

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MRS.JUSTICE S.VIMALA

Civil Miscellaneous Appeal Nos.2576 and 2577 of 2015
and M.P.Nos.1 and 1 of 2015

Vikash J.Shah, Director,
M/s. Shah Yarn Tex (P) Ltd.,
Yarn Merchants and Commission Agents,
93/6, D.B.Road, R.S.Puram,
Coimbatore - 641 002 ... Appellant in CMA No.2576 / 2015/
Appellant

M/s. Shah Yarn Tex (P) Ltd.,
Yarn Merchants and Commission Agents,
93/6, D.B.Road, R.S.Puram,
Coimbatore - 641 002 ... Appellant in CMA No.2577 / 2015/
Appellant

vs.

1. The Commissioner (Appeals),
Office of the Commissioner of Central
Excise and Service Tax (Appeals),
6/7, A.T.D.Street, Race Course Road,
Coimbatore - 641 018
2. The Range Superintendent,
Office of the Superintendent of Central Excise,
Customs and Service Tax,
Range IA, Singapore Plaza, 333 Cross Cut Road,
Coimbatore - 641 012
3. The Customs Excise and Service Tax Appellate Tribunal,
Shastri Bhavan Annexe, First Floor, 26 Haddows Road,
Chennai - 600 006 ... Respondents in both CMAs
(Accepted the cause title vide order of the
Court, dated 18.09.2015 made in M.P.Nos.
1 and 1 of 2015 in CMA (SR) Nos.106127
of 2015 and 106197 of 2014)

Civil Miscellaneous Appeals filed under Section 35G of the
Central Excise Act, as against the orders passed by the Customs,

Excise and Service Tax Appellate Tribunal, Chennai, in Final Order Nos.40318 and 40319 of 2014, dated 09.04.2014, received on 13.06.2014.

For Appellant in both CMAs : Mr. S.D.S.Philip

For Respondents in both CMAs: Mr. A.P.Srinivas

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by S.Vimala, J.,)

These Civil Miscellaneous Appeals have been filed, one filed by the Director and another by the company, as against the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, (CESTAT) Chennai, in Final Order Nos.40318 and 40319 of 2014, dated 09.04.2014.

Brief facts:-

2. The appellants were engaged in the manufacture of mercerized cotton yarn during the period from 01.04.2003 to 01.11.2003. Except during this period, i.e., neither before nor thereafter, the mercerized cotton yarn remained exempted from the payment of duty. The appellants procured duty paid grey yarn, mercerized the same and cleared the product without payment of duty during the said period.

2.1. The original authority issued a show cause notice, dated 22.09.2004, as to why an amount of Rs.1,22,300/- being the duty on Mercerized yarn should not be demanded along with penalty and interest. The appellants sent a reply, dated 19.10.2004 and filed a written submissions, dated 21.12.2004, contending that the show cause notice was timebarred; that there was no intention on the part of the assessee to evade payment of duty; with the introduction of Excise duty on textiles, in Budget 2003, there was lot of confusion at all levels with frequent amendments and as soon as the demand was made, it was paid without any delay. Thereafter, the Original Authority confirmed the demand of duty of Rs.1,22,300/-. Rs.1,06,348/- was adjusted by appropriation from CENVAT Credit and an amount of Rs.22,069/- was paid, by cash, vide TR6 challan, dated 25.11.2003. In addition to that, the Original Authority made the following demands:-

(i) payment of interest at applicable rate under Section 11AB of the Central Excise Act, 1944 (hereinafter referred to as "the Act");

(ii) penalty of Rs.1,22,300/- under Section 11 AC of the Act;

(iii) penalty of Rs.20,000/- on the Director, under Rule 26 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules").

2.2. The appellants filed an appeal before the Commissioner of Central Excise (Appeals), who rejected the appeals, by the order, dated 06.06.2005.

