IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Appeal Nos EX/146-147/2011

Arising out of Order-in-Appeal Nos. 62-63/KOL-II/2010 dated 02.12.2010 passed by the Commissioner of Central Excise (Appeals), Kolkata-II.

1. M/s L. Madanlal (Aluminium) Limited.
2. Shri Manoj Kumar Bagaria, Legal heir of
   Late Madanlal Bagaria (since deceased)

…APPELLANT(S)

VERSUS

Commissioner of Central Excise, Kolkata-II

…RESPONDENT (S)

APPEARANCE
Shri Agnibesh Sengupta, Advocate & Shri Indranil Banerjee, Advocate for the Appellant (s)
Shri K. Chowdhury, Suptd. (D.R.) for the Respondent (s)

CORAM:
SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

DATE OF HEARING:-.23.02.2018

DATR OF PRONOUNCEMENT……………………

ORDER NO. …………………………………………………..

Per Shri P. K. Choudhary :

Briefly stated the facts of the case are that the appellant is engaged in the manufacture of aluminium ingot, notch bars, shots, etc. classifiable under Chapter 76 of the First Schedule to Central Excise Tariff Act, 1985. On 20.09.2006 the Central Excise Officers visited the appellant's factory and conducted stock verification. It has been ascertained that there is shortage of stock as reflected in the statutory records i. e.

Daily Stock Register. The said officers recorded the statement of Shri Madanlal Bagaria, Director of the Appellant company who had admitted the duty liability of Rs. 11 lakhs on shortage and paid the duty vide post dated cheques. A further statement was recorded on 05.10.2007. Thereafter, a Show Cause Notice dated 05.11.2007 was issued to the appellant company and its director. The adjudicating authority confirmed the demand of duty of Rs.21,31,530/- alongwith interest and penalty of equal amount of duty and also appropriated the amount of Rs.11 lakhs as deposited by the appellant company. A penalty of Rs.50,000/- was also imposed on Shri Madanlal Bagaria, Director of the appellant company. By the impugned order, the Commissioner (Appeals) modified the adjudication order to the extent that the penalty was reduced to 25% of the duty, as the appellant company deposited the entire amount of duty with interest. It has also reduced the penalty of Rs. 50,000/- to Rs.12,500/- on the Director of the appellant company. The appellant company and the Director filed these appeals.

2. The Ld. Advocate appearing on behalf of the appellants argued the matter at length. He has also submitted written submission alongwith case laws. The main contention of the Ld. Advocate is that the Central Excise Officers ascertained

the duty liability during the stock verification conducted on 20.09.2006 of Rs.11 lakhs and which was paid by them vide post dated cheques. Therefore, in terms of the provisions of Section 11A (2B) of the Central Excise Act, 1944, there is no requirement to issue the Show Cause Notice. The other contention is that the Central Excise Officers ascertained the shortage of stock during stock verification on 20.09.2006 and the Show Cause Notice was issued on 05.11.2007, i.e. beyond the normal period of limitation. Hence, the demand of duty is barred by limitation.

3. The Ld. Counsel fairly submitted that even though the demand is barred by limitation, they are not disputing the payment of 11 lakhs as deposited by them.

4. The Ld. A.R. for the Revenue reiterated the findings of the lower authority. He submitted that the appellant admitted to the shortage of goods in his statement dated 20.09.2006 and statement dated 05.10.2007. It is further submitted that the Show Cause Notice was issued on 05.11.2007 after recording the statement dated 05.10.2007. Thus, the demand of duty is within the stipulated period as provided under Section 11A of the Act. It is further submitted that the entire amount of duty was not paid in terms of Section 11A (2B) of the Act. It is also submitted that the quantification of the duty liability was not

done at the time of stock verification, which was admitted by the appellant in his statement dated 05.10.2007.

