of any other provisions of the act or of the rules made therein with the intent to evade the payment of duty, has been made out, which made respondents liable to pay duty as determined under sub-section (2) of section 11AC and liable to pay penalty. In the aforesaid facts and circumstances, we are of the view that no substantial question of law arise from the order of the tribunal, which requires interference by this court. The present appeal fails and is dismissed, accordingly.