**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI**

**WEST ZONAL BENCH**

**EXCISE APPEAL NO: 85878 OF 2013**

[Arising out of Order-in-Appeal No: BPS/127/LTU/MUM/2012 dated 23rd November 2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai.]

KSB Pumps Ltd
PO Vambori, Tal: Rahuri Dist: Ahmednagar … ***Appellant***

*versus*

Commissioner of Central Excise & Customs
LTU – Mumbai
29th Floor, Centre -1, World Trade Centre, Cuff Parade
Mumbai - 400005 ***…Respondent***

*APPEARANCE:*

Shri Makrand Joshi, Advocate for the appellant

Shri Sanjay Hasija ,Superintendent (AR) for the respondent

**CORAM:**

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**
**HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER NO: A /85032 /2022**

DATE OF HEARING: 24/11/2021
DATE OF DECISION: 19/01/2022

*PER: C J MATHEW*

The sole issue remaining in the dispute of M/s KSB Pumps Ltd after the conclusion of appeal proceedings, culminating in order-in-appeal no. BPS/127/LTU/MUM/2012 dated 23rd November 2012 of Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai in which penalties under section 11AC of Customs Act, 1962 and rule 173Q of Central Excise Rules, 1944 were set aside, is the confirmation of differential duty of ₹ 3,98,140/- under section 11A of Central Excise Act, 1944 on a premise, and erroneously so as contended by the appellant, of

> *'7. On the other hand, I find that the Appellants, in course of personal hearing held before me on 19.10.2012 have submitted that did not want to pursue their contentions on the merit i.e confirmation of demand of differential duty by the Adjudicating Authority…. However it was not denied by them that they had failed to file a Price list under Rule 173C of the erstwhile Central Excise Rules, 1944 to the department.'*

as sufficing to ignore their contest of the order on grounds of limitation and in the circumstances enumerated by them.

2. Recovery of duty amounting to ₹ 9,67,037/-, proposed in show cause notice dated 22nd March 1999 (subsequently enhanced to ₹ 10,85,711/- by *corrigendum* dated 28th February 2000) for not having included the proportionate cost of 'patterns', supplied free of cost by their customers for manufacture of 'castings', in the assessable value for the period from April 1994 to October 1998, was confirmed by the original authority. Their appeal was dismissed and, upon seeking

further remedy before the Tribunal, the matter was remanded back to the original authority. In the *de novo* proceedings, the duty on amortized cost was re-determined at ₹ 3,98,140/- and penalties imposed.

3. It is common ground that the mandate for inclusion of amortized cost had not been complied with in computing the assessable value for discharge of duty liability. The original authority has accepted the worksheets submitted by the cost accountant of the appellant to drop a substantial portion of the demand proposed in the show cause notice.

4. It is the case of Learned Counsel for appellant that the quashing of penalty under section 11AC of Central Excise Act, 1944, which is invoked on establishing that the same ingredients as for extending the period of limitation in section 11A of Central Excise Act, 1944 is evidenced, cannot be discarded on the same set of facts when it comes to jurisdiction of limitation for recovery of duty. Reliance was placed on the decision of the Hon'ble High Court of Bombay in *Saswad Mali Sugar Factory Ltd. Commissioner of Central Excise, Pune-III [2014 (33) STR 481 (Bom)]* holding that

> *'9. We find that the condition for invocation extended the period of limitation as provided under Section 73 of the Act and the condition precedent for imposing penalty under Section 78 of the Act are identical viz. there should be either*

> *the fraud, collusion or wilful mis-statement or suppression of facts or contravention with intent to evade payment of Service Tax. Once the Commissioner (Appeals) has come to a finding that for the relevant period, there was genuine cause for confusion regarding the correct legal position and also scope for doubt about the Service Tax liability on GTA as the 'Commercial concern' for non-imposition of penalty then the same cause is also to be factored in to conclude that extended period of limitation cannot be invoked. Even if the finding that there was sufficient cause for non-payment of Service Tax was rendered in the context of Section 80 of the Act (as it stood at the relevant time). This finding will also apply to determine whether there was any intent to evade payment of Service Tax. Moreover, the revenue has accepted the deletion of penalty as we are informed that the revenue has not preferred any appeal from the order dated 17 October, 2012 of the Commissioner (Appeals) deleting the penalty. Moreover, Mr. Joshi, learned Counsel for the appellant point out that the services were provided by individual Truck owners who are not covered by the definition of GTA as existing during the relevant period as they are not commercial concern. This according to Mr. Joshi has been the consistent view of the Tribunal as held in the matter of K.M.B. Granites Pvt. Ltd. v. Commissioner of Central Excise, Sales - 2010 (19) STR 437, Salem Co-operative Sugar Mills - 2010 (19) STR 435 and Lakshminarayana Mining Co. - 2009 (16) SR 691. The revenue has not been able to dispute the above position.*

5. Learned Authorized Representative argued that the remand order of the Tribunal had confirmed the leviability of duty on amortized costs and further relied upon the decisions of the Tribunal

in *V Dhanpal v. Commissioner of Central Excise, Madurai [2010(251) ELT 247 (Tri-Chennai)]* and in *Kaveri Alloy Castings Pvt Ltd v. Commissioner of Central Excise, Pondicherry [2007 (219) ELT 173 (Tri-Chennai)]* to contend that setting aside of penalty cannot extinguish demand and that a plea that had not been raised when the matter was remanded is not permitted to be raised thereafter.

