IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 14167 of 2024 (O&M)

Reserved on : 02.12.2024
Date of Decision : 20.12.2024

Haryana City Gas Distribution Limited …Petitioner

Versus

Commissioner of Central Excise and Central Goods and Service Tax and others …Respondents

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Rajesh Garg, Senior Advocate, assisted by
Mr. Rohan Mittal, Advocate,
Mr. S. K. Pandey, Advocate, and
Mr. Sanjeet Singh, Advocate, for the petitioner.

Mr. Suman Jain, Senior Standing Counsel, CBIC and
Ms. Kiratbir Kaur, Advocate, for the respondents.

SANJEEV PRAKASH SHARMA, J.

1. The petitioner is a company registered under the Companies Act, 1956 and is a unit of SKN Group. It is authorized by the Petroleum and Natural Gas Regulatory Board and the State Government of Haryana which distribute CNG and PNG in Gurugram. It is duly registered under the provisions of the Central Excise Act, 1944 (for short, 'the Excise Act').

The Superintendent has requisitioned records vide letter dated 08.02.2024 for the period April 2018 to March 2023. It was informed that audit would be conducted from 07.02.2024 to 14.02.2024. Another letter was issued on 14.02.2024 as a reminder. Again a letter was issued on 19.02.2024 by the Superintendent informing the petitioner company that during the audit conducted by the CAG, it was found that excise duty has not been deposited within time, therefore, interest and penalty are liable to be paid. On 16.04.2024, the Superintendent sent a letter directing the petitioner company to pay the interest and penalty on account of delay in depositing the excise duty. As the amount was not deposited, another letter was issued by the Assistant Commissioner, Division East-1, GST, Gurugram, to the Branch Manager, Canara Bank, South Extension Park-1, New Delhi to freeze the bank account of the petitioner company by invoking the provisions of Section 11(2) of the Excise Act.

Learned Senior counsel appearing for the petitioner company has vehemently argued that the entire process of recovery has been initiated based on the CAG Audit Report which was conducted for the period 2018-2019. He submits that the provisions of Section 11A(1) and 11A(14) of the Excise Act, which are applicable for recovery of interest have been ignored. The audit report could be only a basis for assessment. Since the assessment order is required to be passed after following the due procedure established under the Excise Act and Rules, at the stage of audit report no recovery proceedings could be initiated.

Learned senior counsel also submits that the Superintendent would have no power to issue notices and the order is without jurisdiction. He submits that freezing of the account of the petitioner company is illegal. He, therefore, prays for quashing of the said proceedings.

Learned counsel has also relied on Circular dated 19.01.2022 issued by the Central Board of Indirect Taxes and Customs (CBIC) to submit that recovery proceedings could be initiated after demand of interest or penalty on duty is confirmed. It is stated that petitioner is a public utility company and freezing of its accounts would cause financial duress and affect public utility services like CNG and PNG in the geographical area of

Gurugram. The petitioner company was unable to deposit the excise duty in time on account of the server being down for a considerable period. The same happened on account of Covid-19 Pandemic. Since no show cause notice was issued to the petitioner company, it was unable to present its version. The process adopted by the respondents is illegal.

It is also submitted that the petitioner company has deposited ₹ 50 lacs on 09.05.2024 and another ₹ 50 lacs on 13.08.2024 under protest and without prejudice to its rights and contentions. He relies on judgment of the Supreme Court in ***Union of India and others vs Madhumilan Syntex Private Limited*** 1988 (35) ELT 349.

2. Per contra, learned counsel for the Revenue submits that the Superintendent has informed the petitioner about the audit being conducted vide letter dated 08.02.2024 but the petitioner has not cooperated. Several reminders were sent whereafter the CAG gave its findings and found that the excise duty was not paid in accordance with the timelines provided. The delayed payment of excise duty is an admitted position. Therefore, the petitioner company was informed that on account of the provisions contained under the Excise Act, automatically it is required to deposit the interest. Thus, there is no element of adjudication.

A letter was sent by the Superintendent on 19.02.2024 and then on 15.03.2024 to deposit the interest and penalty on the delayed payment of excise duty. Further reminders were sent on 08.04.2024 and 16.04.2024 but no response was received. Accordingly, the Assistant Commissioner on 02.05.2024 directed the Branch Manager, Canara Bank, to freeze petitioner's bank account by invoking Section 11(2) of the Excise Act.

It is stated that as per the audit, a sum of ₹ 3,86,75,854/- and a penalty of ₹ 3,08,01,956/- is required to be paid. But the petitioner has only deposited a sum of ₹ 1 crore. The total amount of ₹ 6,99,00,810/- is an outstanding against the petitioner company.

It is also informed that the petitioner company is guilty of separation of facts and has not come out with clean hands. It did not declare the correct bank accounts and gave an account number of the bank, which was lying dormant since the last 10 years and had remained inoperative, while the petitioner company is utilizing the public revenue in its favour. The provisions of Section 11A(16) of the Excise Act were relied upon to submit that in cases where there is admitted non-payment of duty in time, interest and penalty is required to be paid and no show cause notice is required to be issued for the said purpose.