2.3. Thereafter, challenging the same, an appeal was filed before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). The CESTAT found that the rejection of the assessee's prayer, for grant of, input duty credit, is unjustifiable and that the appellants must be allowed to utilise input duty credit, while the duty is demanded on the final product. The lower authority had declined the relief on the ground that the appellants did not follow the procedure like filing of declaration for availing the benefit of CENVAT Credit etc., But the CESTAT held that a substantive right is not to be denied on the ground of infraction of procedural provision. On these grounds, the CESTAT set-aside the order of the lower authorities and allowed the appeal to that extent.

2.4. Thereafter, on 27.02.2009, the second respondent herein sent a communication, requiring the appellants to pay the penalty of Rs.1,22,300/-. The appellants replied on 16.03.2009 stating that as the appeal filed by the appellant was allowed by the CESTAT, the question of payment of penalty does not arise. Four years and four months later, i.e., on 22.08.2013, the second respondent again sent a communication, dated 11.02.2013, requiring the appellants to pay penalty. The appellants replied, reiterating the contention that, once the input duty credit was granted by the CESTAT, the question of payment of penalty does not arise. The respondents insisted that the penalty must be paid and threatened stating that, unless the payment is made, recovery proceedings would follow.

2.5. The appellants filed an appeal before the first respondent, challenging the communication, dated 04.10.2013. The first respondent returned the appeal dated 11.12.2013, without giving an opportunity and without assigning any reasons. Thereafter, a communication, dated 17.12.2013 was issued, directing the appellants to pay the arrears due to the Department. Thereafter, the appellants approached the third respondent (CESTAT), challenging the letter, dated 17.12.2013, alleging that no penalty is enforceable, when the adjustment of input duty credit as against the demand was held sustainable. The third respondent dismissed the appeal, on 09.04.2014, giving

a finding that the communication requiring the assesseees to disclose as to whether penalty and interest have been paid and also giving a warning that recovery proceedings would follow in case of failure, would only amount to a communication and therefore, the appeal is not maintainable. However, there was an observation that the Department should have quantified the demand before initiating the recovery proceedings. Thereafter, the appellant sought for quantification of the demand. The second respondent issued a reply, dated 22.08.2014, stating that the duty demanded is 'nil' and directed the appellant to pay penalty and interest.

2.6. It is relevant to point out that when the Department replied stating that the duty demanded is 'nil', it did not mean anything on liability to pay duty, but the meaning conveyed is that, as the duty demanded has already been paid, balance payable is nil. This could only be the reasonable meaning having regard to the facts and context, in which it is said.

2.7. Aggrieved by the final order, dated 09.04.2014, the appellants have filed these Civil Miscellaneous Appeals, which had been admitted on the following substantial questions of law, by this Court:-

(i) Whether the impugned order of the third respondent Tribunal confirming the erroneous holding that the letter / communication, dated 04.10.2013, sent by the second respondent demanding payment of penalty is not an order but a mere communication?

(ii) Whether any penalty can be demanded in the absence of duty payable by the appellant?

(iii) Whether any penalty will arise when the Central Excise Act and Rules permit adjustment of CENVAT credit towards duty payable?" सत्यमेव जयते

3. The provisions of Sections 11AB and 11AC of the Act, under which, penalty and interest had been respectively demanded, have to be looked into, along with the facts, in order to decide the substantial questions of law raised.

"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, the person who is liable to pay duty as determined under sub-section (2), or has paid the duty under sub-section 2(B), 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. 4[(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.

11AC.Penalty for short-levy or non-levy of duty in certain cases.— 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 mis-statement 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 11A, shall also be liable to pay a penalty equal to the duty so determined:

Provided that where such duty as determined under sub-section (2) of section 11A, and the

interest payable thereon under section 11AB, is 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 by such person under this section be twenty-five per cent of the duty so determined:

Provided further 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 the period of thirty days referred to in that proviso: Provided also 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: Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent. of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation.—For the removal of doubts, it is hereby declared that— (1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President; (2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

4. Having considered the provisions regarding the payment of penalty and interest, the primary question is, when the liability to pay interest and penalty arises.

