

(2017) 02 GUJ CK 0024
In the Gujarat High Court
Case No : 799 of 2006

COMMISSIONER OF CENTRAL EXCISE & CUSTOMS
Vs

APPELLANT

SHANOO FASHION PVT. LTD.

RESPONDENT

Date of Decision : 08-02-2017

Acts Referred:

[Central Excise Act, 1944](#), [Section 11AC](#), [Section 11AB](#) - Penalty for short-levy or non-levy of duty in certain cases - Interest on delayed payment of duty.
[Central Excise Rules, 1944](#), [Rule 173Q](#), [Rule 173Q\(1\)](#), [Rule 173Q\(2\)](#)

Citation : (2017) 02 GUJ CK 0024

Hon'ble Judges : M.R. Shah, B.N. Karia

Bench : Single Bench

Advocate : ANKIT SHAH, VIJAY BAIRAGRA, TRIVEDI & GUPTA

Judgement

1. Feeling aggrieved and dissatisfied by the order No.A/13071308/ WZB/2005/CI/EB dated 18.10.2005 passed by the learned Customs, Excise and Service Tax Appellate Tribunal, Mumbai (hereinafter referred to as "CESTAT"), by which the learned CESTAT has quashed and set aside the order of penalty imposed upon the respondent Company under Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944, the appellant herein - Revenue has preferred the present Tax Appeal to consider the following substantial question of law. "Whether the CESTAT is empowered not to impose penalty under Rule 173Q of Central Excise Rules, 1944 read with Section 11AC of Central Excise Act, 1944 on the assessee who evaded Central Excise Duty by suppression of facts and in contravention of Rules under Central Excise Law?"

2. Facts leading to the present Tax Appeal in nutshell are as under: 2.1 The respondent assessee M/s. Shanoo Fashion Pvt. Ltd., Surat who was engaged in the manufacturing of man made fabrics (processed) falling under Chapter 54 of the Central Excise Tariff Act, 1985.

2.2 That the Officers of the Central Excise visited factory premises of the assessee on 20.11.1998 and carried out preventive checks which resulted in recovery of documents revealing that 5805 pcs of MMF(P) goods admeasuring 5,83,748 Mtrs valued at Rs.1,05,07,465/had been illicitly removed by the assessee. The Officers also recovered excess stock of 125 pcs of MMF (P) goods admeasuring 12,644.25 Mtrs. valued at Rs.2,27,597/which did not tally with the lot register and placed the said goods under seizure. The Officers further recovered excess stock of 131 pcs of semi processed fabrics admeasuring 13,664.50 Mtrs valued at Rs.1,70,806/which also came to be seized.

2.3 A show cause notice was issued by the Commissioner of, Central Excise and Customs, SuratI dated 07.05.1999 upon the assessee as well as their Directors. The assessee was called upon to show cause as to why (i) the seized goods i.e. 125 pcs. of MMF (P) admeasuring 12,644.25 Mtrs valued at Rs.2,27,597.00 and 131 pcs. of semi processed man made fabrics admeasuring 13664.50 Mtrs (Grey Mtrs) as detailed in Annexure "B" & "C" to the panchnama dtd. 20.11.1998 should not be confiscated under Rule 173Q(1) of Central Excise Rules, 1944; (ii) the Central Excise duty amounting to Rs.21,01,493.00 (BED : Rs.12,60,896.00 + AED : Rs.8,40,597.00) leviable on 5,83,748.00 Mtrs of MMF(P) valued at Rs.1,05,07,465.00, as detailed in Annexure "A" to the panchnama dated 20.11.1998 should not be demanded and recovered from them under Rule 9(2) of Central Excise Rules, 1944 read with proviso to section 11A(1) of the Central Excise Act, 1994; (iii) penalty should not be imposed upon them under Rule 173Q(1) of Central Excise Rules, 1944 read with section 11AC of Central Excise Act, 1944; (iv) the land, building, plant & machinery etc. belonging to them or in their possession and used in the manufacture / processing / storage and removal of offending excisable goods i.e. MMF (P) should not be confiscated under Rule 173Q(2) of Central Excise Rules, 1944; v) principles as to presumption of documents as laid down under Section 36A of Central Excise Act, 1944 should not be applied in relation to the documents / records, produced / recovered and seized from their custody / control and possession / or from the custody / control of other related persons and vi) interest @ 20% per annum should not be charged / recovered from them on delayed payment of evaded Central Excise duty under section 11AB of Central Excise Act, 1944.