5. Heard both sides and perused the appeal records.

6. I find that the Ld. Counsel submitted that the demand is barred by limitation, but, they are not disputing the deposit of Rs.11 lakhs by post dated cheques on 20.09.2006, and it is covered under Section 11A (2B) of the Act. For the proper appreciation of the case, the relevant portion of Section 11A as it stood during the relevant period is reproduced:-

> "Section 11A (Central Excise Act,1944):
>
> Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-
>
> (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or '[erroneously refunded, whether or not such non-levy or non-payment, short levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made there under], a Central Excise Officer may, within [one year] from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, [as if, [***]] for the words [“one year”], the words “five years” were substituted.

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty on the basis of his own ascertainment of such duty or [on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid.

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of “one year” referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1.- Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty.

Explanation 2.- for the removal of doubts, it is hereby declared that the interest under Section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section."

7. On close reading of Section 11A (1), it is seen that the Central Excise Officers are required to issue notice within one year from the relevant date on the person chargeable with duty which has not been paid. In case, there is fraud, collusion or willful misstatement, etc., the notice should be issued within five years. Sub-section (2B) of Section 11A of the Act had given an option to the assessee to pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice, and to inform the Central Excise Officer in writing, who, shall not serve any notice in respect of the duty so paid. Explanation 1.- to Section 11A (2B) of the Act clarified that this sub-section shall not apply in a case where the duty was not paid by reason of fraud, collusion or willful misstatement,

etc. Thus, the assessee has a right to waiver of service of Show Cause Notice by way of payment of duty on his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer, in case where the duty was not paid by reason of fraud, collusion, etc.

8. In the instant case, I find that the Central Excise Officers visited the appellant's factory and conducted stock verification and found shortage of goods. A statement of Shri Madanlal Bagaria, Director of the appellant company and Appellant No. 2 herein was recorded on 20.09.2006, wherein, in answer to question No. 4, he has submitted as under:-

As explained in earlier para (question). The reasons may be similar. "However, accepting our Central Excise liabilities on this account, I have paid through cheques Rs.11 lakhs in account of L. M (Al.) Ltd. and Rs. 4 Lakhs in account of L. M. (DA) P. Ltd.".

9. It appears from the above statement that the Central Excise officers ascertained the duty liability on shortage of goods of Rs.11 lakhs, which was accepted by the appellant No.2 and also paid thereon. In this background, the plea of the Ld. Counsel is that the appellant paid the duty as ascertained and no Show Cause Notice is required under the provisions of Section 11A (2B) of the Act. It is in addition to his submission that the extended period of limitation cannot be

invoked. In this context, the findings of the adjudicating authority are reproduced:-

> *"Even otherwise, the date of payment of duty as argued by the Noticees to be 20.09.2008 is not acceptable. Mere issuance of post dated cheques cannot be considered as the payment of duty. From the records of the Range it is ascertained that excise duty payment was made against these cheque amount only on 05.02.2007. the information of the payment of duty was intimated to the department on submissions of periodical Returns on 09.02.2007. So, the notice was issued well within one year from the date of receipt of the information of payment.*
>
> *In view of the discussions above, I hold that the noticees' contention and arguments that the notice was issued wholly without and/or in excess of jurisdiction and was barred by limitation have no legal backing, as, Section 11A (2B) or the provisions thereof are not applicable in the case as also the notice was issued well within one year of the date of payment of duty / from the date of receipt of information of such payment."*

10. Apparently, I find that the entire demand of duty was raised on the basis of shortage of goods as detected during the stock verification conducted on 20.09.2006. In terms of Section 11A (3) (ii) (a) (C) of the Central Excise Act as it stood during the relevant period, the term "relevant date" means, - " in the case of excisable goods on which duty of excise has not been paid, the date on which duty is to be paid under the

Act or Rules made there under". In the present case, the duty is to be paid on 20.09.2006 i.e. the date on which the shortage has been detected by the Central Excise Officers. Therefore, the findings of the adjudicating authority that the information of payment of duty was given to the department on 09.02.2007 are contrary to the evidence on record. It is on record that the Central Excise officers deposited the post dated cheques from 26.10.2006 onwards in the bank for encashment vide TR-6 challans. Hence, the finding of the adjudicating authority is not sustainable.