4.1. The contention of the learned counsel for the assessee is that, when there is no liability at all to pay the tax, in the sense that, the tax payable is already available in the form of CENVAT in the hands of the Department, the liability to pay interest or penalty does not arise for consideration.

4.2. Having regard to the plea taken, it is necessary to state what is CENVAT credit.

4.3. CENVAT credit means excise duty and service tax paid on inputs (like raw material, fuel etc.) for manufacturing of goods is deducted from the excise duty payable on the goods manufactured. With effect from 10.09.2004, New Cenvat Credit Rules 2004 was introduced which provided for credit of duty paid on inputs, Capital goods and service tax paid on input services used in or in relation to manufacture of excisable goods. A service provider is entitled to credit of excise duty paid on inputs and Capital goods and service tax paid on input services used by him for providing the output service.

5. This is a case where the Tribunal has given a finding that the assessees ought to have been given the benefit of CENVAT Credit.

5.1. This finding on fact is not under challenge by the Revenue.

5.2. The main contention of the learned counsel for the respondents / Revenue is that, the assessees are not even entitled to file an Appeal (before the CESTAT), based on a mere communication and therefore, the finding given by the CESTAT stating that the assessees ought to have been given CENVAT Credit, cannot be taken advantage of, by the assessees.

5.3. Per contra, the learned counsel for the Assessee / appellants would submit that, it is the content and not the form of the communication that would decide the eligibility to file the appeal, and especially when the content threatened the assessee with the consequence of facing the recovery proceedings, certainly the assessee is eligible to file the appeal and therefore, the finding of the CESTAT is legal and valid. In support of the said contention, the decision reported in 2007 (215) E.L.T. 313 (Kanaga Durga Clothiers (P) Ltd., v. CCE, Madurai) is relied upon, where-under, it has been held that the letter of jurisdictional Superintendent demanding interest on delayed payment of duty is appealable and the relevant observation reads as under:-

"4. The fact remains that the assessee was not put to notice of the proposal for levy of interest from 1.4.2003 as quantified in the Superintendent's letter dated 4.9.2004. It is explicit from the said letter that the amount of interest [Rs.3,66,360/-] was quantified in terms of Rule 8. However, in his letter dated

3.4.2007, the Superintendent seems to have given the go-by to Rule 8 and to have directly invoked Section 11AB. The law does not permit the department to dilly-dally like this to the detriment of an assessee. Both the letters of the Superintendent are of appealable nature. In any case, his letter dated 4.9.2004 demanding interest with effect from 1.4.2003 under Rule 8 (3) (as amended), without prior notice to the party, requires to be set aside on the ground of violation of natural justice. On merits also, such a demand is untenable after the Rajasthan High Court's ruling in Lucid Colloid's case. The view taken by the lower appellate authority that the Superintendent's letter is not appealable is patently erroneous."

5.4. Thus, it is clear that, when the content of the communication was impregnated with missiles (demands), which may at any time, escape and hit against the assessee, then the assessee is entitled to challenge the same, though it is worded as a "letter" and not as an "order". It was really astonishing to read such a finding by the Commissioner of Income Tax (Appeals) that the appeal is not maintainable, by construing the communication as a letter and not as an order.

6. The learned counsel for the respondent submitted that the imposition of interest and penalty is mandatory and the Courts have no discretion to reduce the penalty and therefore, the assessee is liable to pay the penalty, as demanded by the Department. In support of the contention, the decision reported in 2015 (321) E.L.T. 86 (Mad) (Commissioner of Central Excise, Puducherry v. CESTAT, Chennai) is relied upon, where-under, relying upon the decision of the Hon 'ble Supreme Court reported in 2009 (238) E.L.T. 3 (SC) (Union of India v. Rajasthan Spinning and Weaving Mills), it has been held that penalty under Section 11AC of the Act is mandatory and there is no element of discretion vested with the authorities to waive the interest or penalty.

