IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT – IV

Excise Appeal No. E/52234/2018 [SM]

[Arising out of Order-in-Original No. IND-EXCUS-000-APP-679-17-18 dated 26/02/2018 passed by the Commissioner, Central Excise & Central Goods and Service Tax, Indore]

Navin Fluorine International Ltd ...Appellant

Vs.

C.C.E. & S.T., Indore ...Respondent

Present for the Appellant : Mr. Mehul Jivani, CA
Present for the Respondent: Mr. P.R. Gupta, DR

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 10.12.2018

FINAL ORDER NO. 53406 / 2018

PER: RACHNA GUPTA

The appellant herein is a 100% EOU engaged in manufacture of various kinds of chemical products. The adjudication in this case began with the SCN bearing No. 569 dated 21.04.2017 issued after the Department observed that the appellant has shown the finished goods as nil in the ER-2 return of September 2016. Thus, vide the SCN the confiscation of the stock which was found available at the time of physical verification worth Rs. 5,43,73,953/- was proposed alongwith the penalty to be imposed under Rule 25 of Central Excise Rules. While adjudicating the said SCN, the Joint Commissioner vide Order No. 5 dated 23.08.2017 has rejected the proposal of confiscation of the stock as was found available. However, the penalty under Rule 25 was confirmed. Being aggrieved of the said imposition Appeal before Commissioner(Appeals) was preferred who vide the Order under challenge i.e. the one bearing No 679 dated

26.02.2018 has confirmed the imposition of the penalty. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Mr. Mehul Jivani, Ld. CA for the appellant and Shri P.R. Gupta, Ld. DR for the Department.

3. It is submitted on behalf of the appellant that it was due to the clerical error that the appellant erroneously had shown the closing balance of finished goods in stock as nil in the ER-2 return for September 2016. The said inadvertence has duly been appreciated by the adjudicating authorities below. In view of their own findings, the imposition of penalty is not sustainable as there is no intention of the appellant to evade the duty. It is further submitted that Rule 25 is subject to the provision of Section 11AC of Central Excise Act and therefore the condition mandatory for Section 11AC have to be complied which is not the case of appellant as has been held by the adjudicating authorities below themselves. The penalty is therefore prayed to be set aside. Ld. Counsel has relied upon **Ganpati Rollings Pvt. Ltd. case reported as 2016 (338) ELT 587 (Del.)**. Order is accordingly prayed to be set aside and Appeal is prayed to be allowed.

4. While rebutting these arguments, Ld. DR has justified the order where the original adjudicating authority has held that the malafide intention is not the prerequisite for imposing of penalty under Rule 25 of Central Excise Rules. Emphasis has also been laid on the findings of Commissioner(Appeals) while confirming the penalty that *mensrea* cannot be mandatory requisite. It is only the default in complying with the statute which is sufficient for imposition of penalty. The case law as relied upon by

Commissioner(Appeals) is impressed upon in that respect and Appeal is prayed to be dismissed.

5. After hearing both the parties I am of the opinion that the adjudication in the case has shrunken to a narrow compass of the issue of imposition of penalty upon the appellant in view of the findings otherwise arrived at by the Adjudicating Authority below. It is observed from the orders of the adjudicating authorities that the confiscation of finished stock as was proposed by the impugned SCN is held to be proposed merely on ground of not tallying it with ER-2 return filed, and thus not sustainable when the said stock is physically available in the factory premises and also found tallying with the records maintained in SAP system at the time of physical verification by the preventive officers.

