CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
<u>CHENNAI</u>

REGIONAL BENCH – COURT No. III

Excise Appeal No. 42301 of 2015

(Arising out of Order-in-Appeal No. 236/2015 (CXA-II) dated 25.08.2015 passed by Commissioner of Central Excise (Appeals-II), No. 26/1, Uthamar Gandhi Salai, Nungambakkam, Chennai – 600 034)

M/s. CnF Automotive India Pvt. Ltd. **...Appellant**
Plot No: A-11, SIPCOT Industrial Growth Centre,
Oragadam, Mathur Village,
Sriperumbudur Taluk,
Kancheepuram – 602 105.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Marg,
Nungambakkam,
Chennai – 600 034.

<u>APPEARANCE:</u>

For the Appellant : Mr. N. Viswanathan, Advocate
For the Respondent : Ms. Anandalakshmi Ganeshram, Authorised Representative

<u>CORAM:</u>
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

<u>FINAL ORDER No. 41307 / 2024</u>

DATE OF HEARING : 23.09.2024
DATE OF DECISION: 18.10.2024

Order :- Per Mr. VASA SESHAGIRI RAO

M/s. CnF Automotive India Pvt. Ltd., Orgadam, Kancheepuram (the Appellant herein) are the manufacturers of Moulded Plastic Automobile components for supply to M/s. Hanil Automotive India Pvt. Ltd., Sriperumbudur (hereinafter M/s. Hanil). The appellants were being supplied with moulds required for the manufacture of the above components and in respect of which they were found amortizing the cost of the moulds by including in the value of the moulded components supplied to M/s. Hanil and discharging the duty.

1.2 The dispute involved in this appeal is relating to non-inclusion of amortized value of the moulding machines supplied free of cost by M/s. Hanil to the appellants. As the moulding machines were supplied along with the tax invoices on which the appellant has taken the CENVAT credit, they were of the view that amortization of the cost of the machines was not required. However, during the preventive check conducted by the officers of the Commissionerate on 28.08.2012, the appellant was directed to amortize the cost of the said moulding machines supplied free of cost by including the said value in the value of the finished goods manufactured and cleared to M/s. Hanil. Soon after, the appellant has calculated the duty involved as Rs.2,94,268/- which was paid on 13.08.2012 within three days of the visit of the officers and also paid the interest of Rs.30,160/- on 10.09.2012.

1.3 However, the appellant was issued with a Show Cause Notice No. 40/2012 dated 28.12.2012 by the Deputy Commissioner of Central Excise, Chennai, proposing appropriation of the amounts of duty and interest paid along with a proposal for imposing penalty under Section 11AC of the Central Excise Act, 1944. On adjudication of the above Show Cause Notice dated 28.12.2012, the amount of differential duty of Rs.2,94,268/- and interest of Rs.30,160/- paid were appropriated and also a penalty of Rs.2,94,268/- was imposed under Section 11AC of the Central Excise Act,

1944. When an appeal against this order was filed before the Commissioner of Central Excise (Appeals-II) who *vide* his Order-in-Appeal No. 236/2015 (CXA-II) dated 25.08.2015 has upheld the order of the Original Adjudicating Authority for imposition of mandatory penalty under Section 11AC of the Act *ibid* on the grounds that the appellants have been amortizing the value of moulds supplied free of cost regularly and so, they should have been aware of the need for amortization of the value of the moulding machines supplied free of cost by M/s. Hanil and ignorance of law is not an excuse. Being aggrieved, the appellant came in appeal before this forum.

2.1 The Ld. Advocate Shri N. Viswanathan representing the appellant have submitted that they had informed the receipt of the moulding machines and taking of the credit of the duty paid on the machines in their records and there was no finding recorded in the adjudication orders of the Lower Authorities that the appellant had any conscious or deliberate intention to evade the payment of duty which is a *sine-quo-non* for invoking the provisions of Section 11A(4) of the Central Excise Act, 1944 relying on the decision rendered by the jurisdictional High Court of Madras in the case of *Commissioner of Central Excise, Chennai IV Vs. Binny engineering Ltd. [2014 (302) ELT 188 (Mad.)]* wherein it was held that there must be a factual finding rendered by stating that the act of the assessee attracts the conditions expressly contemplated under Section 11 AC of the Central Excise Act, 1944 and in absence of factual finding on this aspect, imposition of penalty cannot be sustained.