2.4 That the aforesaid show cause notice was adjudicated by the Commissioner vide OIO No.14/MP/99 dated 15.10.1999 who ordered confiscation of the goods seized and raised the demand of duty of Rs.21,01,493/on the processed MMF (P) clandestinely removed. The Commissioner ordered as under:

"a) Confiscation of 125 pcs of processed MMF admeasuring 12644.25 Mtrs valued at Rs.2,27,597/and 131 pcs of Semiprocessed MMF goods admeasuring 13664.50 Mtrs valued at Rs.1,70,806/under Rule 173Q(1) of Central Excise Rules, 1944 and gave an option to redeem the same on payment of redemption fine of Rs.1,25,000/.

b) To pay duty of Rs.21,01,493/on the Processed MMF clandestinely removed

- c) To pay interest @ 20% p.a. on delayed payment of evaded Central Excise duty under Section 11AB of the Central Excise Act, 1944.
- d) Imposition of penalty equal to duty on the processed MMF under Rule 173Q(1) of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944.
- e) Imposition of penalty of Rs.1,00,000/under Rule 209A of the Central Excise Rules on the Director of the assessee.
- f) Confiscation of land, building, plant and machinery etc. used in the manufacture / production storage and removal of the offending excisable goods with an option to redeem the same on payment of redemption fine of Rs.20,000/."

2.5 Being aggrieved by the order of the Commissioner, the assessee and its Director filed appeals before the learned CESTAT. The learned CESTAT while deciding the appeals has upheld the duty demand confirmed on goods clandestinely removed. The learned CESTAT has also upheld the confiscation of seized goods and the interest liability and has also upheld the penalty on the Director vide impugned judgment and order. However, the learned CESTAT has set aside the penalty imposed under Rule 173Q(1) of the Central Excise Rules, 1944 (hereinafter referred to as "Rules, 1944") read with Section 11AC of the Central Excise Act, 1944 (hereinafter referred to as "Act, 1944") on the assessee as well as the confiscation of land, plant, building and machinery etc. with an option to redeem the same on payment of redemption fine of Rs.20,000/.

2.6 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned CESTAT quashing and setting aside the penalty imposed under Rule 173Q(1) of the Rules, 1944 read with Section 11AC of the Act, 1944, the Revenue has preferred the present Tax Appeal to consider the following substantial question of law. "Whether the CESTAT is empowered not to impose penalty under Rule 173Q of Central Excise Rules, 1944 read with Section 11AC of Central Excise Act, 1944 on the assessee who evaded Central Excise Duty by suppression of facts and in contravention of Rules under Central Excise Law?"

3. Shri Ankit Shah, learned Counsel appearing on behalf of the appellant - Revenue has vehemently submitted that in the facts and circumstances of the case the learned CESTAT has materially erred in quashing and setting aside the penalty imposed upon the respondent Company under Rule 173Q of the Rules, 1944 read with Section 11AC of the Act, 1944.

3. 1 It is further submitted by Shri Shah, learned Counsel appearing on behalf of the appellant that on one hand the learned CESTAT upheld the duty demand confirmed on goods clandestinely removed and also upheld the confiscation of the seized goods and the interest liability and on the other hand the learned CESTAT has set aside the penalty imposed under Rule 173Q of the Rules, 1944 read with Section 11AC of the Act, 1944. It is submitted that once it was found

that the assessee evaded central excise duty by suppression of facts and in contravention of the Rules under the Central Excise Laws, the penalty under Rule 173Q of the Rules, 1944 read with Section 11AC of the Act, 1944 is required to be imposed.

