

(2013) 01 GUJ CK 0021
In the Gujarat High Court

Case No : Misc. Civil Application No. 11 of 2013

Commr. of C. Ex. and Cus., Surat-I

APPELLANT

Vs

Krishnaram Dyeing and Finishing Works

RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Citation : (2013) 298 ELT 376

Hon'ble Judges : Sonia Gokani, J; Akil Kureshi, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant;

Judgement

Sonia Gokani, J.—This application for review is filed by the Revenue challenging the order of this Court dated 29-12-2011 passed in Tax Appeal No. 963 of 2011 in the following background:-

1.1 The respondent is engaged in manufacturing of processed man-made fabrics. The Department found un-accounted fabrics and incriminating documents during the visit on 17-3-1996, this was since treated as indicative of clearance of goods without due payment of duty under the law, the show cause notice was issued for confiscation of goods, demanding duty with interest and proposing imposition of penalty u/s 11AC of the Central Excise Act, 1944. Commissioner passed an order of confiscation of seized goods and confirmed the demand of Central Excise duty to the tune of Rs. 40,26,799/- with interest and impugned penalty of an equal amount under Rule 173 of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act.

When challenged in appeal before the Customs, Excise & Service Tax Appellate Tribunal, Ahmedabad ("the Tribunal" for short), the Tribunal vide its order dated 22-11-2006 (2007 (269) E.L.T. 410 (Tri. - Ahmd.)) partly allowed the appeal of the respondent.

Aggrieved by the same, the Department challenged the same in Tax Appeal No. 1996 of 2006. This Court remanded the matter back to the Tribunal for

consideration vide its order dated 2-2-2009 in the light of the decision of the Apex Court rendered in case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others,

2. The Tribunal imposed penalty of the amount equivalent to the demand of duty confirmed by the adjudicating Commissioner. However, it provided option to the respondent to pay reduced penalty if duty, interest and penalty were paid within 30 days from the receipt of the order of the Tribunal. Such order dated 24-3-2010 was challenged by way of an application, for rectification of mistake by the Department. The Tribunal rejected the same on 14-12-2010.

2A. Aggrieved by such order, present appellant preferred an appeal u/s 35G of the Central Excise Act being Tax Appeal No. 963 of 2011. And, before this Court, following substantial questions of law were raised:

(a) Whether, in the facts and circumstances of the case, the Tribunal has committed substantial error of law in holding that duty liability under sub-section (2) of Section 11 of the Central Excise Act is determined by order-in-original dated 27-2-1998, appeal against which is decided by the Tribunal in the year 2006 and therefore the respondent is entitled for benefit of reduced penalty within the meaning of explanation to proviso of Section 11ACC of the Central Excise Act, 1944?

(b) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in giving option to the respondent to deposit duty, interest and @ 25% of duty amount towards penalty, within 30 days from the receipt of the order of the Tribunal for availing benefit of reduced penalty under the proviso to Section 11AC of the Central Excise Act, 1944?

(c) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in applying decisions of the Tribunal in case of M/s. Swati Chemical Industries (2009 (248) E.L.T. 421 (Tri)) and decision of this Hon'ble Court in case of The DCIT vs. Akash Fashion Prints Pvt. Ltd. without recording comparative facts of the said cases and case of the respondent and recording findings thereon, for giving option to the respondents of reduced penalty?

(d) Whether the impugned order of the Tribunal can be said to be an order passed in accordance with law?

3. This Court dismissed such appeal in limine on the ground that no new question of law arises.

4. Revenue challenged the same before the Apex Court by preferring SLP (Civil) C.C. No. 10987 of 2012 also seeking condonation of delay. This was withdrawn with a liberty to file appropriate review application and such permission since was granted by the Apex Court, present application is preferred raising various grounds.

5. Learned Senior Counsel Mr. Oza appearing for the Department has urged that this is a fit case for review as first and second proviso to Section 11AC, if is examined, the benefit of reduced penalty is available only if the party pays the entire amount of duty, interest and 25% of the penalty within 30 days from the date of communication of the order-in-original. Since the assessee has not paid the amount of interest and 25% of penalty within 30 days, he cannot avail the benefit of reduced penalty from the order-in-original determining the duty u/s 11A.

6. On thus hearing learned counsel and on perusal of the record, it can be noted that this Court has confirmed the order of the Tribunal based on the decision of this Court rendered in the case of The DCIT vs. Akash Fashion Prints Pvt. Ltd. In number of other appeals also such stand of the Tribunal had been affirmed by this Court.

