
(2012) 06 GUJ CK 0071
In the Gujarat High Court
Case No : Tax Appeal No. 606 of 2006

Commissioner of Central Excise	Vs	APPELLANT
Harish Silk Industries		RESPONDENT

Date of Decision : 14-06-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AC, 3, 35G, 4

Citation : (2013) 288 ELT 74

Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Gaurang H. Bhatt, SC, for the Appellant;

Judgement

Harsha Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act")/the appellant-Commissioner of Central Excise and Customs has challenged the order dated 19th September, 2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (hereinafter referred to as "the Tribunal") in Appeal No. E/1/2005. While admitting the appeal, this court had, by an order dated 23rd June, 2009 framed the following substantial question of law:-

1. Whether an assessee can avail the facility of making the payment from his deemed creditor account in spite of specific rule to make the payment through account current (PLA) when he defaults in making these fortnightly payment and forfeited the facility of payment of duty on fortnightly basis and whether the judgment of Hon"ble High Court of Bombay in the case of Lloyds Steel Industries Limited Vs. Union of India (UOI), can be made applicable after considering the facts and circumstances of the present case or otherwise?

The respondent assessee, an independent textile processor, was engaged in the manufacture of excisable goods namely, MMF (Processed) falling under Chapter 54 of the Schedule to the Central Excise Tariff Act, 1985. The assessee had been availing the facility of payment of duty on fortnightly basis in terms of the

procedure laid down in Rule 8 of Central Excise Rules, 2002 (hereinafter referred to as "the Rules"). It appears that the assessee had defaulted several times during the financial year; however, it had paid the default amount of central excise duty along with interest under Rule 8(3) of the Rules. By an order dated 28th June, 2002 of the Deputy Commissioner, Central Excise, the facility of installment payment came to be forfeited for a period of two months starting from the date of communication of the order and till such date on which all the dues were paid. Accordingly, the assessee was restrained from availing of the benefit of fortnightly/monthly basis scheme for a period of two months and was directed to clear the goods on payment of duty consignment-wise from the PLA only for the said period. It appears that despite the aforesaid order withdrawing the facility of payment by way of installment, the assessee paid duty from its deemed credit account.

2. A show-cause notice dated 26th June, 2003 came to be issued to the assessee alleging that in terms of Rule 8 of the said rules, the defaulter was required to pay duty from account current (PLA) and not from deemed credit and in the event of any such failure, the clearances would be deemed to have been made without payment of duty and the consequences for penalty under the Central Excise Rules, 1944 would follow. The assessee was, accordingly, called upon to show cause as to why duty to the tune of Rs. 9,11,772/- under Rule 8 of the Rules and Section 11A of the Act, interest at the rate of 24% per annum under Rule 8(3) and penalty under Rule 25 of the Rules should not be imposed. The adjudicating authority by an order dated 16th February, 2004 held that the assessee was liable to pay Central Excise duty amounting to Rs. 9,11,772/- and further imposed penalty of Rs. 9,11,772/- on the assessee under Rule 25 of Rules. Being aggrieved, the assessee carried the matter in appeal before the Commissioner (Appeals) who, by an order dated 21st September, 2004, held that as the assessee had forfeited the facility of monthly payment of duty in terms of Rule 8 of the Rules, it was obliged to pay the entire amount of duty from its PLA (Account Current) during the said period. The Commissioner (Appeals) further found that the assessee having failed to comply with the provisions of Rule 8, it was liable to pay interest under Rule 8(3) of the Rules. Before the Commissioner, it was contended that if the assessee was required to make payment of duty from the PLA, they should be allowed to take re-credit of the amount paid as duty from their deemed credit account. The said request of the assessee was accepted and it was permitted to take re-credit of the amount of Rs. 9,11,772/- from its deemed credit account. It was also contended on behalf of the assessee that there was no intention to evade payment of duty and as such, there was no reason to impose penalty under Rule 25 of the Rules. The Commissioner (Appeals) was of the view that there is no requirement of mala fide intention for imposition of penalty under Rule 25(1)(a) of the Rules and accordingly held that the assessee was liable to pay penalty under Rule 25 for contravention of Rule 8 of the Rules. The assessee carried the matter in second appeal before the Tribunal.

3. The Tribunal, by the impugned order, set aside the order of Commissioner (Appeals) by placing reliance upon the decision of the Bombay High Court in the case of Lloyds Steel Industries Limited Vs. Union of India (UOI), and allowed the appeal.

4. Mr. Gaurang Bhatt, learned Standing Counsel for the appellant assailed the impugned order by submitting that the assessee despite the clear provision in the rules that duty should be paid only from PLA, cleared the goods after debiting the deemed credit account in contravention of Rule 8 during the period of two months. Therefore, clearance of goods by debiting the deemed credit account was rightly considered to be clearance of goods without payment of duty by the adjudicating authority. It was argued that the Tribunal had erred in relying upon the decision of the Bombay High Court in Lloyds Steel Industries Limited v. Union of India (supra) as the said decision had been rendered in the context of the Central Excise Rules, 1944 and not under the Central Excise Rules, 2002. It was submitted that under the existing rules in case of default in fortnightly payment, an assessee is required to pay excise duty for each consignment only through the account current commonly known as PLA and there was no option to make payment from Cenvat credit balance. It was, accordingly, urged that the Tribunal has erred in blindly following the decision of the Bombay High Court in Lloyds Steel Industries Limited v. Union of India (supra) without so much adverting to the facts of the case and discussing as to how the said decision would be applicable.

