

**IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

Appeal No. E/85038/18

(Arising out of Order-in- Appeal No. PUN-EXCUS-
001-APP-427-2017-18 dated 06.10.2017 passed by
the Commissioner of Central Excise(A), Pune I)

Poona Industries Appellant

Vs.

CCE & ST, Pune-I Respondent

Appearance:

Shri Shankar S. Patil, Advocate for the appellant
Shri M.R. Melvin, Supdt. (AR) for the respondent

CORAM:

Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 10.08.2018

Date of decision : 13.12.2018

O R D E R No: **A/88103/2018**

Imposition of 50% penalty and interest for non-payment of duty liability of ₹26,34,931/- against clearance of manufactured excisable goods namely castings between the period from 10.03.2013 to 30.09.2013 by the adjudicating authority that attained finality in the order of Commissioner (Appeals) is being assailed before this forum.

2. Fact of the case, in brief, is that EA audit 2000 had observed in its report dated 23.12.2013 that appellant had

effected clearance of excisable goods of the above referred value without payment of excise duty. It was put to show-cause vide notice dated 23.12.2014 for recovery of duty along with interest and penalty culminated in passing of the OIO and OIA confirming duty liability, interest and penalty at the rate of 50% under Section 11AC sub-clause (c) proviso.

3. In the memo of appeal and during course of hearing of appeal, Id. Counsel Shri Shankar S. Patil for the appellant argued that due to deep financial crisis appellant could not pay the duty at the time of clearance but reflected those in its statutory monthly returns. In filing the GAR-7 challans and referring to para 8 of the show-cause notice, the Id. Counsel for the appellant also submitted that entire duty of ₹26,24,931/- has been paid along with interest and show-cause notice was time barred in respect of duty liability and interest as well. He too challenged the confirmation of 50% penalty imposed under Section 11AC of the Central Excise Act on the ground that show-cause notice was time barred. Referring to several decisions including the one passed in the case of Cosmic Dye Chemical vs. CCE Mumbai reported in 1995 (75) ELT 721(SC) he also indicated that it has been held by the Hon'ble Supreme Court in the said case that intention to evade duty must be proved and for this misstatement or suppression of facts must be wilful to

invoke extended period for which he prays to set aside the order passed by the Commissioner (Appeals).

4. Ld. AR for the department, in response to such submissions of appellant, argued that Rule 8(3A) of the Central Excise Rules 2002 is equally applicable to the appellant as such clearance is deemed to have been made by the appellant without payment of duty for which penalty is provided in the Rule and therefore no illegality or irregularity can be found from the Commissioner (Appeals)'s order that would require invocation of jurisdiction of this Court. In citing case law reported in 2007 (215) ELT 23 (Mum) and with reference to Rule 11AC (2B) as well as amended Rule 8 and Rule 8A of the Central Excise Rules 2002, he justified 50% penalty imposed on the appellant for which he sought for no interference by the appellate Tribunal.

5. Heard from both sides and gone through the case records as well as judicial decision submitted by the both parties. It is found even from the show-cause notice that assessee has discharged the duty liability much before the issue of show-cause notice and GAR detail challan, as found from the page 103 by the appeal memo, indicates that in the remark column the appellant had referred that remaining excise duty along with interest has been paid on 10.10.2013 while show-cause notice dates 23.12.2014.

There can be two possibilities. First, the same has not been submitted before the adjudicating authority or second, he has not taken note of such payment of interest, as the same is not found mentioned in his order. However, the contention of the appellant is acceptable that it has mentioned the duty liability in its monthly return and there is no stipulated mandatory time frame available for discharge of duty liability within a particular time period beyond one month which is payable without interest. Appellant was put to show-cause notice for imposition of penalty under Section 11AC of the Central Excise Act 1994. In para 22 of the order of the adjudicating authority, he noticed no suppression of fact and only found non compliance of Rule 8 of Central Excise Rules 2002 for which he gave his finding that there is default in payment of duty which renders the appellant liable for penalty under the provision of Rule 8 (3A) of the Central Excise Rules 2002 as the Rule itself specifies such penalty which is read with Section 11AC of the Act.

6. On close scrutiny of Rule 8(3A), as applicable to the corresponding period under dispute i.e. between 10.03.2013 to 13.09.2013, only utilisation of cenvat credit was denied to the assessee unless outstanding amount including interest thereon would be paid and only after Rule 3A has been substituted w.e.f. 11.07.2014 penalty at the

rate of 1% is to be payable by the assessee, who fails to pay the duty declared as payable in its return within a period of one month from the due date and there is no provision available in the Central excise Act or Rules that would automatically attract Section 11AC and made the assessee liable for penalty for violation of provision of Rule 8(3A) of the Central Excise Rules 2002, as has been held in the OIO. Under the circumstances, penalty being a criminal remedy to set right a defaulter which is to be proved by the prosecution itself beyond all reasonable doubt, in the absence of any such finding regarding fraud, collusion, wilful misstatement or suppression of fact or contravention of the provisions of this Act or Rules penalty under Section 11AC is not attracted. Hence the order –

7. The appeal is allowed and the order of the Commissioner (Appeals) imposing 50% penalty on the appellant for not discharging duty liability of ₹26,34,931/- along with applicable interest is hereby set aside.

(Pronounced in Court on 13.12.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)