3. 2 It is submitted by Shri Shah, learned Counsel appearing on behalf of the appellant that in the present case the learned CESTAT has set aside the penalty imposed under Rule 173Q of the Rules, 1944 read with Section 11AC of the Act, 1944 solely on the ground that composite levy of penalty both under Rule 173Q of the Rules, 1944 and Section 11AC of the Act, 1944 is not permissible.

3. 3 Shri Shah, learned Counsel appearing on behalf of the appellant has vehemently submitted that while deleting the penalty imposed under Rule 173Q of the Rules, 1944 read with Section 11AC of the Act, 1944, the learned CESTAT has not properly appreciated the object and purpose of the penalty imposed in terms of Rule 173Q of the Rules, 1944 and Section 11AC of the Act, 1944. It is further submitted by Shri Shah, learned Counsel appearing on behalf of the appellant that the penalty imposed under Rule 173Q(1) of the Rules, 1944 will be different than that of penalty imposable under Section 11AC of the Act, 1944. It is submitted that in the present case the penalty is imposable under both i.e. under Rule 173Q(1) of the Rules, 1944 as well as under Section 11AC of the Act, 1944. It is submitted that therefore the learned CESTAT has materially erred in quashing and setting aside the penalty imposed under Rule 173Q of the Rules, 1944 read with Section 11AC of the Act, 1944 solely on the ground that as the penalty imposed in terms of Rule 173Q(1) of the Rules, 1944 and Section 11AC of the Act, 1944 being composite penalty cannot be sustained. Making above submissions it is requested to allow the present Tax Appeal.

4. Shri Vijay Bairagra, learned Counsel appearing for M/s. Trivedi & Gupta, on behalf of the respondent assessee has supported the impugned order passed by the learned CESTAT.

4. 1 It is submitted that as composite penalty was imposed both under Rule 173Q of the Rules, 1944 and Section 11AC of the Act, 1944, the learned CESTAT has rightly set aside the composite penalty.

4. 2 Shri Bairagra, learned Counsel appearing on behalf of the respondent assessee has heavily relied upon the following decisions of the Hon"ble Supreme Court as well as this Court in support of his above submissions that levy of composite penalty under Rule 173Q of the Rules, 1944 and Section 11AC of the Act, 1944, is not permissible. (1) (2000) 3 SCC 131 Collector of Customs vs. Television and Components Ltd.

(2) 2003 (158) E.L.T. 711 (Tri. - Del.) Lauls Ltd. vs. Commissioner of C. Ex., New Delhi

(3) 2009 (234) E.L.T. 215 (Guj.) Commissioner of C. Ex. & Customs, SuratII vs. R.G. Agarwal

(4) Tax Appeal No.804/2011 Commissioner, Central Excise, Customs & Service Tax vs. Bijal Latif Memon Making above submissions and relying upon above decisions, it is requested to dismiss the present Tax Appeal.

5. Heard learned Counsel appearing on behalf of respective parties at length. The short question which is posed for consideration of this Court is whether in the facts and circumstances of the case the learned CESTAT is justified in quashing and setting aside the penalty imposed under Rule 173Q(1) of the Rules, 1944 and Section 11AC of the Act, 1944 solely on the ground that the consolidated levy of penalty both under Rule 173Q of the Rules, 1944 and Section 11AC of the Act, 1944 is not permissible?

5. 1 While considering the question of law posed for consideration of this Court the relevant provisions with respect to penalty under Section 11AC of the Act, 1944 and Rule 173Q of the Rules, 1944 are required to be considered which read as under: "11AC. Penalty for shortlevy or nonlevy of duty in certain cases.- Where any duty of excise has not been levied or paid or has been shortlevied or shortpaid or erroneously refunded by reasons of fraud, collusion or any wilful 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 subsection (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined: Provided that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, for the purposes of this section, the duty, as reduced or increased, as the case may be, shall be taken into account.