6. Further, I find that the Noticee is a 100% EOU and most of its clearance is meant for export. They have cleared only one item namely Dimethy phosphonate [(out of 37 items seized) to one of their customers for domestic clearance ever. Further, I also find that the Noticee is doing only contract research and manufacturing service (CRAMS) wherein they manufacture fluorine molecules through R&D for the customers. The said fluorine molecules is used in specialized advanced pharmaceuticals by the client (like Pflizer, vertex, Noverts Gilead etc in USA) i.e. used into the manufacturing of their Active Pharmaceuticals ingredients (API) which they were developing at their end to get it parented and which they would launch in next 3.8 years time for the trade. Thus, Noticee manufactures the goods under contract which will be used by the clients for their R&D purpose. Thus, goods manufactured by the Noticee is manufactured under contract and are special purpose

goods and thus are of no use to other customers. Further, as per the contract Noticee cannot share the chemistry developed/manufactured/sell these product developed to any other customer. Therefore, there is no possibility of clandestine removal. Thus, I find that goods which were there in stock were manufactured for the purpose of export under the contract which establish the fact that goods were not meant to be removed clandestinely with intent to evade duty. Therefore, the charges of suppressing with intent to clear the same clandestinely are not sustainable. There is otherwise no evidence on record to prove any intention of clandestine clearance. Above all there is no evidence on record to prove any intention of clandestine clearance. Commissioner(Appeals) has held that the charges of suppressing production with intent to clear the same clandestinely are not sustainable qua the appellant. Also from the statements and the other evidences on record I do not find any infirmity with these findings.

7. It is only to be adjudicated now as to whether the malafide intention is not a prerequisite for imposition of penalty under Rule 25 as has been held by the authorities below. For the purpose the case law as relied upon by the appellant is perused wherein the intention of the legislature under Rule 25 and Section 11AC of Central Excise Act has been considered and has been adjudicated as follows:

> *"The opening words of Rule 25 is 'Subject to the provisions of Section 11AC of the CE Act' and not an non obstante clause which would have begun with the words 'notwithstanding the provisions of Section 11AC of the CE Act.' It is plain that the CE Rules are subordinate legislation and have to abide the discipline of the statue under which they are made. Where Rule 25(1) expressly begins with 'Subject to the provisions of Section 11AC of the CE Act', obviously the requirements of Section 11AC will have to constitute a condition subject to which the power under Rule 25 can be exercise Rule 25 can be exercised. Rule 25 of the CE Rules itself came up for interpretation before the Gujarat High Court in* ***Saurashtra Cement Ltd 2010 (260) ELT 71 (Guj.)*** *wherein para 17 it was observed as under:*

> *"17. It is also to be borne in mind that Rule 25 starts with the word "subject to the provisions of Section 11AC…." Section 11AC of the Central Excise Act deals with penalty for short levy or non-levy of duty in certain cases. It says that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the Rues made there under with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of Section 11AC, shall also be liable to pay a penalty equal to the duty so determined. For the purpose of invoking Section 11AC of the Act, the condition precedent is that the duty has not been levied, or paid or short levied or short paid or the refund is erroneously granted by reasons of fraud, collusion or any wilful misstatement or suppression of facts. If these ingredients are not present, penalty under Section 11AC cannot be levied. Since Rule 25 can be invoked subject to the provisions of Section 11AC of the Act, as a natural corollary, the ingredients mentioned in Section 11AC are also required to be considered while determining the question of levying of penalty under Rule 25 of the Central Excise Rules.""*

The Hon'ble High Court Delhi in this case has referred to the adjudication of Hon'ble Apex Court in the case **Ashok Leyland Vs. State of Tamil Nadu 2004(3) SCC 1** wherein it was held:

> *"20. Thus as laid down by the Supreme Court the use of the words 'subject to' has reference to effectuating the intention of the law and the correct meaning, is 'conditional upon'. Rule 173Q opens with the words 'subject to the provisions contained in Section 11AC of the Act and sub-rule (4) of Rule 57-I and sub rule (6) of Rule 57-U.' Thus, confiscation of goods and levy of penalty under Rule 173Q of the Rules is conditional upon the requirements of Section 11AC and sub-rule (4) of Rule 57-I and sub-rule (6) of rule 57-U being satisfied. Thus, the words 'subject to' used in the said rule express a limitation on the power to confiscate goods and levy of penalty under the said rule."*

