In the High Court of Judicature at Madras

Dated : 12.2.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice N.KIRUBAKARAN

Civil Miscellaneous Appeal Nos.1630 to 1633 & 1949 to 1952 of 2015
and MP.Nos.1 and 1 of 2015

M/s.Archana Spinners Ltd., rep.
by its Director Mr.S.Rajaram ...Appellant in all the appeals

Vs

1.The Deputy Commissioner of Central
Excise, Tuticorin Division, Tuticorin.

2.The Commissioner of Central Excise
Central Revenue Building
Tractor Road NGOA Colony
(Appeals), Tirunelveli-7.

3.The Customs, Excise & Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan Annex Ist floor
26 Haddows Road
Chennai-6. ...Respondents 1 to 3 in all the appeals

4.The Superintendent of Central Excise,
SPIC II Range, Tuticorin-8. ...R4 in CMA.Nos. 1630 to 1633/2015
C50 Sipcot

APPEALS under Section 35G of the Central Excise Act, 1944 against the common order dated 14.8.2014 made in Misc.Order Nos.41398 to 41405/ 2014 in E/ROM/42238 to 42241/2014 in Appeal E/462 to 465/2004 respectively on the file of the third respondent herein (CMA.Nos.1630 to 1633 of 2015) and against the order dated 9.7.2013 made in Final Order Nos.40323 to 40326/ 2013 in E/462 to 465/2004 respectively on the file of the third respondent herein (CMA.Nos.1949 to 1952 of 2015).

For Appellant : Mr.B.Kumar, SC for Mr.S.M.Abdul Nazeer

For Respondents 1, 2 and 4 : Mr.A.P.Srinivas

COMMON JUDGMENT

(Judgment was delivered by V.RAMASUBRAMANIAN,J)

All these appeals are directed against the orders of the Customs, Excise and Service Tax Appellate Tribunal.

2. Heard Mr.B.Kumar, learned Senior Counsel for the appellant and Mr.A.P.Srinivas, learned Standing Counsel for the Department.

3. The appellant holds a central excise registration bearing No.7/92. They are engaged in the manufacture of polyester yarn and poly viscose falling under Chapter Heading 5509. They are availing MODVAT facility on inputs and capital goods. The appellant is also engaging another company as their consignment agent and is effecting clearance through their consignment agent.

4. By show cause notices bearing Nos.541/98, 1092/98, 216/98, 273/ 99, 685/99 and 1094/99 respectively dated 2.4.1998, 1.7.1998, 18.11.1998, 1.4.1999, 30.7.1999 and 1.12.1999 relating to various periods namely 9/97 to 12/97, 1/98 to 4/98, 5/98 to 8/98, 9/98 to 12/98, 1/99 to 4/99 and 5/99 to 8/99, the appellant/assessee was called upon to show cause as to why a demand for additional duty of excise to the total extent of Rs.20,27,588/- should not be demanded for adopting a lower assessable value at the time of removal of the goods.

5. All these six show cause notices resulted in an Order in Original bearing No.18/2000 dated 29.2.2000, confirming the demand of duty to the tune of Rs.20,27,588/-. No interest was demanded, but a penalty of Rs.500/- was imposed. This Order in Original was confirmed in an order in appeal No. 178/2003 dated 28.11.2003.

6. Similarly, two show cause notices bearing Nos.335 and 387/2000 respectively dated 5.4.2000 and 25.4.2000 relating to the period September 1999 and 10/99 to 12/999 were issued demanding duty. These two show cause notices resulted in an Order in Original bearing No.54/2000 dated 30.10.2000, confirming the demand to the tune of Rs.3,87,446/-. This order

was also confirmed by the same order in appeal No.178/2003.

7. Yet another show cause notice bearing No.481/2001 dated 11.5.2001 relating to the period 5/2000 to 6/2000 was issued and the same resulted in an Order in Original No.43/2001 dated 15.10.2001 confirming a demand of Rs.2,34,292/-. This order was confirmed on the same appeal bearing No.178/2003 dated 28.11.2003.

8. The last show cause notice bearing No.479/2001 dated 11.5.2001 for the period from 7/2000 to 10/2000 resulted in an Order in Original No.42/ 2001 dated 15.10.2001, confirming the demand of Rs.2,16,720/-.