6.1. On the other hand, the learned counsel for the Assessee would submit that, even though no discretion is vested with the authorities to reduce the interest or penalty and the main issue to be considered is, when there is no liability to pay any outstanding tax and when there is no delay or non-payment of duty, the liability to pay the interest or penalty does not arise for consideration, the decision reported in 2015 (321) E.L.T. 86 (Mad) (cited supra) will not be applicable to the facts of the case. It is pointed out by the learned counsel

for the Assesseees that, when the Tribunal itself has given a finding that the denial of input duty credit is unjustifiable and when that finding is not under challenge, then there is no question of payment of penalty or interest.

7. It is the contention of the learned counsel for the assesseees that: when once the Cenvat Credit is allowed and when there is no violation and that there is not even a delay or evasion in the payment, the question of imposing penalty does not arise and in support of the same, two decisions are relied upon:-

(i) 2001 (128) E.L.T. 400 (Siddarth Petro Products v. CCE) where-under it has been held that, when the disallowance of Modvat Credit is on a flimsy grounds and when the appellants were entitled to Modvat Credit nothing remains for imposition of penalty.

(ii) 1999 (113) E.L.T. 160 (Asian Alloys v. CCE) where-under it has been held that once the availment of Modvat Credit is accepted by the Commissioner (Appeals), it is legally wrong on his part; to uphold the order of imposing penalty for wrong availment of Modvat Credit in terms of Rule 173Q of the Central Excise Rules, 2002 and thus, the levy of penalty does not arise at all.

8. The learned counsel for the Revenue would contend that the assesseees themselves admitted that they are liable to pay duty on mercerized yarn from 01.04.2003 to 01.11.2003 and that it was an offence to have cleared the mercerized yarn without payment of duty.

8.1. It is not the case of the assesseees that they are not liable to pay the tax, but the contention is that because of the confusion in the amendment and on account of want of knowledge that they did not pay and that, in any event, the duty payable was already available with the Department (as input credit), there is no question of any evasion or denial or violation of payment of duty.

8.2. The further contention of the learned counsel for the Assesseees is that, when the claim of the assesseees for the adjustment of the demand with the Cenvat Credit and this denial on the part of the Department was held to be unjustified, then the Department ought not to have proceeded with the claim for penalty and interest after 4½ years of delay. It is also pointed out that the show cause notice itself can be issued only in serious cases where there is allegation of fraud, suppression, willful misstatement or for other reasons mentioned in proviso to Section 11A(1) of the Act and that unfortunately, provisions of Section 11 A(1) had been used unwarrantedly.

8.3. These issues raised by the assesseees have been partly answered by the Tribunal.

9. Coming to the facts of the case on hand, in the Final Order, dated 05.09.2008, the CESTAT has given two vital findings, which reads as under:-

"I have found hardly any valid ground against the demand of duty on mercerized yarn; rejection by the lower authorities of the assesseees' prayer for grant of input duty credit is apparently unjustifiable; the reasons stated by the lower authorities, in this case, for denial of CENVAT Credit for input (Gray yarn) is that the appellants did not follow the procedure like filing of declaration etc., It is trite law that a substantive right is not to be denied on the ground of infraction of procedural provision."

9.1. On these findings, the impugned order to the extent of denying the input duty credit has been set-aside.

9.2. Therefore, when the input duty credit is allowed, the duty is deemed to have been paid on the original date of payment of duty. When input duty credit is allowed, then there is no question of any liability to pay further duty.

10. When such is the legal consequence and when such kind of findings are staring at the face of the Department, whether the Department is at liberty to demand penalty and the interest, is the question to be answered.

10.1. The legal position, enunciated above, shows that the demand is not legal. It would be appropriate to quote the decisions of the Hon'ble Supreme Court, in which, the penalty of interest had been held to be not sustainable:-

(i) Maruti Suzuki Ltd. v. CCE (2009) 240 E.L.T. 641 (SC):-

".... on account of repeated amendments in the CENVAT Credit Rules, huge litigation in the country stands generated. In the circumstances, we are of the view that penalty is not leviable on appellant/assessee, particularly when in large number of other cases, on account of conflict of views expressed by various Tribunals / High Court, the assesseees have also succeeded. Hence, although M/s.Maruti Suzuki Ltd. (appellant) has failed in their civil appeals the Department will not impose penalty."