11. I find force in the submission of the Ld. Counsel that the demand is barred by limitation as the extended period of limitation cannot be invoked. But, there is no need to look into this aspect as the Ld. Counsel accepted the duty liability of Rs. 11 lakhs.

12. The Ld. A.R. submitted that in view of the statement dated 05.10.2007 of appellant No. 2, the payment of Rs. 11 lakhs by post dated cheques on 20.09.2006 is ad hoc payment. It is well settled that a statement should be read as a whole and not in piece-meal. On perusal of the statement dated 20.09.2006, it is clear that the duty liability of Rs. 11 lakhs was ascertained against the shortage of goods. The next statement was recorded after one year on 05.10.2007. In the

statement dated 05.10.2007, in reply to Q.3, the appellant No. 2 had stated that “However, accepting our duty liability, we have already made an ad-hoc payment of Rs.11 lakhs through cheques on the date of detection i.e. 20.09.2006.” On perusal of the statement dated 20.09.2006, there is no indication of ad hoc payment. Hence, I agree with the submission of the Ld. Counsel for the appellant that by inserting the word ‘ad-hoc’ in the statement dated 05.10.2007, the veracity and truth of the statement dated 20.09.2006 cannot be altered. Hence, there was no requirement to issue Show Cause Notice as per provisions of Section 11A (2B) as the appellant had already paid the duty as ascertained by the officers before issuance of Show Cause Notice. The Tribunal in the case of Leela Kempinski Vs. Commissioner of Central Excise, Mumbai reported in [2017 (358) E.L.T. 401 (Tri.-Mumbai)] had discussed the provisions of Section 11A (2B) as it stood during the relevant period as under:-

> “**6.**On reading of the show cause notice it is noted that charge to evade Central Excise duty, was based only on an allegation that appellant being in the organized sector should have known the law and should have read the notification correctly before availing the benefit and it cannot be said that they were unaware of the law. Only on this allegation it has been stated that appellant has suppressed the fact from the department

with intention to evade Central Excise duty. I do not find any merits in the arguments raised by the learned Authorised Representative and as recorded by both the lower authorities. Provisions of Section 11A(2B), as it stood during the relevant period, specifically states for non-issuance of show cause notice on discharging duty liability and the interest thereof, on ascertainment of duty liability by an assessee on their own or on being pointed out by the Central Excise officer. As already recorded herein above, it is the claim of appellant that due to mis-interpretation of the clause of the notification the duty was short paid during the relevant period, which made good by the appellant before issuance of show cause notice. If this be so, it cannot be said that the appellant had intention to evade payment of Central Excise duty on the branded goods manufactured and cleared by them. I find that the decision of the Apex Court in the case of *Chamundi Die Cast (P) Ltd.* (supra) specifically holds that if an assessee acted on genuine belief that they were covered by the exemption notification, it cannot be held against them and hold that there was intention to evade duty. I also find that the judgment of the Apex Court in the case of *Gopal Zarda Udyog* v. *Commissioner of Central Excise, New Delhi* - 2005 (188) E.L.T. 251 (S.C.) also lays down the law that mere failure or negligence on the part of manufacturer either not to take out licence or not to pay duty in cases where there is scope for doubt, does not attract provisions of Section 11AC of Central Excise Act, 1944. In the case in hand, I do find merit in the appeal filed by the appellant as to setting aside of penalty imposed. In view of the foregoing I set aside the penalty imposed by the adjudicating authority and upheld by the first appellate authority, at the same time the duty liability with interest thereon is upheld."

13. In view of the above discussion, the impugned order is modified to the extent that the demand of Rs. 11 lakhs as deposited by the appellant before issuance of Show Cause Notice is upheld and the balance amount of demand of duty alongwith interest and penalty are set aside. The appeals filed by the appellants are disposed of in the above terms.

(Pronounced in the open court on……………………….)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

T.K.