
(2010) 02 GUJ CK 0011
In the Gujarat High Court
Case No : Tax Appeal No. 29 of 2010

Commr. of C. Ex. and Cus.

APPELLANT

Vs

Swati Chemicals Industries Ltd.

RESPONDENT

Date of Decision : 17-02-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(2), 11AC, 35G

Citation : (2013) 294 ELT 208

Hon'ble Judges : Rajesh H Shukla, J;K.A. Puj, J

Bench : Division Bench

Advocate : Y.N. Ravani, for the Appellant;

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The Commissioner of Central Excise, Ahmedabad has filed this Tax Appeal u/s 35G of the Central Excise Act, 1944 proposing to formulate the following substantial question of law for the determination and consideration of this Court:-- Whether the CESTAT committed error in interpreting proviso of Section 11AC of the Central Excise Act, 1944 by offering to an assessee to deposit amount of interest and penalty within 30 days of its order to avail benefit of reduced penalty at 25% of duty, though CESTAT has not redetermined the quantum of duty?

Heard Mr. Y.N. Ravani, learned Standing Counsel appearing for the Revenue and perused the orders passed by the authorities below. 2. The brief facts giving rise to this appeal are that the adjudicating authority had passed an order-in-original on 30-6-2003 raising the demand of duty of Rs. 2,19,817/- u/s 11A(2) of the Central Excise Act, 1944 and imposing penalty of Rs. 15,000/- u/s 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2001 and charging interest at the prescribed rates u/s 11AB of the Central Excise Act, 1944. The department has challenged this order before the Commissioner (Appeals) who vide his order dated 15-12-2003 upheld the order-in-original of the adjudicating authority and dismissed the said appeal. Being further aggrieved

by the said order, the Department preferred Second Appeal before the Tribunal and the Tribunal vide its order dated 14-9-2005 dismissed the Appeal by holding that no merits are found in the Revenue's Appeal.

3. Being further aggrieved by the said order of the Tribunal, the Revenue filed Tax Appeal No. 524 of 2006 before this Court for enhancement of penalty equal to duty evaded u/s 11AC of the Central Excise Act. This Court vide its order dated 27-2-2009 decided the said tax appeal and remanded the matter to the Tribunal with a direction to decide the issue afresh in light of the Apex Court decision in the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, .

4. Pursuant to the order of this Court, the Tribunal decided the appeal and by its common order passed in 17 matters on 15/16/17-7-2009 [2009 (248) E.L.T. 421 (Tri.-Ahmd.)], has enhanced the penalty equal to the duty confirmed against the respondent assessee. However, relying upon the judgment of the Punjab & Haryana High Court in the case of Commissioner of Central Excise Commissionerate Vs. J.R. Fabrics (P) Ltd., set aside the order passed by the adjudicating authority with a direction to give an option to the respondent assessee to deposit 25% of the penalty within a period of 30 days of the communication of the order, in which case the penalty shall stand restricted to 25% of the duty amount.

5. It is this order which is under challenge in the present tax appeal.

6. Mr. Ravani has submitted that in the remand matter, the Tribunal has wrongly passed an order by incorrect interpretation of the decision of the Apex Court in the case of M/s. Dharamendra Textile Processors (supra). He has further submitted that the Tribunal can give such option to the assessee only on those cases, where the duty demanded to be payable has reduced or increased by it, which is clearly stipulated in the Central Excise Act. Third and fourth proviso to Section 11AC is regarding giving benefit of reduced penalty of 25% of the duty, in case the duty determined is changed (either increased or decreased) by the appellate authorities. However, in the present case, the Tribunal has not redetermined the quantum of duty and, therefore, the Tribunal has no power to give the option to pay reduced penalty of 25% of the duty within 30 days of communication of its order to the assessee.