In another adjudication of Gujarat *High Court* in the case of ***Saurashtra Cement Ltd 2010 (260) ELT 71 (Guj.)***, the Hon'ble High Court while relying upon the adjudication of Hon'ble Apex Court in the case **Union of India Vs. Rajasthan Spinning and Weaving Mills 2009 (238) ELT 3 (S.C.)** has held as follows:

*"**17.** It is also to be borne in mind that Rule 25 starts with the word "Subject to the provisions of Section 11AC.....". Section 11AC of the Central Excise Act deals with penalty for short levy or non-levy of duty in certain cases. It says that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of Section 11AC, shall also be liable to pay a penalty equal to the duty so determined. For the purpose of invoking Section 11AC of the Act, the condition precedent is that the duty has not been levied, or paid or short-levied or short-paid or the refund is erroneously granted by reasons of fraud, collusion or any willful misstatement or suppression of facts. If these ingredients are not present, penalty under Section 11AC cannot be levied. Since Rule 25 can be invoked subject to the provisions of Section 11AC of the Act, as a natural corollary, the ingredients mentioned in Section 11AC are also required to be considered while determining the question of levying of penalty under Rule 25 of the Central Excise Rules.*

***18.** This issue has come up before the Andhra Pradesh High Court in case of Commissioner of C. Ex. Guntur v. Andhra Cements Limited (supra) wherein the Court has taken the view that as per Rule 25(d) of the Rules subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty, he is liable to pay the penalty in terms of Rule 25 of the Rules. The Court further observed that a bare perusal of this Rule would suggest that evasion of payment of duty is not sufficient to impose penalty on a producer or manufacturer. There should be an element of intention to evade payment of duty. Unless the authorities come to the definite conclusion that there was an intention to evade the payment of duty, a penalty cannot be imposed. Considering the facts before the Andhra Pradesh High Court, the Court observed that there is a finding of the Tribunal that the circumstances were beyond the control of the respondent-company as the matter was pending before BIFR, and as such, the amounts could not be deposited by the respondent-company within time and as soon as it was in a position to make the payment, the respondent-company made the payment not only of the duty, but also the interest calculated under Rule 8(3) of the Rules. The Court, therefore, come to the conclusion that the Tribunal has correctly interpreted Rule 25 of the Rules and the penalty cannot be imposed on the assessee company.*

***19.** A similar issue has come up before the Kerala High Court in the case of Superintendent of Central Excise v. Sance Pharmaceuticals (supra). The Court in that case was concerned with issuance of show-cause notice and levy of*

penalty under Rule 173GG of erstwhile Central Excise Rules, 1944. The Division Bench of the Kerala High Court while confirming the order and judgment of the learned single judge, setting aside the penalty, has held that the learned single judge has correctly applied the law laid down by the Apex Court that penalty should not be imposed in absence of willful intention to evade payment of tax or duty, as the case may be. The Court further held that it is trite law that even the statute provides for imposition of penalty when there is failure to pay duty within the statutorily prescribed period, such imposition of penalty should be preceded by a finding that there was a willful default as such and in the case before the Kerala High Court, the deficit duty had been paid along with interest even before the issuance of the show-cause notice. The appellate authority had also found absence of any intention to evade payment of duty. The Court, therefore, took the view that the orders of penalty were not sustainable and rightly interfered with by the learned single judge."

8. In view of the above entire discussion, it stands clear that the malafide intention i.e. the element of *mensrea* is very much the basic ingredient for imposition of penalty under Rule AC of Central Excise Act and since Rule 25 under which the penalty has been confirmed has a clause of it being subject to Rule 11AC the element of *mensrea* is undoubtedly a premandate/requisite for this provision as well. Otherwise also perusing Rule 25 sub clause D makes it an express intention of the legislature where the words used are "the contravention of any provisions of Rules with an intent to evade the payment of duty". The findings of the authorities below denying the *mensrea* or the said intent to not to be the requisite are apparently wrong, accordingly are hereby set aside. As a result, Appeal stands allowed.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.