3. We have carefully considered the submissions.

4. The provisions of Section 11AA of the Act provides for interest on delayed payment of duty, which is as under:-

> "***11AA. Interest on delayed payment of duty.***
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> *(1) Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the rate specified in sub-section (2), whether such payment is made voluntarily or after determination of the amount of duty under section 11A.*
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> *(2) Interest, at such rate not below ten per cent. And not exceeding thirty-six per cent. per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid in terms of section 11A after the due date by the person liable to pay duty and such interest shall be calculated from the date on which such duty becomes due up to the date of actual payment of the amount due.*

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where-

(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 37B; and

b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment."

. As regards penalty, Section 11AC(1) of the Act would be relevant and, therefore, is quoted as under:-

"***11AC. Penalty for short-levy or non-levy of duty in certain cases***

(1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows:-

(a) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason other than the reason of fraud or collusion or/any wilful mis-statement 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 (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent of the duty so determined or rupees five thousand, whichever is higher:

PROVIDED that where such duty and interest payable under section 11AA is paid either before the issue of show cause notice or within thirty days of issue of show cause notice, no penalty shall be payable by the person liable to pay duty or the person who has paid the duty and all proceedings in respect of said duty and interest shall be deemed to be concluded;

(b) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (a) is paid within thirty days of the date of communication of the order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent. of the penalty imposed, subject to the condition that such reduced penalty is also paid within the period so specified;

(c) 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 or collusion or any wilful mis-statement 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 (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined:

PROVIDED that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent, of the duty so determined;

(d) where any duty demanded in a show cause notice and the interest payable thereon under section 11AA, issued in respect of transactions referred to in clause (c), is paid within thirty days of the communication of show cause notice, the amount of penalty liable to be paid by such person shall be fifteen per cent. of the duty demanded, subject to the condition that such reduced penalty is also paid within the period so specified and all proceedings in respect of the said duty, interest and penalty shall be deemed to be concluded;

(e) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (c) is paid within thirty days of the date of communication of the order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent. of the duty so determined, subject to the condition that such reduced penalty is also paid within the period so specified."

Sub-section (16) of Section 11A of the Excise Act reads as under:-

"**11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.**

(1) to (15) xx xx xx

(16) The provisions of this section shall not apply to a case where the liability of duty not paid or short-paid is self-assessed and declared as duly payable by the assessee in the periodic returns filed by him, and in such case, recovery of non-payment or short-payment of duty shall be made in such manner as may be prescribed.)

Explanation 1: For the purposes of this section and section 11AC,--

(a) refund includes rebate of duty or excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) relevant date means,-

(i) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid, and no periodical return as required by the provisions of this Act has been filed, the last date on which such return is required to be filed under this Act and the rules made thereunder;

(ii) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied

or short-paid and the return has been filed, the date on which such return has been filed;

(iii) in any other case, the date on which duty of excise is required to be paid under this Act or the rules made thereunder;

(iv) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(v) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund;

(vi) in the case where only interest is to be recovered, the date of payment of duty to which such interest relates.

(c) specified records means records including computerised records maintained by the person chargeable with the duty in accordance with any law for the time being in force.

Explanation 2: For the removal of doubts, it is hereby declared that any non-levy, short-levy, non-payment, short-payment or erroneous refund where no show cause notice has been issued before the date on which the Finance Bill, 2015 receives the assent of the President, shall be governed by the provisions of section 11A as amended by the Finance Act, 2015."

As per the Excise Act, the authorities are empowered to conduct special audit in terms of Section 14A and in certain circumstances in terms of Section 14AA. Section 14 of the Excise Act empowers the Central Excise Officer to summon any person to give evidence and produce documents in inquiries under this Act.

As far as the present case is concerned, the Central Government Audit was being conducted as the Superintendent has communicated about the records to be made available for the said purpose. He, therefore, cannot be said to be unauthorized for issuing letters. After the audit has been conducted, it is found that the petitioner company has voluntarily deposited the excise duty and it was also noticed that payment of duty was delayed.

5. The terms of sub-sections (13) and (14) of Section 11A of the Excise Act provide different circumstances where on the basis of determination of an amount by the appellate authority or tribunal or court, interest and penalty is payable. While under Section 11A (14) of the Excise Act on determination of duty of excise, the person liable to pay the duty would be required to pay interest alone. As per sub-section (16) of Section 11A of the Excise Act, the recovery proceedings under Section 11A would not apply where the amount of duty is paid voluntarily.

Section 11AA provides for interest on delayed payment of duty and generally lays down that in addition to the duty, the person would be liable to pay interest at the rate as specified in sub-section (2) of Section 11AA of the Excise Act whether such payment is made voluntarily or after determination of amount under Section 11A of the Excise Act. Similarly, the penalty on short levy or short paid also results in liability to pay penalty not exceeding 10% of the duty so determined. However, as per Section 11AC (1)(a) of the Excise Act, no penalty shall be payable by the person liable to pay duty where such duty and interest payable under Section 11AA is paid before the issuing of show cause notice or within thirty days of issuance of show cause notice.