7. As can be noted from the record that when this Court remanded the matter to the Tribunal for passing a fresh order in accordance with law, it had kept the question of applicability of proviso to Section 11AC open for its consideration by directing thus:-

Therefore, the order of the Tribunal is set aside. The matter is remanded to the Tribunal for passing fresh orders in accordance with law. The question of applicability of proviso to Section 11AC will also be considered and examined by the Tribunal while deciding the matter afresh. The Tribunal shall pass fresh order within a period of three months from the date of receipt of a copy of this judgment.

8. The Tribunal thus was required to consider such question. It clearly noted that the lower authorities had not given the option to pay duty, interest and 25% of the duty amount towards penalty within 30 days of the order to the assessee and in view of the decision of the Tribunal in the case of Commissioner of C. Ex., Vadodara v. Swati Chemical Indus. Ltd. reported in 2009 (248) E.L.T. 421 (Tri.-Ahmd.), where the Tribunal had given the option to the assessee to deposit the entire dues along with 25% interest of penalty within a period of 30 days of communication of its order and in such case, the penalty stood restricted to 25% of the duty amount. While so holding, it discussed the decision of Union of India v. Dharamendra Textile Processors (supra) and other judgments of the High Courts in the following manner:-

3. It was noted that in some cases the assessee had challenged the vires of Rule 96ZQ(5) and the Gujarat High Court held that the said rule incorporated the requirement of mens rea. The Division Bench clarified that if the larger bench takes a view to say that the penalty leviable under the said clause is mandatory, it is still open to the assessee to challenge the vires of Rule 96ZQ(5).

4. During the course of hearing, learned counsel for the parties agreed that a similar issue is involved in respect of Rule 96ZO.

5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in Section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible u/s 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the Revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the Revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to willful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here.

6. It was pointed out that Rule 96ZO refers to manufacturer of ingots and billets while Rule 96ZQ relates to independent processor of textile fabrics. They belong to the same category and failure to pay duty attracts penal consequences. In the other category in cases of fraud etc. penalty is for statutory offence. It is pointed out that in Dilip Shroffs case (supra) the question relating to discretion was not the basic issue. In fact, Section 271(1)(c) of the I.T. Act provides for some discretion and, therefore, that decision has no relevance. So far as the present dispute is concerned, whether discretion has been properly exercised is a question of fact. It is submitted that Chairman SEBI's case (supra) has full application to the facts of the present case.

7. In reply, learned counsel for the respondent submitted that the factual scenario in each case has to be examined. In cases relatable to Section 11AC of the Act, the Appellate Tribunal in some of the cases has come to a finding that there was no willful disregard involved and the assessee's conduct was bona fide. It is pointed out that Section 11A relates to the expression "assessee shall be liable" and, therefore, there is discretion to reduce the penalty. With reference to Sections 271C and 271B of the I.T. Act, it is pointed out that in the case of former it is "liable" while in the latter it is "shall pay". Reference is also made to Sections 271F and 272A of the said I.T. Act. Reliance is placed on a decision of this Court in State of Madhya Pradesh and others Vs. Bharat Heavy Electricals, to contend that even if this Court held that it appears to give the expression that the imposition of penalty is mandatory, yet there was a scope for exercise of discretion.

9. When challenged, this Court in Tax Appeal No. 963 of 2011 confirmed the order of the Tribunal in the following manner:-

2. Heard learned counsel Mr. R.J. Oza and perused the order of the Tribunal, which as relied on the decision in case of Swati Chemical Industries Ltd. & Ors., reported in 2009 (248) E.L.T. 421.

This matter, when was challenged by way of this Appeal before this Court, the order of Tribunal was confirmed in case of The DCIT vs. Akash Fashion Prints Pvt. Ltd. In various judgments of this Court, this view has been upheld. As the Department could not point out any reason for taking contrary view then already taken in earlier Tax Appeals, and with no question of law remain to be determined by this court, the present Tax Appeal fails and is dismissed.

10. This Court in the case of The DCIT vs. Akash Fashion Prints Pvt. Ltd. did not accept the contention of the Revenue that the Tribunal ought not to have reduced the penalty u/s 11AC In the matter before this Court, the duty amount was paid prior to the raising of demand and the Court, therefore, held that on invoking the second proviso to Section 11AC, the order of the Tribunal, of reducing the penalty amount, was justifiable in the following words:-

4. When the matter came up for hearing today, the learned counsel for the appellant at the outset prayed for time so as to have the appeal listed along with other matters wherein issue regarding penalty u/s 11AC of the Central Excise Act, 1944 ("the Act"), is stated to be pending by way of various Tax Appeals. When the attention of the counsel was invited to the order made by the Adjudicating Authority and the fact that the Tribunal had reduced the penalty to 25% of the penalty imposed, the learned counsel once again reiterated request for adjournment. In light of the peculiar facts of the case, the request has been turned down by the Court.