9. As against one common order passed in order in appeal No.178/ 2003 arising out of four different Orders in Original bearing Nos.18/2000, 54/ 2000, 43/2001 and 42/2001, the assessee filed four appeals in E/462 to 465/ 2004. These appeals were dismissed by the Customs, Excise and Service Tax Appellate Tribunal by a final order dated 9.7.2013. As against the said common order passed in four appeals, the assessee has come up with C.M.A. Nos.1949 to 1952 of 2015.

10. But, before coming up with the appeals, the assessee also filed miscellaneous petitions in E/Misc/40865 to 40868/2014 seeking a clarification of the final order and also for a rectification of the mistake alleged to have crept into the final order. These miscellaneous petitions were dismissed by the Tribunal by an order dated 14.8.2014. As against the said common order dated 14.8.2014, dismissing all the miscellaneous petitions, the assessee has come up with four different appeals in C.M.A.Nos.1630 to 1633 of 2015.

11. As seen from the facts narrated above, there are four appeals on hand that arise out of the common order of the Tribunal dated 9.7.2013 passed in the substantial proceedings confirming the demand of additional duty of excise. The other four appeals arise under certain peculiar circumstances. The circumstances, under which, the appeals are filed against the orders passed in the miscellaneous petitions, as follows :

(i) After the disposal of substantial appeals by the Tribunal by a common order dated 9.7.2013, the Superintendent, SPIC II Range issued a communication dated 12.11.2013 to the assessee, calling upon the assessee to pay interest to the tune of Rs.26,68,917/- on the ground that under Section 11AB of the Central Excise Act, 1944, the assessee is liable to pay interest, if any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, after a determination is made under Section 11A(2).

(ii) The assessee gave a reply dated 28.1.2014 to the demand. But, the contentions raised by the assessee were rejected by the Superintendent by an order dated 14.3.2014 on the ground that the liability to pay interest is automatic and that even if interest is not demanded in the show cause notice or Order in Original, the same can be demanded at any point of time.

12. The above reply of the Superintendent compelled the assessee to make four petitions before the Tribunal in Misc. Petition Nos.40865 to 40868/ 2014 for clarification and rectification. The Tribunal rejected the petitions on the ground that in view of Section 35C(2), the Tribunal is entitled to only rectify any mistake apparent on the record or amend any order, if the mistake is brought to its notice. Also the petitions were filed beyond six months. Therefore, the Tribunal held that the petitions were not maintainable. Moreover, the Tribunal also held that the case on hand would not also fall under Rule 41 of the CESTAT (Procedure) Rules, 1982. Hence, those orders are also under challenge in four appeals in C.M.A.Nos.1630 to 1633 of 2015.

13. In so far as the appeals arising out of the common order of the Tribunal dated 9.7.2013 are concerned, they arise out of a demand for additional duty of excise. On merits, the three Authorities have found against the appellant. The finding of fact recorded by the Original Authority that the appellant had adopted a lower assessable value than the actual value of clearance, is actually a finding of fact, on which, this Court cannot interfere. No question of law arises in C.M.A.Nos.1949 to 1952 of 2015 to interfere with the common order dated 9.7.2013 passed by the Tribunal.

14. Accordingly, CMA.Nos.1949 to 1952 of 2015 are dismissed. No costs. Consequently, the connected MP is also dismissed.

15. Coming to the remaining four appeals that revolve around the question of payment of interest, the substantial questions of law raised for our consideration by the appellant are as follows :

(i) Whether the demand for interest made after the issue of an Order in Original and the confirmation of the same by the Appellate Authority is in tune with the provisions of Section 11AB of the Act ? and

(ii) Whether the Department is entitled to take advantage of the amendment brought forth to Section 11AB with effect from 11.5.2001 in relation to the show cause notices that emanated before the said date ?

16. For finding an answer to these questions of law, it may be necessary to take a look at the amendments that were brought

forth to Sections 11AA and 11AB first with effect from 11.5.2001 and subsequently with effect from 8.4.2011.