5. Though served, there is no appearance on behalf of the assessee.

6. The central issue, that arises for consideration in the present appeal is as to whether upon withdrawal of facility of payment in installments under Rule 8 of the Rules, it is permissible for the assessee to make payment from its deemed credit account.

7. At this juncture it may be germane to notice certain statutory provisions. Section 3 of the Act is the charging section and provides for levy of a duty of excise on all excisable goods which are produced or manufactured in India. Section 4 of the Act provides for valuation of excisable goods for the purposes of charging duty of excise on each removal of goods. Thus, excise duty is chargeable at the stage of removal of goods from the factory, warehouse, depot, etc. Rule 4 of the Rules which bears the heading "Duty payable on removal" lays down that every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided. Rule 8 of the Rules, which makes provision for the manner of payment of excise duty, as it stood at the relevant time, reads thus:

Rule 8. Manner of payment.--(1) The duty on the goods removed from the

factory or the warehouse during the first fortnight of the month shall be paid by the 20th day of that month and the duty on the good removed from the factory or the warehouse during the second fortnight of the month shall be paid by the 5th day of the following month:

Provided that in case of goods removed during the second fortnight of the month of March, the duty shall be paid by the 31st day of March:

Provided further that where an assessee is availing of the exemption under a notification based on the value of clearances in a financial year, the duty on the goods cleared during a calendar month shall be paid by the 15th day of the following month.

Explanation.-For removal of doubts, it is hereby clarified that the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.

(2) The duty of excise shall be deemed to have been paid for the purposes of these rules on the excisable goods removed in the manner provided under sub-rule (1) and the credit of such duty allowed, as provided by or under any rule.

(3) If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification u/s 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount

4. If the assessee defaults,-

(i) in payment of any one installment and the same is discharged beyond a period of thirty days from the date on which the installment was due in a financial year, or

(ii) in payment of installment by the due date for the third time in a financial year, whether in succession or otherwise,

then, the assessee shall forfeit the facility to pay the dues in installments under this rule for a period of two months, starting the date of communication of the order passed by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in this regard or till such date on which all dues are paid, whichever is later, and during this period the assessee shall be required to pay excise duty for each consignment by debit to the account current and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow.

8. As noticed earlier, the duty of central excise is recovered at the time of removal of the goods from the factory. Thus, as and when a consignment is cleared excise duty becomes payable thereon. However, sub-rule (1) of Rule 8 of the Rules provides a facility of fortnightly payment of duty on all goods removed

from a factory or warehouse. Hence, instead of paying excise duty on each removal, by virtue of the provisions of sub-rule (1) of Rule 8, in respect of goods cleared during the first fortnight duty is required to be paid by the 20th of the said month and in respect of the goods cleared during the second fortnight by the 5th of the following month. Sub-rule (3) of Rule 8 provides for payment of interest in case of late payment of duty. Sub-rule (4) which is relevant for the present purpose provides for the consequences of non-payment of duty within the period prescribed and lays down that in case of default by the assessee in payment of any one installment beyond a period of thirty days from the due date, or in payment of installment for the third time in a financial year, the assessee shall forfeit the facility of payment of dues in installments for a period of two months from the date of communication of the order passed by the Deputy Collector of Central Excise in this regard or till such date on which all dues are paid, whichever is later. The sub-rule further provides that during such period the assessee shall be required to pay excise duty for each consignment by debit to the account current, failing which it shall be deemed that the goods have been cleared without payment of duty and the consequences and penalties under the rules would follow. Thus, Rule 8 of the Rules contains an inbuilt scheme which gives a facility of payment of Central Excise duty on a fortnightly basis and also provides for the consequences of breach of its provisions.

9. It may be recalled that the respondent-assessee, who was availing of the facility of payment of duty on a fortnightly basis under Rule 8 of the Rules, had defaulted in making payment on account of which, by an order passed by the Deputy Commissioner, the facility of making payment in installments under sub-rule (1) of Rule 8 came to be withdrawn. The assessee was, therefore, required to pay excise duty for each consignment by debit to the account current. However, the assessee, instead of paying the excise duty by debit to the account current, made payment from the deemed credit account. It is the case of the appellant that payment out of deemed credit account is not equivalent to payment by debiting to the account current and as such the same amounts to clearance of goods without payment of duty. The case of the assessee before the authorities below was that it had paid the duty amount from the PLA and deemed credit accounts on consignment basis during the period of forfeiture of the facility of fortnightly payment, which cannot be termed as non-payment/short-payment.