173Q. Confiscation and penalty.(1) Subject to the provisions contained in section 11AC of the Act and subrule (4) of rule 57I and subrule (6) of rule 57U, if any manufacturer, producer, registered person of a warehouse or a registered dealer,- (a) removes any excisable goods in contravention of any of the provisions of these rules; or (b) does not account for any excisable goods manufactured, produced or stored by him; or (bb) takes credit of duty or money in respect of inputs or capital goods for being used in the manufacture of final products or capital goods for use in the factory of the manufacturer of final product, as the case may be, wrongly or without taking reasonable steps to ensure that appropriate duty on the said inputs or capital goods has been paid as indicated in the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, accompanying thereof, or takes credit of duty or money which he knows or which he has reason to believe, is not permissible under these rules, or does not utilise the inputs or capital goods in the manner provided for in these rules, or utilises credit of duty or money in respect of inputs or capital goods in contravention of any of the provisions of these rules, or does not render proper and true account of the receipt and disposal of the said inputs or capital goods and the credit of duty or money taken thereon as required under these rules, or

contravenes any of the provisions contained in Section AA or AAAA of Chapter V of these rules; or

(bbb) enters wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of such goods which is not permissible under these rules; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (bbb) or clause (c) or clause (d) has been committed, or five thousand rupees, whichever is greater. Explanation.-For the purposes of clause (bb) of subrule (1), a person availing of credit of duty on inputs received by him shall be deemed to have taken "reasonable steps" if he satisfies himself about the identity and address of the manufacturer or supplier, as the case may be, issuing the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, either(a) from his personal knowledge; or (b) on the strength of a certificate given by a person with whose handwriting or signature he is familiar; or (c) on the strength of a certificate issued to the manufacturer or the supplier, as the case may be, by the Superintendent of Central Excise within whose jurisdiction such manufacturer has his factory or the supplier has his place of business: Provided that where the identity and address of the manufacturer or the supplier is satisfied on the strength of a certificate, the person availing of credit of duty shall retain such certificate for production before the proper officer on demand." Under Section 11AC of the Act, 1944, penalty is imposable / leviable for shortlevy or nonlevy of duty. Section 11AC of the Act, 1944 provides that where any duty of excise has not been levied or paid or has been shortlevied or shortpaid or erroneously refunded by reasons of fraud, collusion or any wilful 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 subsection (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined. A penalty under Rule 173Q of the Rules, 1944 is leviable / imposable upon the manufacturer, producer, registered person of a warehouse or a registered dealer. Rule 173Q of the Rules, 1944 provides that subject to the provisions contained in Section 11AC of the Act, 1944, if any manufacturer, producer, registered person of a warehouse or a

registered dealer removes any excisable goods in contravention of any of the provisions of the Central Excise Rules, or does not account for any excisable goods manufactured, produced or stored by him....., enters wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of such goods which is not permissible under these rules; or engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or contravenes any of the provisions of these rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (bbb) or clause (c) or clause (d) has been committed, or five thousand rupees, whichever is greater.

5.2 Thus, on considering section 11AC of the Act, 1944 and Rule 173Q of the Rules, 1944, both operates in different fields and the penalty leviable under both the provisions are different. As observed hereinabove, the penalty under Section 11AC of the Act, 1944 is leviable on the person who is liable to pay duty as determined under subsection (2) of Section 11 of the Act, 1944.

