

2014 (1) ECS (36) (HC- Mad.)

In The High Court Of Judicature At Madras

Date of Decision: 05.02.2014

CCE, COIMBATORE

Vs.

M/s. S.M.T. EXPORTS

C.M.A No. 2800 of 2006

Appearance:

Mr. E.Vijay Anand

None

For the Appellant

For the Respondent

CORAM:

Honourable Mrs. Justice Chitra Venkataraman

Honourable Mr. Justice T.S. Sivagnanam

“It is not sufficient that the mere payment of duty either immediately prior to the Show Cause Notice or immediately prior to the passing of the order of adjudication would absolve the assessee from the lavy of penalty nor it could be treated as mitigating circumstances fo the purpose of reduction of penalty. It has been held that once the provisions of Section 11AC stands attracted and the authority recorded a clear finding that there is an intention to evade payment of duty then penalty equivalent to the amount of duty becomes automatic.” (Para 8)

“ The Tribunal while considering the case of the assessee concurred with the original Authority as well as the first Appellate Authority that the conduct of the assessee was contumacious and their conduct was with an intent to evade payment of duty. Havin recorded such a factual finding there was no jurisdiction for the Tribunal to reduce the penalty in terms of the language employed of Section 11AC of the Act.” (Para 9)

JUDGMENT

(The Judgment of the Court was made by T.S. SIVAGNANAM, J.)

This appeal by the revenue is directed against the Final Order passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal) in Final order No.1197 of 2005, dated 06.09.2005 and the appeal has been admitted on the following substantial questions of Law:

“ (i) Whether the Appellate Tribunal has power to reduce the mandatory penalty under Section 11AC of the Central Excise Act,1944?

(ii) Whether the Appellate Tribunal is correct in reducing the penalty when holding that the respondent had an Intention to evade payment of

duty on the raw materials in question?"

2. We have heard Mr. Vijay Anand, learned counsel appearing for the Revenue. Though the respondent has been served and their name is printed in the cause list, none appeared for the respondent.
3. the respondent/ assessee availed benefit under Rule 19(2) of the Central Excise Rules, 2002, (Rules) read with the provisions of Central excise (Removal of goods at concessional rate of duty for manufacture of Excisable Goods) Rules, 2001, for procuring Cotton yarn without payment of duty for the manufacture of power loom woven unprocessed grey fabrics falling under Chapter Heading 5207.00 of the Central excise Tariff Act, 1985 and exported the same out of India. The Department found that the assessee had cleared cotton yarn valued at Rs..21,30,325/- which was procured without payment of duty under Rule 19(2) of the Rules. In a statement given by the proprietor of the assessee, he admitted such diversion. In terms of Rule 19 (2) read along with the provision of the notification No. 43/2011-CE (N.T.). dated 26.06.2001 the manufacturer or processor shall procure excisable goods without payment of duty for manufacture of export goods and the intended purpose of procuring yarn to manufacture grey fabrics to export was not fulfilled and the duty free goods were sold in the market. A Show Cause Notice was issued to the assessee under Section 11A (1) of the Central Excise Act, 1944, (Act) demanding duty of Rs.1,95,990/- and proposing to levy interest under Section 11AB and penalty under Rule 25 and Section 11AC of the Act. The Adjudicating Officer after considering the reply given by the assessee by order dated 27.09.2004 confirmed the proposal in the Show Cause Notice and imposed penalty equivalent to that of duty and also ordered payment of interest at the appropriate rate on the duty demanded. The Assessing officer recorded a factual finding that the conduct of the assessee was with an intent to evade payment of duty and defraud the exchequer and therefore inlawful.
4. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Central Excise (Appeals). The Appellate Authority after considering the case, held that the assessee has misused a beneficial scheme and underscored the trust reposed on them by the Government and it is a clear case of defrauding the Government. Accordingly the appeal was rejected and confirmed the order of the Original Authority.
5. Aggrieved by the same, the assessee preferred appeal to the Tribunal. The Tribunal considered the case of the assessee and in paragraph 4 of the order pointed out that assessee was aware of their liability when they diverted the final product to local market

instead of exporting it and the assessee did not maintain proper accounts for raw materials procured in the manner stated and they did not maintain any correlation between the raw materials and the final products. Thus, the Tribunal concluded that the conduct of the assessee when they cleared the final product into the local market was with an intention not to fulfill the obligation under the relevant notification. That apart, the Tribunal recorded a specific finding that the conduct of the assessee was with an intention to evade payment of duty on raw materials in question and the circumstances of invocation of Section 11AC against the assessee cannot be faulted. Having rendered such a finding, the Tribunal proceeded to reduce the penalty to Rs. 1,00,000/-. In fact, no reasons have been assigned by the Tribunal for reducing the penalty.

