(2014) 12 P&H CK 0187

In the Punjab And Haryana At Chandigarh

Case No : Central Excise Appeal Nos. 63, 59 and 70 of 2014

Universal Timber Corporation — APPELLANT

Vs

Commissioner of C. Ex. — RESPONDENT

Date of Decision : 09-12-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 11AC

Citation : (2015) 319 ELT 273

Hon'ble Judges : Rajive Bhalla, J;B.S. Walia, J.

Bench : Division Bench

Advocate : Jagmohan Bansal, Advocate, for the Appellant; Sukhdev Sharma, for the Respondent

Judgement

Rajive Bhalla, J.?By way of this order, we shall decide Central Excise Appeal No. 63 of 2014, filed by the assessee and Central Excise Appeal Nos. 59 and 70 of 2014, filed by the Revenue. For the sake of convenience, facts are being taken from CEA No. 63 of 2014. Counsel for the assessee submits that proceedings to revise an accepted return can be validly initiated only if there is suppression of relevant facts. The Tribunal while setting aside penalty has held that the appellant is not guilty of suppression of relevant facts. The Tribunal, however, failed to apply this finding to the duty levied and affirmed the levy of duty. The order passed by the Tribunal is, therefore, contradictory and may be set aside.

2. Counsel for the Revenue submits that in his self assessment return the assessee claimed that he is covered by the notification. The assessee was aware that duty was required to be paid but did not deposit duty, thereby proving suppression of material facts. The Assessing Officer has, therefore, rightly exercised jurisdiction within the extended period of limitation i.e., within five years of the assessment. Counsel for the Revenue further submits that the Tribunal having affirmed duty it had no jurisdiction to set aside the penalty. The appeal filed by the Revenue may, therefore, be allowed whereas the appeal filed by the assessee may be dismissed.

3. We have heard counsel for the parties, appraised the impugned order as well as orders passed by the Tribunal, the Assessing Authority, the first appellate authority.

4. The appellant filed a declaration for assessment years 2000-01, 2001-02, claiming that supply of ammunition boxes, to the Army is exempted from payment of excise duty. The Revenue, by invoking the extended period of limitation of five years, served a notice, calling upon the assessee to show cause why his return be not revised. In response, the appellant pleaded that it did not pay duty as tenders issued by the Ministry of Defence, contain a recital that excise duty is NIL and as the Joint Commissioner, Central Excise, Panchkula, has in the case of M/s. Jai Forging & Stampings Pvt. Ltd. clarified that duty is not payable. The Assessing Officer, rejected the appellant''s explanation, revised the return by invoking the extended period of limitation, raised a demand for duty and imposed penalty.

5. Aggrieved by this order, the appellant filed an appeal, which was dismissed by the first appellate authority. The appellant filed an appeal before the CESTAT specifically averring that, in view of Sections 11A and 11AC of the Central Excise Act, 1944 (hereinafter referred to as ''the Act''), jurisdiction to revise a return, within the extended period of limitation can only be exercised if there is a suppression of facts. The CESTAT, vide order dated 16-1-2014 confirmed the demand of duty, but set aside penalty by holding that there is no suppression of facts. A relevant extract from the order reads as follows:-

"2. Perusal of the two documents referred above shows that the appellant has informed to the department while seeking SSI exemption. That aspect remain undisputed for the reason that learned Adjudicating authority has taken cognizance thereof in para 51 of the adjudication order. But the fact still remains is that the appellant was not a factory as specified by the notification. Goods manufactured by an ordinance factory belonging to Central Government, and the like are prescribed factories. Notification being issued under the statute, satisfaction of both conditions prescribed thereby is mandatory. Failure to comply one of the conditions disentitles the appellant to the benefit of duty exemption. The appellant fails on the count of levy of duty demand for which we confirm such demand made in the adjudication order.

3. So far as penalty aspect is concerned, considering that the appellant has informed the department about claim of exemption while exercising option to avail SI exemption and that remains undisputed, levy of penalty is unwarranted in the absence of material fact of suppression. Therefore, there shall not be levy of penalty under Section 11AC of Central Excise Act, 1944.

4. So far as penalty of Rs. 5 lakh in appeal No. E/3526/2006 is concerned there appears no good reason to confirm penalty in absence of finding relating to existence of elements of imposition of penalty demonstrating deliberate intention to cause loss to Revenue. Therefore, penalty is waived and this appeal is

allowed."

6. A perusal of the order passed by the Tribunal reveals that while setting aside penalty, the learned Tribunal has recorded a positive finding that there is no suppression of relevant facts. The question of suppression of material facts was germane to both issues i.e., assumption of jurisdiction by the Assessing Authority to re-assess and penalty. The Tribunal having held that there is no suppression of material facts while deciding the question of penalty, was required to apply this finding to the legality of assumption of jurisdiction to re-assess duty. The Revenue in its appeal impugns the setting aside of penalty by urging that suppression of material facts has been proved. The finding recorded by the Tribunal on the question of suppression of material facts, being contradictory, we have no option but to set aside the impugned order and call upon the Tribunal to consider whether there was any suppression of material facts, that enabled the Revenue to assume jurisdiction to re-assess the appellant and thereafter to impose duty and penalty.

7. Consequently, the impugned order is set aside, appeals filed by the Revenue and the assessee are allowed and the matter is remitted to CESTAT for adjudication afresh. The Tribunal shall decide the appeal within three months of receipt of a certified copy of this order. This order shall not construe as an expression of opinion on the rights of parties. Parties are directed to appear before the CESTAT on 29-1-2015.