5. Section 11AC of the Act provides for levy of penalty in cases of short-levy or non-levy of duty in certain cases. The first proviso thereunder provides for exception to the main provision by stipulating that where the duty and the interest are paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid u/s 11AC of the Act shall be 25% of the duty so determined; and under second proviso, it is provided that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within a period of thirty days referred to in the first proviso.

6. In the facts of the present case, the duty amount of Rs. 1,03,628/- was paid on 7-1-2002, as recorded by the Tribunal, whereas the duty amount was fixed by the Adjudicating Authority on 24-2-2004. Therefore, admittedly, the amount which was paid prior to the raising of demand has to be considered as having been in compliance with the first proviso. Accordingly, the equivalent penalty of Rs. 1,03,628/- u/s 11AC of the Act shall stand reduced to 25% if the assessee complies with requirement of second proviso to Section 11AC of the Act. It is in

this context that the Tribunal has reduced the penalty amount.

7. In the circumstances, it is not possible to accept the submission on behalf of the appellant that the penalty ought not to have been reduced. The appeal is accordingly dismissed in absence of any substantial question of law.

11. This Court in the case of Exotic Associates Vs. The Commissioner of Central Excise, also was confronted with the identical issue. This Court considered the question in the light of the proviso of Section 11AC which talks about the option to give the assessee to pay the excise duty within 30 days from the date of the order and in lieu of that penalty u/s 11AC be reduced to 25% of the amount of excise duty levied in the order passed by the adjudicating authority. The Court referred to the decision of various High Courts as in the case of K.P. Pouches (P) Ltd. Vs. Union of India (UOI), The Court also referred to the decision of Punjab & Haryana High Court in the case of Commissioner of Central Excise, Rohtak v. J.R. Fabrics Private Limited reported in 2009 (238) E.L.T. 209 (P & H) and considering both the judgments, it allowed the appeal filed by the assessee and remanded the matter to the Additional Commissioner to pass a fresh order in light of the observations, where it found that the assessee was not given any option as to whether he wanted to pay duty demand within 30 days from the date of adjudication of the order. It would be worthwhile to reproduce relevant paragraphs:-

12. This very question has come up before the Delhi High Court in the case of K.P. Pouches (P) Ltd. Vs. Union of India (UOI), wherein the Court after discussing the controversy between the parties in paragraph 27 of the judgment has observed that to obviate any similar situation from arising in future, the adjudicating authority in its adjudication order under the Act should explicitly set out the options available to the Assessee u/s 11AC of the Act. Once the chances are made known to the assessee and it still does not take advantage of the first Proviso to Section 11AC of the Act, it will be entirely at its own peril. The Court, therefore, held that it would be beneficial both from the point of view of the Revenue as well as the assessee, if the options available to the assessee are mentioned in the adjudication order itself.

13. Pursuant to the above judgment of the Delhi High Court, the Central Excise department has issued Circular on 22-5-2008 wherein it is clarified that in all the cases wherein penalty u/s 11AC of the Act is imposed, the provisions contained in the first and second Proviso to Section 11AC should be mandatorily mentioned in the order-in-original itself by the adjudicating authority.

14. The Punjab & Haryana High Court is also faced with the similar situation and in its judgment in the case of Commissioner of Central Excise, Rohtak v. J.R. Fabrics Private Limited, 2009 (238) E.L.T. 209, the Court took the view that it is appropriate to notice that the period in question is 28-7-2001 to 28-2-2002 and there is no dispute that the proviso added by the Act No. X of 2000 is made applicable with effect from 12-5-2000, which provides that an amount equal to

25% of the amount of duty of excise be paid as penalty if the amount of duty of excise is paid within 30 days from the date of communication of the order by the Central Excise Officer. In that case, the order-in-original also imposes penalty which is equivalent to the amount of duty of excise assessed by the adjudicating authority. The assessee was, however, not given any option as to whether he wants to pay the duty within 30 days from the date of the adjudication order. The Court, therefore, took the view that the conclusion reached by the Tribunal that the assessee was liable to pay penalty to the extent 25% of the amount of duty of excise demanded by the officer concerned. While arriving at this conclusion, the Court has also considered the decision of the Apex Court in the case of Dharamendra Textile (supra) and observed that the provisos first and second which were added in the year 2000 were not the subject matter of consideration before their Lordships in Dharamendra Textile Processor's case (supra). The Court, therefore, did not find any substance in the contention raised on behalf of the Revenue, especially, in the face of express provision made by the four provisos in the year 2000.