2.2 It was also submitted that receipt of the capital goods i.e., moulding machines was different from the moulds which are consumables and further they have taken the credit of the duty paid on the machines and it was a *bona fide* mistake on their part in not amortizing the cost which otherwise they were doing in case of moulds. It was argued that they have paid the differential duty and interest within a short period of being informed indicating the *bona fides* which do not approve of the invocation of Section 11 A(4) of the Act *ibid* as there was no conscious or deliberate intent to evade payment of duty. The Ld. Advocate prayed for setting aside the penalty imposed.

3. The Ld. Authorised Representative Ms. Anandalakshmi Ganeshram, Assistant Commissioner has affirmed the findings of the Lower Adjudicating Authorities and have argued for imposition of mandatory penalty under 11AC of the Act *ibid* for non-amortization of the cost of the moulding machines supplied free of cost when they were aware of the Rule in amortizing the cost of moulds supplied free of cost.

4. Heard both sides and considered the submissions and other evidences available in the records of the appeal.

5. The only issue that is required to be determined in this appeal is whether imposition of penalty under Section 11AC of the Central Excise Act, 1944, is justified or not?

6. It is evident from the facts of the appeal that the appellant had paid the differential duty of Rs.2,94,268/- along with interest Rs.30,160/- within a few days after the visit of the officers. So, we are of the view that the provisions of Section 11A(2) of the Central Excise Act, 1944 are clearly applicable to the facts of this case and invoking the provisions of Section 11A(4) of the Act *ibid* is not justified. The provisions of Section 11A(2) read as under:-

> *"The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder."*

7. Entire amount of duty was paid on 31.08.2012 within three days of the visit of the officers which was on 28.08.2012 and applicable interest was paid on 10.09.2012 whereas the Show Cause Notice was issued only subsequent to payment of interest and duty which was on 28.12.2012.

8. The above provision clearly mandates that when the assessee has paid the duty along with interest and informs the Central Excise officer concerned, no notice shall be served in respect of such duty paid and no penalty is leviable under the provisions of the Act.

9. Even otherwise, we do not find any justification to attribute suppression on the part of the appellant with an intent to evade payment of

tax. The Ld. Lower Appellate Authority has also observed that it happened due to the ignorance of law on the part of the appellant.

10. We also have considered the decision of the Hon'ble Apex Court which has been relied upon by the appellant in the case of *Collector of Central Excise Vs. H.M.M. Limited [1995 (76) ELT 497 (SC)]* which has held as follows: -

> *"2. The assessee contended before the Additional Collector of Central Excise that the show cause notice was time barred under the main part of Section 11A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained the notice on the ground that it was within five years impliedly holding that the purported action was under the proviso to Section 11A of the Act. There is no dispute that the show cause notice cannot be sustained under sub-section (1) of Section 11A unless the proviso is attracted. Admittedly, it is beyond the period of limitation of six months prescribed under Section 11A(1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful mis-statement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years as provided by the said proviso. Therefore, in order to attract the proviso to Section 11A(1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful mis-statement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was guilty of wilful mis-statement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding the specific allegation under the proviso to that sub-section. The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade*

payment of duty or that the assessee was guilty of fraud, collusion, mis-conduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty."

11. As the appellant has accepted the need to include the amortized cost of the capital goods supplied free of cost in the value of finished products supplied to M/s. Hanil in terms of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, appropriation of the demand of duty and interest is not interfered with. However, the impugned Order-in-Appeal No. 236/2015 (CXA-II) dated 25.08.2015 cannot be sustained only on the issue of imposition of penalty under 11AC of Central Excise 1944.

12. Thus, the appeal is allowed with consequential relief, if any, as per the law.

(Order pronounced in open court on 18.10.2024)

Sd/-	Sd/-
(VASA SESHAGIRI RAO)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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