6. That an appellant chooses not to pursue argument on merit and prefers to restrict themselves to the bar of limitation does not, of itself, imply acceptance of liability. That such an issue was not raised on the former occasion before the Tribunal cannot preclude its relevance on the later occasion especially in the light of fresh finding by the first appellate authority in *de novo* proceedings; that certainly is not the ratio of the decisions cited by Learned Authorized Representative.

7. There is no doubt that the computations leading to the confirmation of demand during the first round of litigation were revised substantially during the second round indicating lack of certainty when proceedings were initiated by the central excise authorities. A higher measure of certainty cannot be expected of an assessee.

8. It is also seen from the records that guidelines on proportionate allocation of costs were covered in circular no. 170/4/96-CX dated 23rd January 1996 of Central Board of Excise & Customs whereas the

demand pertains to a period prior to that also.

9. Moreover, the finding in the impugned order that

> *'13. All said and done, the department has not been able to place any clinching documentary evidence to prove the allegation that the Appellants had intention to evade payment of duty by willfully suppressing the facts except the admitted fact the Appellants did not file the requisite Price declarations as required under erstwhile Rule 173C ibid. Nevertheless, the failure to file such Price Declarations under Rule 173C ibid, alone cannot be considered adequate ground to hold the charge of intention to evade payment of duty by willful suppression of facts. It is already a settled law, that mere failure to submit any information alone in not adequate something more is required to hold the allegation of willful mis-statement or suppression of facts with an intention to evade payment of duty. Reliance in this regard may be placed on the following case laws:-*
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> *(i)* ***COLLECTOR OF CENTRAL EXCISE vs. CHEMPHAR DRUGS & LIN1MENTS-1989 (40) E.L.T. 276 (S.C.)*** *wherein it is held that-*
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> *"Demand - Limitation - Extended period of five years applicable only when something positive other than mere inaction or failure on the part of manufacturer is proved." (emphasis supplied)*
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> *(ii)* ***COMMR. OF CUS. & C. EX., HYDERABAD vs. MAHALAKSHM! PROFILES LTD. - 2012 (279) E.L.T. 355 (A.P.),*** *wherein it is held that-*
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> *"Element of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any of provisions of Act or the Rules, with intent to evade payment of duty must be present before a penalty under Section 11AC ibid or under Rule 25 ibid could be levied, [paras 7, 8]"*

*14. It also no disputed that divergent views were being, taken in the subject matter. It is also settled that when divergent view being taken and the matter involved interpretation of statute, no penalty could be imposed in such cases. Reliance in this regard is placed upon the following case laws:-*

***(i) UNIFLEX CABLES LTD. vs. COMMISSIONER OF CENTRAL EXCISE, SURAT-II-2011 (271) E.L.T. 161 (S.C.)*** *wherein it is held that-*

*"Penalty not imposable when issue involved is of interpretational nature."*

***(ii) U.G. SUGAR & INDUSTRIES LTD. vs. COMMISSIONER OF C. EX., MEERUT-II -2011*** *(266) E.L.T, 339 (Tri. - Del.)- wherein it is held that-*

*"10. As far as merits of the case are concerned, the same do not warrant any interference . in the impugned order in that regard. Learned Advocate for the appellants however justified in contending that in view of divergent views expressed by different Benches of the Tribunal there was no justification for imposition of penalty. Certainly, therefore, the intention to evade the payment of the revenue cannot be drawn from the materials on record in the facts and circumstances of the case. Hence, as far as penalty is concerned, the order in that regard is liable to be set aside. As far as penalty is concerned and the impugned order to that extent is hereby quashed and set aside. No further interference is called for."*

*15. In view of the foregoing, I hold that the intention to evade payment of duty against the Appellants is not established. Hence, no penalty under Section 11AC as well as under Rule 173Q ibid, is imposable upon the Appellants.'*

renders a finding that is equally applicable insofar as the ingredients permitting the extended period in section 11A of Customs Act, 1962 to be invoked; it is settled law that one cannot exist without the other.

10. For these reasons, we set aside the demand and allow the appeal.

*(Order pronounced in the open court on 19/01/2022)*

**(AJAY SHARMA)**
***Member (Judicial)***

**(C J MATHEW)**
***Member (Technical)***

**/as*