17. Before 11.5.2001, the Scheme of Sections 11A, 11AA and 11AB was to the following effect :

(i) Whenever any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with duty, requiring him to show cause as to why he should not pay the amount specified in the notice;

(ii) After considering the representation, if any, made by the noticee, the Central Excise Officer may determine the amount of duty of excise due from such a person under Sub-Section (2) of Section 11A;

(iii) If the duty, so determined under Section 11A(2) in the manner prescribed above, was not paid within three months from the date of such determination, the person becomes liable to pay interest under Section 11AA, at a rate not below 10% and not exceeding 30%, from the date immediately after the expiry of the said period of three months till the date of payment of such duty; and

(iv) If the 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 misstatement or suppression of facts or contravention of any of the provisions of this Act or the Rules made thereunder, with intent to evade payment of duty, the person liable to pay duty as determined under Section 11A(2) should also pay interest at a rate not below 10% and not above 30% from the first date of the month succeeding the month, in which, the duty ought to have been paid under the Act.

18. Therefore, the provisions of Section 11A, 11AA and 11AB as they stood before 11.5.2001, made a clear distinction between two categories of cases namely

(a) cases where there has been no levy or no payment or short levy or short payment or erroneous refund in the normal course and

(b) cases where there has been no levy or no payment or short levy or short payment or erroneous refund due to fraud, collusion, wilful misstatement or suppression of facts.

19. These two categories of cases were treated differently by the statute in so far as the liability to pay interest is concerned. If the case fell under the first category where there is no allegation of fraud, collusion, etc., interest became payable only under Section 11AA and that too, only if no payment is made within three months of the determination under Section 11A(2). Therefore, the statute did not make the liability to pay interest as automatic after determination under Section 11A(2).

20. It is only in the second category of cases where there was a determination under Section 11A(2) of not only levy, but also a finding of fraud, collusion, etc. that the statute imposed a liability under Section 11AB. This is why the date of commencement of the liability to pay interest was the date of original liability and not the date of determination under Section 11AB. Unless we understand this scheme that was prevailing before 11.5.2001, the interpretation that is called for to the provision that exists post amendment with effect from 11.5.2001 or the provisions as they now stand after the amendment dated 8.4.2011, cannot be understood.

21. Now, let us take the amendments that were inserted with effect from 11.5.2001. The provisions of Section 11AA and 11AB as they stood before 11.5.2001 and after 11.5.2011 are provided in the tabular column as follows :

Sec.	Before 11.5.2001	After 11.5.2001
11AA	Interest on delayed payment of duty: Subject to the provisions contained in Section 11AB, where a person chargeable with duty determined under Sub-Section (2) of Section 11A, fails to pay such duty within three months from the date of determination, he shall pay, in addition to the duty, interest at such rate not below ten per cent and not exceeding thirty six percent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty : Provided that where a person chargeable with duty determined under Sub-Section (2) of Section 11A before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty. Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the date of such determination shall be the date on which an amount of duty is first determined to be payable. Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the date of such determination shall be, - (a) for the amount of duty first determined to be payable, the date on which the duty is so determined; (b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable; (c) for the amount of further increase of duty, the date of order on which the duty is so further increased. (2) The provisions of Sub-Section (1) shall not apply to cases where the duty becomes payable on and after the date on which the Finance Bill, 2001 receives the assent of the President.	Interest on delayed payment of duty : (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. (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.

Sec.	Before 11.5.2001	After 11.5.2001
11AB	Interest on delayed payment of duty: (1) 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 misstatement or suppression of facts or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, the person liable to pay duty as determined under Sub-Section (2) of Section 11A shall, in addition to the duty be liable to pay interest at such rate not below eighteen per cent and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the duty ought to have been paid under this Act or the Rules made thereunder or from the date of such erroneous refund, as the case may be, but for the provisions contained in Sub-Section (2) of Section 11A, till the date of payment of such duty. (2) For the removal of the doubts, it is hereby declared that the provisions of Sub-Section (1) shall not apply to cases where the duty became payable before the date on which the Finance (No.2) Bill, 1996 receives the assent of the President. Explanation 1 - Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest shall be payable on such reduced amount of duty. Explanation 2 - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.	Interest on delayed payment of duty - (1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under Sub-Section (2), or has paid the duty under Sub-Section (2B), of Section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in Sub-Section (2), or Sub-Section (2B), of Section 11A till the date of payment of such duty : Provided that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid. (2) The provisions of Sub-Section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President. Explanation 1 - Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal (National Tax Tribunal) or, as the case may be, the court, the interest shall be payable on such reduced amount of duty. Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal (National Tax Tribunal) or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.