However, the penalty under Rule 173Q of the Rules, 1944 is imposable / leviable on the manufacturer, producer, registered person of a warehouse or a registered dealer. Therefore, in a given case the penalty under Section 11AC of the Act, 1944 as well as under Rule 173Q of the Rules, 1944 i.e. under both the provisions shall be leviable / imposable. In a given case it may happen that the penalty under Section 11AC of the Act, 1944 may not be leviable / imposable if the concerned person is not found liable to pay duty as determined under subsection (2) of section 11 of the Act, 1944. But if he is a manufacturer, producer, registered person of a warehouse or a registered dealer in that case on the eventuality occurred as mentioned in Rule 173Q of the Rules, 1944, the penalty is imposable / leviable on the manufacturer, producer, registered person of a warehouse or a registered dealer as the case may be. Thus, in a case where a composite penalty is levied under both the provisions i.e. under Rule 173Q of the Rules, 1944 and section 11AC of the Act, 1944 and if it is found that it is not possible to bifurcate the penalty imposable under Section 11AC of the Act, 1944 and Rule 173Q of the Rules, 1944 and/or it is not possible to apportion quantum of penalty imposable under Rule 173Q of the Rules, 1944 and/or section 11AC of the Act, 1944, in such a case the matter may be remanded to the appropriate Adjudicating Authority to redetermine the quantum of penalty either under Rule 173Q of the Rules, 1944 and/or section 11AC of the Act, 1944, as the case may be. However, to set aside the penalty imposed on the ground that a composite penalty has been imposed under Rule 173Q of the Rules, 1944 and section 11AC of the Act, 1944, shall be giving a premium to the person who has committed the

wrong and/or has evaded the duty and/or has contravened the Rules. The consequences in such a case would be that there shall not be any penalty imposed under any of the provisions i.e. either under Rule 173Q of the Rules, 1944 or under Section 11AC of the Act, 1944. Therefore, the proper remedy in such a case would be to remand the matter to the Adjudicating Authority to determine the amount of penalty and/or to determine quantum of penalty either under Rule 173Q of the Rules, 1944, in case the concerned person is manufacturer, producer, registered person of a warehouse or the registered dealer and if it is found that the said person is a person who is not liable to pay the duty as determined under subsection (2) of section 11 of the Act, 1944 and/or under section 11AC of the Act, 1944 if concerned person is found to be liable to pay the duty as determined under subsection (2) of section 11 of the Act, 1944.

5.3 Now, so far as the reliance placed upon the decision of the Hon''ble Supreme Court in the case of Television and Components Ltd. (Supra) by the learned Counsel appearing on behalf of the assessee is concerned, it is required to be noted that even in that case the Hon''ble Supreme Court remanded the matter to the Collector to redetermine the quantum of penalty after determining the issue on licensing aspect. In the case before the Hon''ble Supreme Court it was specifically found that it was not possible to appreciate the quantum of penalty between the contraventions found and therefore, the Hon''ble Supreme Court though upheld the Collector's findings on the issue of declaration and evasion, remanded the matter to the Collector to redetermine the quantum of penalty after determining the issue on licensing aspect. Therefore, on facts the said decision shall not be applicable to the facts of the case on hand. Even in the cases of R.G. Agarwal (Supra) and Bilal Latif Memon (Supra), a composite penalty was imposed upon the Directors / partners of the firm, under the relevant provisions of the Customs Act and the Rules. In the present case the penalty under Rule 173Q of the Rules, 1944 and section 11AC of the Act, 1944 has been imposed upon the assessee. The penalty is leviable upon the assessee both under Section 11AC of the Act, 1944 as well as under Rule 173Q of the Rules, 1944. Under the circumstances, the aforesaid decisions shall not be applicable to the facts of the case on hand. It is required to be noted that in the present case the penalty imposed is Rs.21,01,493/only, which is leviable both under Rule 173Q(1) of the Rules, 1944 as well as under Section 11AC of the Act, 1944. Under the circumstances, in the facts and circumstances of the case narrated hereinabove, the learned CESTAT has materially erred in quashing and setting aside the order of penalty imposed upon the assessee, imposed under Rule 173Q of the Rules, 1944 and Section 11AC of the Act, 1944.

view of the above and for the reasons stated above, present Tax Appeal succeeds. Impugned order No.A/13071308/ WZB/2005/CI/EB dated 18.10.2005 passed by the learned Customs, Excise and Service Tax Appellate Tribunal, Mumbai in quashing and setting aside the order of penalty imposed under Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Central

Excise Act, 1944 upon the assessee is hereby quashed and set aside. The question of law is answered in favour of the Revenue and against the assessee.