7. Mr. Ravani has invited the attention of the Court to the recent Circular dated 15-9-2009 issued by the Central Board of Excise & Customs, clarifying that in order to avail the benefit of 25% penalty, the duty, interest and penalty are required to be paid within 30 days of communication of the order passed by the adjudicating authority. The fourth proviso to Section 11AC stipulates that wherever duty amount is increased at any appellate stage, in that case, in order to avail the benefit of 25% penalty, the assessee is required to pay differential amount within 30 days of the passing of the order by the appellate authority. A combined reading of all the four proviso would, therefore, make it clear that the

benefit of 25% penalty is applicable only when the assessee has paid duty, interest and the reduced penalty within 30 days of communication of the order passed by the adjudicating authority. Mr. Ravani has, therefore, submitted that the intention of legislation is to provide the option of reduced penalty when first time issue is adjudicated by original authority. It has never intended to provide option at first appellate stage or even by the Tribunal.

8. We have considered the submissions made by Mr. Ravani and also perused very minutely the order passed by the authorities below. As a matter of fact, all these submissions urged by Mr. Ravani were already considered by this Court in its order dated 18-11-2009 in the case of Exotic Associates Vs. The Commissioner of Central Excise, and Tax Appeal No. 1942 of 2008, in the case of Commissioner of C. Ex. and Customs Vs. Rama Synsilk Mills P. Ltd., . This Court after considering the decision of Commissioner of Central Excise Vs. Malbro Appliances P. Ltd., . Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, , Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, , K.P. Pouches (P) Ltd. Vs. Union of India (UOI), - Commissioner of Central Excise Commissionerate Vs. J.R. Fabrics (P) Ltd., , has taken the view that the order passed by the Tribunal retaining the penalty of 25% of the duty amount seems to be quite justified. For the reasons recorded in the said two judgments, we do not feel it necessary to take any different view in this Appeal.

9. We have an occasion to deal with similar such submission made on behalf of Revenue with regard to non-compliance of the pre-condition for availment of benefit of reduced penalty under proviso to Section 11AC of the Central Excise Act, 1944. As per the first proviso, the duty amount was not paid with interest and even the reduced penalty of 25% was not deposited by the respondent within 30 days from the date of such determination, as required under second proviso to Section 11AC of the Act. Despite this, the Court has granted benefit of the Proviso by issuing direction to the adjudicating authority to give an option to the assessee.

10. Even with regard to the submission of Mr. Ravani that the adjudicating authority is not under any statutory obligation to set out in its order, the availability of benefit of reduced penalty prescribed under proviso to Section 11AC of the Central Excise Act and to give an option to such person liable for penalty under that Section, was considered by us in Tax Appeal No. 572 of 2007 with Tax Appeal No. 869 of 2007 decided on 18-11-2009. We have observed therein that the adjudicating authority has not calculated the interest neither in the order-in-original nor even thereafter. It is, therefore, too much to expect from the respondent - assessee to pay the interest along with the duty amount in absence of such calculation of interest. As far as statutory obligation of the adjudicating authority is concerned, the Central Excise Department itself has earlier issued Circular on 22-5-2008 wherein it is clarified that in all cases wherein penalty u/s 11AC of the Act is imposed, the provisions contained in the first and second proviso of Section 11AC should be mandatorily mentioned in the

order-in-original itself by the adjudicating authority. It is, therefore, not open for the Revenue to agitate this issue before the Court in contradiction of the Circular issued by the Central Excise Department. This Court in Messers Exotic Associates (supra) has directed the adjudicating authority to pass a fresh order giving option to the assessee to pay the duty amount within 30 days by making it explicitly clear in the order itself that if the assessee wants to avail such option he is permitted to do so. In the case on hand, since the duty amount has already been paid by the respondent-assessee and if the interest and/or reduced penalty of 25% were not paid by the respondent-assessee, the adjudicating authority may send a communication to the respondent-assessee indicating therein that the particular amount of interest and/or 25% of the penalty of the duty amount is not paid by the respondent-assessee and hence if the assessee wants to avail the benefit of the reduced penalty of 25%, such amount of interest and/or penalty of 25% should be paid within 30 days from the date of receipt of such communication, failing which they would be liable to pay penalty u/s 11AC equivalent to the amount of duty.

11. Since the order passed by the Tribunal is in accordance with the view taken by this Court, there is no question of considering the Circular issued by the Central Board of Indirect Taxes on which reliance was placed by Mr. Ravani. In the above view of the matter, we do not see any substance in this tax appeal and no substantial question of law can be said to have arisen out of the order of the Tribunal. This appeal is, therefore, summarily dismissed.