22. A careful look at the tabulation above would show that the distinction between the two categories of cases that was maintained upto 11.5.2001 disappeared to some extent by the amendment inserted from 11.5.2001. Though a small distinction was still retained, the liability to pay interest became common for both categories of cases and a distinction was retained only in respect of the minimum ratio of interest and the date of commencement of liability post 11.5.2001. In cases where the payment was made voluntarily after determination of the amount

of duty under Section 11A, the amendment stipulated a minimum rate of interest at 10% per annum and a maximum rate of interest at 36% per annum. But, in other cases, the minimum rate of interest was maintained at 18% per annum. Except this, the distinction between the two categories of cases was diluted.

23. After amendment with effect from 8.4.2011, Section 11AA itself is removed. Therefore, all types of cases where there is a determination under Section 11A(2) are treated alike irrespective of the presence or absence of fraud, collusion, etc.

24. Having seen the manner, in which, the amendments were brought forth in 2001 and 2011, if we get back to the cases on hand, it could be seen that the periods, in respect of which, the show cause notices were issued, were all from 1997 to 2000. The show cause notices covered by the Order in Original bearing Nos.18/2000 and 54/2000 were dated 2.4.1998, 1.7.1998, 18.11.1998, 1.4.1999, 30.7.1999 and 1.12.1999 as well as 5.4.2000 and 25.4.2000 respectively. The show cause notices covered by the Orders in Original bearing Nos.42/2001 and 43/2001 were exactly dated 11.5.2001.

25. Hence, out of the four cases on hand, two relate to the show cause notices issued on the date, on which, the amendment to Sections 11AB and 11AA came into force. In respect of the remaining two cases, they cannot be covered by the amendment introduced with effect from 11.5.2001. In so far as the cases where show cause notices were issued before 11.5.2001, it is seen from all the show cause notices, the Orders in Original and the orders of the Appellate Authority that there was no allegation of fraud, collusion, misrepresentation, etc. Even the communication of the Superintendent dated 12.11.2013 does not categorise the case of the assessee as one where there was fraud, collusion, etc. But, the communication of the Superintendent dated 12.11.2013 refers to Section 11AB. Therefore, it is obvious that the amendment dated 11.5.2001 is what is sought to be taken advantage of. This cannot be done at least in respect of two cases that arise out of the Orders in Original bearing Nos.18/2000 and 54/2000 respectively dated 29.2.2000 and 30.10.2000. Hence, the questions of law in respect of the appeals arising out of these orders in relation to the interest claim, should be answered in favour of the assessee.

26. But, there is a difficulty. In so far as the Order in Original bearing No.54/2000 is concerned, the demand for payment of interest was made at 24% per annum under Section 11AA. This demand, without any discussion, was upheld by the Appellate Authority as well as the Tribunal.

27. The Appellate Authority as well as the Tribunal ought to have at least considered as to why a rate of interest at 24% was

chosen between the minimum of 10% and the maximum of 30%. The case of the assessee was that there was a claim for refund, which could have been adjusted by the Department. While passing an order in appeal No.178/2003, the Appellate Commissioner found that at least in respect of the claim under Order in Original bearing No.18/2000, it was adjustable. Therefore, that portion of the order of the Tribunal as well as the order in appeal is without any application of mind to the quantum of interest under Section 11AA.

28. Mr.B.Kumar, learned Senior Counsel raised a question of law of limitation.

29. We leave it open to be decided in appropriate cases.

30. Therefore, in so far as CMA.Nos.1630 to 1633 of 2015 are concerned, the appeals arising out of the Orders in Original bearing Nos.18/ 2000 and 54/2000 are allowed. i.e. CMA.Nos.1630 and 1631 of 2015 are allowed. The questions of law are answered in favour of the assessee. The other two appeals namely CMA.Nos.1632 and 1633 of 2015 are dismissed, as they arise out of the Orders in Original, which relate to the show case notices exactly dated 11.5.2001. No costs. Consequently, the connected MP is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To
1.The Deputy Commissioner of Central Excise, Tuticorin Division, Tuticorin.
2.The Commissioner of Central Excise (Appeals), Tirunelveli-7.
3.The Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench,
Chennai-6.
4.The Superintendent of Central Excise, SPIC II Range, Tuticorin-8.

+4 ccs to Mr.M.Abdul Nazeer Advocate sr.9289, 9292, 9291,9290

CMA.Nos.1630 to 1633 & 1949 to 1952 of 2015 & MP.Nos.1 & 1 of 2015

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