(ii) CCE v. Gujarat Narmada Fertilisers Co. (2009) 240 E.L.T. 661 (SC):-

"... It may be noted that litigation on interpretation of Cenvat Credit Rules has arisen on account of various conflicting decisions given by the

various benches of CESTAT, the reason being that the Rules have not been properly drafted. In the circumstances, we are of the view that in this batch of cases, no penalty is leviable."

11. Therefore, in the absence of the Department challenging the findings of the Tribunal that there is no justification to deny CENVAT Credit, the Revenue has no case and the Department is not at liberty to demand either interest or penalty.

12. When the Central Excise Act, 1944 and the Rules framed thereunder, permit the adjustment of CENVAT Credit, and when the CENVAT Credit is granted, there is no outstanding duty payable and therefore, the question of payment of interest and penalty do not arise.

13. For the foregoing reasons, the substantial questions of law are answered in favour of the assessee and against the Department. In the result, these Civil Miscellaneous Appeals are allowed.

Sd/-
Asst.Registrar (CS II)

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Sub Asst. Registrar

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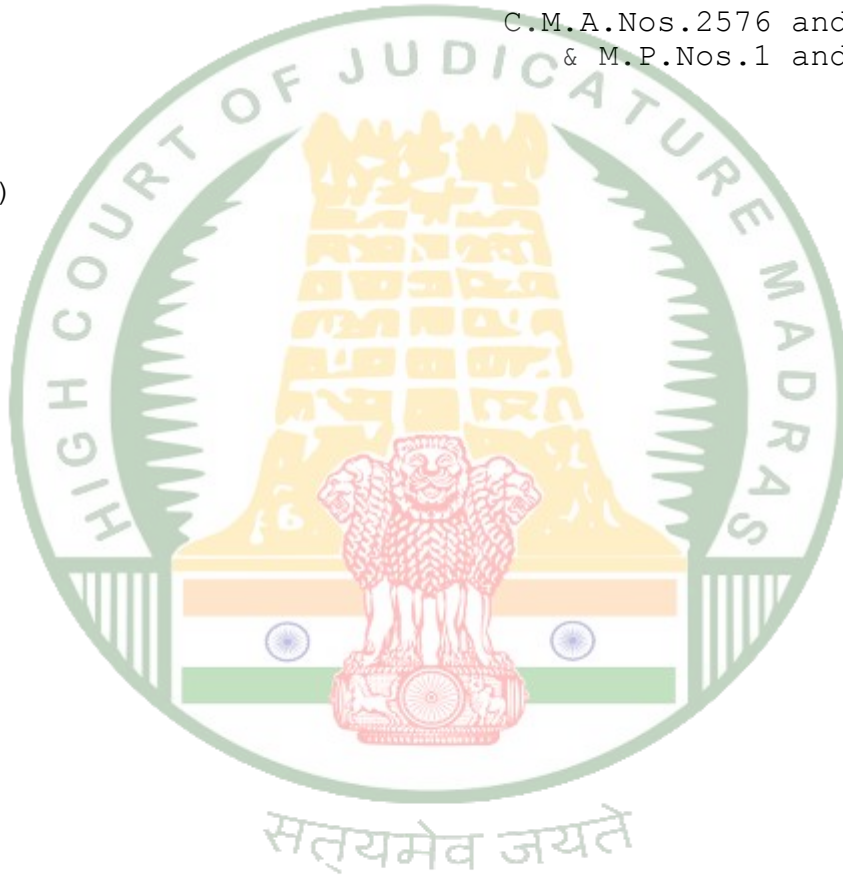
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1 cc to Mr.S.D.S. Philip, Advocate, Sr. 6042
1 cc to Mr.A.P. Srinivas, Advocate, Sr. 6025

C.M.A.Nos.2576 and 2577 of 2015
& M.P.Nos.1 and 1 of 2015

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