From the aforesaid provisions, it is apparent that for imposition of penalty, a show cause notice is required to be issued. As per Section 11AA(3)(b) of the Excise Act, if the amount has been paid voluntarily, no interest is required to be paid if the short duty is paid within forty-five days without reserving any right to appeal. Thus, if a firm or an assessee is informed about its non-payment of duty in time, there is a provision to pay voluntarily to avoid any interest or penalty.

6. Admittedly, the petitioner has been demanded interest and penalty on the excise duty, which the petitioner company has already paid on the basis of an audit report. The same was admittedly paid after due date. While this Court notes that the amount was paid voluntarily before any interest or penalty could have been imposed, show cause notice was required to be given to it to explain the delay as Section 11AA as well as Section 11AC lay down different circumstances wherein the interest would be payable. If the petitioner would have been given an opportunity of hearing, the authorities would have reached to a conclusion whether the duty paid by the petitioner can be said to be delayed or not firstly and secondly whether the same was voluntarily deposited and the benefit was available to it.

7. A bare reading of the complete provisions of recovery of duties under Section 11AA of the Act reflects that the principles of natural justice are inherent and imbibe the same. Therefore, merely on the basis of CAG findings of non-compliance of duty payment timelines and potential interest and penalty demand, it cannot be said that the penalty and interest would be automatic. Any order or action which results in taking away civil rights of an individual would stand vitiated if it violates the principle of *audi alteram partem.*

8. The Supreme Court in ***Madhumilan Syntex Private Limited*** (supra), held as under:-

> *"4. As far as the relevant items in the First Schedule of the Central Excises Act are concerned, it is not necessary to set out the same in detail. It will be enough to point out that if the cellulosic spun yarn made by a manufacturer with the aid of power contains man made fibre of non-cellulosic origin, it will*

fall under Item No. 18(III) (ii), but if it does not contain any man made fibre of non-cellulosic origin, it will fall under Item No. 18(III)(i) and duty would be leviable there at a lower rate. The relevant portion of Section 11A of the Central Excises Act runs as follows:-

> *"When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months 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:*
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> *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 wilful mis-statement or suppression of fact, or contravention of any of the provisions of this Act or of the n rules made thereunder with intent to evade payment of duty, by such person agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer".*
>
> *the words "Collector of Central Excise and for the words "six months", the words "five years' were substituted."*

A perusal of the aforesaid provisions shows that before any demand is made on any person chargeable in respect of non-levy or short-levy or under payment of duty, a notice requiring him to show cause why he should not pay the amounts specified in the notice must be served on him. It is the admitted position in the present case that no such notice was served. It would thus appear that the aforesaid demand notice, dated 7th February, 1984 was in violation of the provisions of Section 11A and is bad in law. Mr. Govind Das, learned counsel for the appellant, however, contended that although the aforesaid *section provides that no demand could be made against a person thereunder without affording that person an adequate opportunity to show cause against the same, in the present case, though no prior show cause notice was given and the petitioners were not given an opportunity to be heard before the notice of demand was issued, such a notice was issued and an opportunity to show cause was given after the demand was made and the demand confirmed after hearing and hence it must be regarded as valid. It was submitted by him that a post facto show cause notice should be regarded as adequate in law. In support of this contention Mr. Govind Das tried to place reliance on certain decisions where a view has been taken that in cases where urgent and emergent action is required, an opportunity to be heard can be given after the order affecting at person adversely is passed and that where a particular Act does not provide for any such opportunity to be heard being given before an adverse order is passed, a post facto opportunity to be heard might, in certain cases, be regarded as adequate compliance with principles of natural justice. We are of the view these cases have no relevance in considering the questions before us because it is quite apparent that in the present case no urgent or emergent action was required and Section 11A of the Central Excises Act clearly provides that prior show cause notice must be issued to the person against whom any demand on ground of short-levy or non-levy of payment of excise duty is proposed to be made. In Gokak Patel Vokkart Ltd. v. Collector of Central Excise, Belgaum 1987 (28) ELT. 53 (S.C.) ALR. 1987 S.C. 1161, this Court has held that the provisions of Section 11A(1) and (2) of Central Excises and Salt Act, 1944 make it clear that the statutory scheme is that in the situations covered by sub-section (1), a notice of show cause has to be issued and sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person* *who is likely to be prejudiced when the order is made before making the order Notice is thus a condition precedent to a demand under subsection (2).”*

As per the written submissions filed by the petitioner company, it is apparent that the financial implications identified in audit were required to be placed before the petitioner company and it should have been given an opportunity of hearing and put up its defence whereafter a speaking order was required to be passed. If such an order would have been passed, the petitioner would also have an opportunity to file an appeal against the same,

9. Keeping in view the above, the action of demanding the amount from the petitioner and imposing penalty is not sustainable in law. The order dated 02.05.2024 and summons dated 17.09.2024 are quashed and set aside.

10. Accordingly, the writ petition is allowed.

11. All pending applications shall stand disposed of.

12. No costs.

(SANJEEV PRAKASH SHARMA)
JUDGE

20.12.2024
VS

(JASJIT SINGH BEDI)
JUDGE

Whether speaking/reasoned Yes/No

Whether reportable Yes/No