10. On a plain reading of sub-rule (4) of Rule 8 of the Rules, it is abundantly clear that the same specifically provides that during the period of forfeiture of the facilities provided under sub-rule (1) the assessee shall pay duty on consignment basis by debit to the current account, that is, through the PLA. The said sub-rule does not envisage payment of duty in any other manner except from the current account and further postulates that non-payment as provided therein would tantamount to clearance of excisable goods without payment of excise duty. At noted earlier, in the present case, undisputedly the assessee had defaulted in making payment of excise duty in terms of sub-rule (1) of Rule 8 of the Rules pursuant to which the facility for making payment on a fortnightly basis had been

forfeited. The assessee was therefore, required to make payment of duty consignment-wise from the PLA only and could not have utilised Cenvat credit till the outstanding amount including the interest thereon had been paid. The assessee, however, instead of making payment from the PLA (account current), had made payment from the deemed credit in breach of the directions issued by the Deputy Commissioner in the order withdrawing the facility and thereby clearly contravened the provisions of sub-rule (4) of Rule 8 of the Rules.

11. The Tribunal, in the impugned order, has merely observed that in view of the decision of the Bombay High Court in the case of *Lloyds Steel Industries Limited v. Union of India* (supra), the order of Commissioner (Appeals) is required to be set aside without so much as adverting to the facts of the case and discussing as to how the said decision was applicable to the facts of the present case, thereby warranting setting aside of the penalty. Thus, the impugned order passed by the Tribunal is totally bereft of any reasoning.

12. The Bombay High Court in the case of *Lloyds Steel Industries Limited v. Union of India* (supra) on which reliance has been placed by the Tribunal while allowing the appeal has observed thus:

It is not disputed that the liability to pay duty can be discharged by debiting the account current or utilising Cenvat credit, which is considered as good as making payment by debiting account current, in support of which reliance has been placed on the circular issued by the Central Board of Excise and Customs on 20-1-1998.

Thus, it is apparent that the said decision was rendered on a concession by the respondent that utilising Cenvat credit is as good as making payment by debiting to the account current, which is not so in the present case. Here it is the specific case of the appellant that sub-rule (4) of Rule 8 of the Rules, mandates that in case of failure to make payment as provided thereunder, during the period of forfeiture, the assessee shall make payment only through the account current, that is, PLA and that payment of duty through the deemed credit account amounts to clearance of goods without payment of duty. The Tribunal has, therefore, wrongly applied the said decision of the Bombay High Court to the facts of the present case.

13. After holding that there is a clear contravention of sub-rule (4) of Rule 8 of the Rules, what is then required to be examined is whether the penalty imposed under Rule 25 of the Rules is justified in the facts and circumstances of the case.

14. As noted hereinabove, the adjudicating authority has levied penalty equal to the amount of duty, that is, to the tune of Rs. 9,11,772/- under Rule 25 of the said Rules. Before the Commissioner (Appeals), the assessee had raised a contention that Rule 25 of the Rules cannot be invoked as there was no finding to the effect that there was any intention on the part of the assessee to evade payment of duty. The Commissioner (Appeals) has held that there is no requirement of mala fide intention for imposing penalty u/s 25(1)(a) of the

Central Excise Rules. The Tribunal has not gone into the said issue as it has allowed the appeal by following the decision of the Bombay High Court.

15. In this regard it may be germane to refer to the provisions of Rule 25 of the Rules which provides for confiscation and penalty. Clause (1)(a) of Rule 25 of the rules lays down that subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer removes any excisable goods in contravention of any of the provisions of the rules or the notifications issued under the said rules, then all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or rupees two thousand, whichever is greater. At this juncture it may be apposite to refer to the decision of this court in Commissioner of C. Ex. and Customs Vs. Saurashtra Cement Ltd., wherein in the context of Rule 25 of the Central Excise Rules, 2002, it was held thus:

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 u/s 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.

16. Thus, in the light of the principles propounded in the above decision, for the purpose of invocation of Rule 25 of the Rules, what is required to be examined is as to whether in the facts of the present case the requirements of Section 11AC of the Act have been satisfied. As can be seen from the orders passed by the adjudicating authority as well as the Commissioner (Appeals) there is no allegation to the effect that there was any fraud, collusion or any willful misstatement or suppression of facts or that the contravention of Rule 8 of the Rules was with the intention to evade payment or duty. Under the circumstances, the ingredients of Section 11AC of the Act are clearly not satisfied. Therefore, there was no warrant for invocation of Rule 25 of the rules and as such, no

penalty could have been imposed by resorting to the said provision. As noted earlier, there is a clear contravention of sub-rule (4) of Rule (8) of the Rules. However, in the facts of the present case, resort could not have been made to Rule 25 of the Rules. The relevant rule would be Rule 27 of the Rules, which makes provision for "General penalty" under which the maximum penalty is five thousand rupees. Having regard to the facts and circumstances of the case, after this length of time, considering the smallness of the amount involved, even while answering the question in the affirmative, that is in favour of the revenue and against the assessee, this court does not deem it fit to disturb the order passed by the Tribunal. The appeal stands disposed of accordingly.