6. The Hon'ble Supreme Court in the case of *Union of India Vs Rajasthan Spinning and weaving Mills* reported in [(2009) 13 SCC 448], considered the earlier decision of the Hon'ble Supreme Court in the case of *Union of India and Ors Vs Dharmendra Textiles Processor & Ors.*, reported in [2008] 306 ITR 277 (SC) and held that it goes without saying that for applicability of Section 271 (1) (c) of the Act, condition stated therein must exist. The above said decision came up for consideration in the case *Commissioner of Income Tax vs Reliance petroproducts Pvt, Ltd*, reported in [2010 322 ITR 158 (SC)]. On reading of Section 271 (1) (c), the Hon'ble Supreme Court pointed out that in order to bring the case under Section 271 (1) (c), there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income in order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision could not be invoked. Thus, the Hon'ble Supreme Court pointed out that mere making of a claim, which is not sustainable in law by itself, would not amount to furnishing of inaccurate particulars regarding the income of the assessee. The reading of the decision of the Hon'ble Supreme Court referred to above, thus points out that for sustaining penalty, the bonafide explanation of the assessee must be looked at, so that the contumacious conducts of the assessee for the purpose of sustaining the penalty would be taken as condition that is the main requirement under Section 271 (1) (c) of the Act. Referring to the decision in the case of *Dharmendra Textiles Processors*, (supra), the Hon'ble Supreme Court pointed out that in the background of Section 271 (1) (c) of the Act, there is no necessity of mens rea being shown by the Revenue, however referring to the Explanation to Section 271 (1) (c) penalty being a multiple liability, the bonafide of the conduct of the assessee necessarily assumes significant, even though willfulness of the assessee may not be a criteria, the conduct

is to be considered. Thus, a mere fact that the addition in this case has been sustained by this Court by itself would not lead to the automatic application to Section 271 (1) of the Act.

7. Further, in the recent decision of the Hon'ble Supreme Court in Civil Appeal No 9772 of 2013, dated 30.10.2013(Mak Data P. LTD., vs Commissioner of Income Tax -II), the Hon'ble Supreme Court while considering the Explanation to Section 271 (1) , held that the question would be whether the assessee had offered an explanation for concealment of particulars of income or furnishing inaccurate particulars of income and Explanation to Section 271(1) raises a presumption of concealment when a difference is noticed by the Assessing Officer between the reported and assessed income. The burden is then on the assessee to show otherwise by cogent and reliable evidence and when the initial onus placed by the explanation has been discharged by the assessee, the onus shifts on the Revenue to show the amount in question constituted their income and not otherwise.
8. In the light of the above decision, it is not sufficient that the mere payment of duty either immediately prior to the Show Cause Notice or immediately prior to the passing of the order of adjudication would absolve the assessee from the levy of penalty nor it could be treated as mitigating circumstances for the purpose of reduction of penalty. It has been held that once the provisions of Section 11AC stand attracted and the authority recorded a clear finding that there is an intention to evade payment of duty then penalty equivalent to the amount of duty becomes automatic.
9. The Tribunal while considering the case of the assessee concurred with the original Authority as well as the first Appellate Authority that the conduct of the assessee was contumacious and their conduct was with an intent to evade payment of duty. Having recorded such a factual finding there was no jurisdiction for the Tribunal to reduce the penalty in terms of the language employed of Section 11AC of the Act.
10. In the light of the above, the order passed by the Tribunal reducing the penalty is not sustainable in law. The Civil Miscellaneous Appeal is allowed and the order passed by the Tribunal so far as reducing the penalty is set aside and the penalty imposed by the Adjudicating Authority in the order dated 29.09.2004, stands restored. No costs