15. Considering the above judgment of the Delhi High Court as well as Punjab & Haryana High Court and further considering the impugned order of the Tribunal, we are of the view that the matter requires to be considered afresh in light of the above decisions of the Delhi High Court as well as Punjab & Haryana High Court. It is an admitted position that the assessee was not given any option as to whether he wants to pay the duty demand within 30 days from the date of the adjudication order and in that case, he has to pay only 25% of the penalty. Since this aspect was not considered by the authorities below, we are of the view that interest of justice would better be served if the matter is remanded to the adjudicating authority with a direction to frame an order de novo after giving the assessee an option to pay 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.

16. In the above view of the matter, we allow the appeal filed by the assessee for statistical purpose and remand the matter to the Additional Commissioner to pass a fresh order in light of the observations made hereinabove. It is, however, made clear that looking to the peculiar facts of the case, the Court has adopted this course and it shall not be treated as precedent.

12. This Court in the case of Commissioner of C. Ex. & Cus. Surat-I v. Harish Silk Mills reported in 2010 (255) E.L.T. 393 (Guj.) also decided this very question. The issue raised before the Court was that the assessee did not comply with the pre-condition of payment of duty with interest and 25% of penalty within 30 days from the date of receipt of determination (adjudication order) for availment of benefit of reduced penalty under proviso to Section 11AC. It was also argued before the Court that the adjudicating authority was not under statutory obligation to spell out in the order, the availability of benefit of reduced penalty prescribed under proviso to Section 11AC and give an option to the assessee

liable for penalty under this Section. This Court held thus:-

10. However, Mr. Oza has made two more submissions in this Tax Appeal. He has emphatically stated that the respondent has not complied with 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% is 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. So far as second issue is concerned, Mr. Oza submitted 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. Both these issues were dealt with by this Court in Tax Appeal No. 572 of 2007 with Tax Appeal No. 869 of 2007 decided on 18-11-2009. It is also important to note 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 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. Before parting, we observe that the order passed by the Tribunal cannot be said to be a non-speaking and non-reasoned order. The authorities cited by Mr. Oza in support of his submission that a non-speaking order is passed by the Tribunal and hence it deserves to be dismissed, were duly considered by us and we are of the view that they are not applicable to the facts of the present case. The Tribunal while dismissing the Departmental Appeal observed that the

quantum of the penalty is to the extent at around 25% of the duty amount and does not call for any interference. The Tribunal is taking consistent view in the matters of penalty levied u/s 11AC and when the duty amount is paid before issuance of show cause notice, the penalty is reduced to 25% of the duty amount. If the duty amount with interest is not paid in time and even reduced penalty of 25% of the duty amount is not paid in time and option is not given to the respondent assessee, we have taken the view that such option should be given to the assessee and period of 30 days would commence from the date of giving such option. In this view of the matter, no interference is called for in the order of the Tribunal.

13. As can be noted from the decisions mentioned hereinabove, this Court has followed a consistent view that the assessee is required to be given the option by the adjudicating authority where he is asked to pay a duty demand with interest and 25% of penalty within 30 days from the date of adjudication of the order and in such case, he would be liable to pay only 25% of the penalty. Whenever such option had not been given, the remand had been made to the concerned authorities. And period of 30 days is being considered, if in case option is not given earlier, from the date of availing such option.

14. In the present case also, the remand had been made to the Tribunal and in the order of remand, it was also directed to consider the provision of Section 11AC and the Tribunal had specifically noted that none of the two authorities below had availed any option to the assessee to pay duty demand with interest and penalty of 25% of the duty within 30 days from the date of adjudication, and therefore, the Tribunal in its order impugned maintained that the case of the assessee is squarely covered by the explanation to Section 11AC. The Tribunal also noted that the duty determined u/s 11AC(2) was subsequent to the year 2000 and, therefore, the case would be covered by the explanation to Section 11AC of the Central Excise Act.

15. When no option was given by any of the adjudicating authorities after determination for payment of duty, interest and penalty of 25% of the duty, what all Tribunal had done, pursuant to the direction in remand order, was to avail option to the respondent-assessee and this was in consonance with the ratio laid down by the Court time and again. Thus, no case is made out by the applicant for reviewing the order in Tax Appeal No. 963 of 2011. Review application, being devoid of merits stands dismissed.