**(2007) 03 RAJ CK 0029**

**In the Rajasthan High Court**

Union of India (UOI) and Others APPELLANT

Vs

T.P.L. Industries Ltd. RESPONDENT

**Date of Decision :** 02-03-2007

**Acts Referred:**

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Central Excises and Salt Act, 1944 — Section 11A, 11AC, 4

**Citation :** (2007) 214 ELT 506 : (2007) 3 RLW 2272

**Hon'ble Judges :** Rajesh Balia, J;Gopal Krishan Vyas, J

**Bench :** Division Bench

**Final Decision :** Dismissed

# Judgement

Rajesh Balia, J.

D.B. Civil Excise Appeal No. 16/2006:

1. The following substantial question of law has been framed in this appeal for consideration:

Whether in the facts and circumstances of this case the Tribunal was right in setting aside the penalty imposable as equal to the amount of duty u/s 11AC of the Act, 1944 because the assessee had deposited the amount of duty on being detected by the Departmental Officers before issuance of the show cause notice?

2. The facts necessary for the present case are that along with show cause notice for levy of duty which has not been paid notice for levy of penalty was also issued for committing breach of Rule 9(1), 52A, 53, 173F, 173Q & 226 of Central Excise Rules read with Section 3 of the Additional Duties of Excise Act, 1957. Penalty was sought to be levied under Rule 9(2), 52A, 173Q and 226 of the Central Excise Rules red with Section 11AC of Central Excise Act for contravention of aforesaid provisions and ultimately finding that the duty was short levied, a penalty under Rule 9(2) read with Rule 173Q was imposed and also a penalty equivalent to the amount of tax levied was imposed with reference to Section 11AC of the Central Excise Act.

 

3. Duty was already paid before issuance of show cause notice. The Tribunal has set side the levy of penalty by holding that since Duty has been paid prior to issuance of show cause notice, no penalty is leviable u/s 11AC.

D.B. Central Excise Appeal No. 76/06:

4. The following substantial question of law has been framed at the time of admission of this appeal:

Whether the Tribunal was justified in holding that penalty u/s 11AC of the Central Excise Act, 1944 cannot be levied where the manufacturer has deposited the amount of Duty and interest thereon before adjudication?

5. The manufacturer respondent was given a show cause notice dated 27/3/2001 pointing out that the manufacturer has contravened the provisions of Section 4 of the Central Excise Act, 1944, Rule 5 of the Central Excise (Valuation) Rules, 1975 and Rules 173F & 173G of the Central Excise Rules, 1944 in respect of manufacture of P/V Yarn. Along with show cause notice, notice was also issued for proposed levy of penalty u/s 11AC and Rule 173Q along with notice for interest on duty.

6. Vide adjudication order dated 26/9/2001, the Joint Commissioner held the assessee liable for payment of short levied duty and also for levy of penalty u/s 11AC & Rule 173Q of the Central Excise Act & Rules. The amount of short levied duty on forwarding charges which the adjudicating officer sought to include in the monetary consideration. Short Duty was deposited by the manufacturer during the course of scrutiny but before issuance of the show cause notice. Penalties were imposed u/s 11AC & Rule 173Q.

7. On appeal, the Commissioner (Appeals) affirmed the short levy of duty and also the levy of penalty u/s 11AC equal to amount of Duty short levied but set aside the penalty levied under Rule 173Q in respect of very same defaults.

8. The Tribunal, however, held that in view of decision in Commissioner of Central Excise-I Vs. Gaurav Mercantiles Ltd., , since assessee has already deposited the amount of short levy of duty before issuance of show cause notice, no penalty was leviable and set aside the order of penalty in toto.

9. In these cases the respondents assessee have deposited the short levied Duty before issuance of show cause notice, which fact is not in dispute. The adjudicating authority levied the duty as well as penalty equal to the amount of duty with reference to Section 11AC and he did not consider Rule 173Q for the purpose of levy of penalty. The Tribunal has set aside the penalty by holding that since the assessee has paid short levied duty even before issuance of show cause notice, no case for penalty has been made out u/s 11AC. In setting aside the penalty, the Tribunal has followed the decision of Bombay High Court in case of Commissioner of Central Excise-I Vs. Gaurav Mercantiles Ltd.,

10. The proposition appears to be well settled that where the duty has been

 

deposited before issuance of show cause notice u/s 11A & Section 11AB of the Central Excise Act, 1944, no action u/s 11AC of the said Act for imposition of penalty can be initiated or taken. The reason is obvious. As on the date show cause notice is issued, there is no short levy of Duty for which such notices can be issued.

11. In Commissioner of C. Ex. Vs. Shree Krishna Pipe Industries, Karnataka High Court, in Commissioner v. Jkon Engineering (P) Ltd. 2005 (67) RLT 157 Madras High Court and in Commissioner of Central Excise-I Vs. Gaurav Mercantiles Ltd., Bombay High Court have all taken the view that where duty imposed has been deposited before issuance of the show cause notice u/s 11AC of the Central Excise Act, 1944, no action u/s 11AC of the Act, 1944 should be initiated or taken.

12. Further, the Karnataka High Court while considering the question opined that where the party even before issuance of show cause notice has deposited the duty, the inference can reasonably be drawn that there was no question of any fraud, misrepresentation or suppression of fact, which is essential foundation for levy of penalty u/s 11AC of the Act of 1944, at all. In coming to this conclusion, the Karnataka High Court has referred to the decision of 2003 (161) ELT 285 appeal against which has been dismissed by the Supreme Court as reported in Commissioner of Central Excise v. Rashtriya Ispat Nigam Ltd. 2004 (163) ELT A 53 (SC).

13. In view of the aforesaid consistent view of three different High Courts and appeal against the Tribunal''s order taking the same view having been dismissed by Apex Court, and no other view contrary to it has been brought to our notice, we do not find any reason to take a different view.

14. Accordingly, the appeals fail and are hereby dismissed.