IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III
Excise Appeal No. 2306/2011- [SM]

[Arising out of Order-in-Appeal No. 137 (CB) CE/JPR-II/2011 dated 28.06.2011 passed by the Commissioner (Appeals) Central Excise, Jaipur-I]

Nitin Spinners Ltd. …Appellant

Vs.

C.C.E., Jaipur … Respondent

Present for the Appellant : Ms. Rinki Arora, Advocate.
Present for the Respondent: Mr. G.R. Singh, A.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

Date of Hearing.14.06.2017
Date of Decision._08.09.2017

Final Order No. 56475 /2017

Per S.K. Mohanty:

This appeal is directed against the impugned order dated 13.06.2011 passed by the Commissioner, Central Excise (Appeals), Jaipur.

2. Brief facts of the case are that the appellant is a 100% EOU, is engaged in the manufacture of Cotton and Yarn falling under Chapter 52 of the Central Excise Tariff Act, 1985. The unit of the appellant was de-bonded on 16.05.2008 into a DTA unit. After getting approval from the Development Commissioner for de-bonding of the EOU unit, the Central Excise Department verified

the inputs, furnished goods, capital goods lying in stock and calculated the duty payable by the appellant. Accordingly, the appellant deposited the duty amount on such goods and thereafter no due certificate was issued by the authorities. On the strength of such certificate, the unit of the appellant was de-bonded vide letter dated 16.05.2008. Subsequently, it was observed that the appellant did not declare the details of Bobbins, plastic crates and Card cans procured duty free under CT-3, which were lying in stock as on 16.05.2008 at the time of exit from 100% EOU scheme. The appellant deposited the duty along with interest on those goods by availing the benefit of deprecation. The Department initiated Show Cause Proceedings against the appellant, seeking confirmation of the duty demand, which was not deposited by the appellant. The matter was adjudicated vide order dated 14.09.2010 in confirming the Central Excise duty inability of Rs. 16, 12,844/- along with interest. Besides, penalty of Rs. 16,12,844/- was imposed on the appellant. The amount of duty an interest deposited by the appellant were appropriated into the Government account. Feeling aggrieved with the adjudication order dated 14.09.2010, the appellant has preferred appeal before the Commissioner (Appeals), which was disposed of vide the impugned order, wherein the benefit of deprecation in respect of the disputed goods was allowed and the differential duty in respect of those goods was quashed. However the ld. Commissioner (Appeals) has upheld the adjudication order to the extent of imposition of penalty under Section 11 AC of the Central Excise Act, 1944. Against imposition of penalty in the impugned order, the appellant has filed the present appeal before this Tribunal.

3. The ld. Advocate appearing for the appellant submitted that the disputed goods were procured indigenously under CT-3 certificate, but due to oversight, the appellant did not declare the stock of goods available in the factory, while calculating the duty liability and issuance of no due certificate. She further submitted that upon detection of the mistake, the appellant had suo moto deposited duty amount along with interest. Thus, according to her, there is no question of suppression, fraud etc. for invoking the provisions of Section 11AC *ibid* in order to impose equal amount of penalty. She also referred to the adjudication order dated 19.05.2011 passed by the Commissioner of Central Excise, Jaipur wherein proposed imposition of penalty in the SCN for the earlier period was dropped by him.

4. On the other hand, the ld. DR appearing for the Revenue reiterated the findings recorded in the impugned order.

5. Heard both sides and perused the case records.

6. Provision for imposition of penalty in case of short levy or non levy of duty in certain cases, is contained in Section 11 AC *ibid*. The said statutory provision mandates that where duty of Excise has not been levied or paid or has not been short levied or short paid by reasons of fraud, conclusion or any willful mis-statement or suppression of facts, the person liable to pay duty

as determine under sub-section (2) of Section 11 A, shall also be liable to pay penalty equal to the duty so determined.

7. Perusal of the provisions of Section 11 AC *ibid* reveals that the said provision can be invoked in the eventually, when the duty has not been paid due to the reason of fraud, suppression etc. In the present case, the ld. Commissioner (Appeals) has recorded the submissions of the appellant that as soon as the omission of non-payment of duty was noticed, the appellant suo-moto paid the entire duty along with the interest amount. He has not specifically addressed the issue as to whether there is involvement of any fraud, suppression etc. on the part of the appellant, in non-payment of duty within the stipulated time frame. Since, the onus to prove suppression etc. entirely lies with the Department, which in the present case, has not been discharged with the help of any tangible evidence, I am of the view that imposition of penalty under Section 11 AC *ibid* cannot be sustained.

8. Therefore, the impugned order to the extent it imposed penalty under the Section 11AC *ibid* is set aside and the appeal is allowed in favour of the appellant.

(Pronounced in the open court on 08.09.2017)

(**S. K. Mohanty**)
Member (Judicial)

Sakshi